

KEYWORD: Guideline D; Guideline E

DIGEST: Applicant failed to rebut the presumption that the Judge considered all of the evidence in the record. The Appeal Board has no authority over how clearance investigations are conducted. Judge’s description of the Guideline D security concern did not mean that he found all aspects of that concerned implicated in Applicant’s case. Adverse decision affirmed.

CASE NO: 09-06026.a1

DATE: 03/05/2013

DATE: March 5, 2013

In Re:)	
)	
-----)	ISCR Case No. 09-06026
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On May 23, 2012, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline D (Sexual Behavior) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Department Counsel requested a hearing. On December 19, 2012, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Thomas M. Crean denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge considered all of the record evidence and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact

The Judge made the following pertinent findings of fact: Applicant has been married for over 30 years. He and his wife have three children. Applicant worked for a Government Agency (GA) for over 23 years. He retired in 2007 and has worked for a Defense contractor since then.

The SOR alleged security concerns arising from Applicant's extramarital sexual conduct. From 2004 to 2006, he engaged the services of prostitutes in various overseas locations. He also engaged in sexual conduct with a foreign national in a hotel steam room. Although his wife and friends are not aware of this conduct, he disclosed it to security clearance investigators and no action was taken against him.

In addition, he engaged in an extramarital affair with a college friend from 2007 until 2010, and the two resumed their affair in 2012. This affair was ongoing as of the close of the record. Applicant's wife is not aware of his extramarital sexual conduct, nor are the GA, his friends, or his current employer. Applicant has acknowledged that he occasionally engages in extramarital affairs, having recently done so with various women while on business-related travel. He has acknowledged that his behavior could raise counterintelligence concerns and that some of his decisions on sexual matters were failures in judgment.

Applicant enjoys an excellent reputation for his dedication to mission-accomplishment, job performance, and good judgment.

The Judge's Analysis

The Judge concluded that Applicant's sexual conduct raised security concerns under Guidelines D and E. He further concluded that Applicant had failed to mitigate those concerns. He stated that Applicant's conduct evinced a lack of judgment, and that his ongoing affair could subject him to coercion, exploitation, or duress. The Judge stated that Applicant had taken no steps to eliminate his vulnerability to coercion. In the whole-person analysis, the Judge stated that Applicant's pattern of recklessness in his sexual conduct shows poor judgment, lack of discretion, and failure to exercise self control, casting doubt on his ability to safeguard classified information.

Discussion of Appeal Issues

Applicant points to evidence of his lengthy federal career without security incident or concern, his favorable character evidence, and his evidence that he has not been targeted by foreign intelligence operatives. A Judge is presumed to have considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 10-11083 at 2 (App. Bd. Dec. 18, 2102). The Judge was required to consider the matters that Applicant has cited, along with all the other evidence in the record. The

Judge made extensive findings about Applicant's circumstances, including the evidence Applicant cites in his appeal. Applicant's argument on appeal is not sufficient to rebut the presumption that the Judge considered all of the evidence in the record. Regarding Applicant's good security record, the Government need not wait until an individual mishandles or fails to safeguard classified information before it can make an unfavorable security determination. *See, e.g.*, ISCR Case No. 08-00435 at 3 (App. Bd. Jan. 22, 2009).

Applicant takes issue with language in the Decision in which the Judge states that sexual behavior can raise security concerns if it indicates a personality or emotional disorder, a lack of judgment, or that the applicant may be lacking in reliability. He argues that there is nothing in the record to support the belief that he has a personality disorder. However, the Judge was merely citing to the Directive's statement of security concern under Guideline D.¹ He was not concluding that Applicant's circumstances actually evidenced a personality disorder. The Judge found that two of the Guideline D disqualifying conditions applied to Applicant's circumstances: 13(c)² and 13(d),³ neither of which involve allegations of personality disorders. We find no error in the challenged statement by the Judge.

Applicant contends that those investigating him for a clearance failed to interview his colleagues. He states that this lapse prevented DOHA from making a fully informed decision in his case. The Appeal Board has no authority over how clearance investigations are conducted. *See, e.g.*, ISCR Case No. 11-01618 at 3 (App. Bd. Jan. 24, 2013). In any event, at a DOHA hearing the applicant bears the burden of persuasion as to mitigation. Directive ¶ E3.1.15. Applicant submitted a character reference, which the Judge cited in his Decision. The record provides no reason to believe that Applicant was precluded from submitting additional evidence in mitigation, had he so desired. To the extent that Applicant is alleging a failure of due process, we resolve this issue adversely to him.

The record supports a conclusion that the Judge examined the relevant data and articulated a satisfactory explanation for the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Judge's adverse decision is sustainable on this record. "The general standard is that

¹See Directive, Enclosure 2 ¶ 12: "Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which may subject the individual to undue influence of coercion, exploitation, or duress can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information."

²Directive, Enclosure 2 ¶ 13(c): "sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress[.]"

³Directive, Enclosure 2 ¶ 13(d): "sexual behavior of a public nature and/or that reflects lack of discretion or judgment[.]"

a clearance may be granted only when ‘clearly consistent with the interests of the national security.’”
Department of the Navy v. Egan, 484 U.S. 518, 528 (1988). *See also* Directive, Enclosure 2 ¶ 2(b):
“Any doubt concerning personnel being considered for access to classified information will be
resolved in favor of the national security.”

Order

The Decision is **AFFIRMED**.

Signed: Jeffrey D. Billett

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board