KEYWORD: Guideline d; Guideline E

DIGEST: The Judge denied Applicant a clearance based on the conduct in the SOR. Other conduct was considered in the limited context of mitigation. Adverse decision affirmed.

CASENO: 11-13664.a1

DATE: 08/15/2013

DATE: August 15, 2013

In Re:	)	
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	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Julie R. Mendez, Esq., Department Counsel

FOR APPLICANT
Elizabeth L. Newman, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 24, 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). Applicant requested a hearing. On May 6, 2013, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Paul J. Mason 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 improperly raised security concerns not alleged in the SOR; whether the Judge substituted a credibility determination for record evidence; whether the Judge erred in his analysis of the pertinent mitigating conditions; and whether the Judge's whole-person analysis was erroneous. Consistent with the following, we affirm the Judge's decision.

The Judge's Findings of Fact

Applicant has worked for his current employer since the early 1980s. He has held security clearances since the early 1970s. He was denied access to sensitive compartmented information (SCI) in the late 2000s.

The allegations in the SOR were based on answers Applicant provided to another Government agency (AGA) in connection with a polygraph examination. The allegations pertained to Applicant's having viewed sexually-explicit images of children and to his having viewed sexually explicit images on a work computer. The Judge cited to several documents that described Applicant's answers to questions about this conduct.

A 2005 "polygraph report" described an admission by Applicant that he had on his home computer 500 to 1000 images of females who were 11 to 17 years of age. He stated that he would download images of sexual acts regardless of the ages of the participants. He was embarrassed to admit that he liked girls under 18.

In 2008, Applicant submitted to an interview with agents of AGA. GE 2 contains a summary of this interview. Applicant is reported to have stated that he had viewed pornography every two weeks since 2002, downloading the images onto disks. He estimated that he had about 12,000 images of underage girls on disks.

In 2009, Applicant provided a written response to AGA's proposal to deny him access to SCI. In that document he stated that the estimated number of underage females was "over inclusive." Decision at 4. He stated that the images were not pornographic if they did not show anything sexually provocative. He denied having stated that he liked girls under age 18. He also stated that 12,000 represented the total number of pornographic images on his disks, not the number involving underage females. He asserted that the newsgroups through which he acquired access to pornography did not identify the ages of the participants but that he did not download files that

implied "youthful content." Decision at 5. The Judge stated that he had evaluated Applicant's explanations carefully and did not find them credible.

The Judge quoted other statements by Applicant regarding this matter. In 2008, Applicant advised AGA that he was not sure that he had any images of underage girls. At the hearing, he testified to his belief that he had no pictures of females under 18, although some may have been younger than he originally thought. The Judge stated, "I am not persuaded by Applicant's explanations that he did not view nude and sexually-explicit pictures of underage females at home on the internet." Decision at 5.

Concerning allegations that Applicant had viewed sexually explicit photographs on his work computer, the Judge cited to the 2008 interview, in which Applicant stated that he had done so from 1999 to 2002. Applicant stated that he did so from a half hour to an hour during his work shift. He stated that he never viewed pornography on a Government computer except once.

In 2009, Applicant stated that, at the time he viewed such material at work, there was no company policy prohibiting such conduct. He stopped doing so when his company instituted a policy prohibiting viewing sexually oriented web sites. At the hearing, he testified that he did not remember telling AGA in 2008 about the frequency with which he viewed sex sites while at work.

The Judge noted other inconsistent statements by Applicant. In 2005, Applicant stated that he viewed sexually-oriented magazine sites about 10 times from his work computer. At the hearing, he stated that he had done so only once. In 2009, in his response to AGA, he stated that this one time was duty-related. At the hearing, Applicant was cross-examined about GE 4, an affidavit that he had executed in 2010. In this document, he stated the images he viewed were of clothed or topless models and that he had viewed them by himself or with other employees. When confronted with this document, Applicant testified that he did not recall making either statement.[1]

Applicant's wife testified at the hearing. She stated that Applicant had spent a lot of time on the computer and would turn off the screen when she entered the room. She surmised that he was viewing sexually explicit material even though she never saw it. She believed him when he stated to her that he did not view sexually explicit images of children.

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[1]GE 4 is an 8-page affidavit, written in longhand and signed by Applicant. Applicant wrote the following: "At the time there was no company policy against such viewings. I viewed pictures of supermodels clothed and topless on my non-government work computer after business hours. I do not recall the time frame or frequency of my viewings. I viewed these images because I wanted to see what was available . . . I viewed the topless images by myself in my office and showed some to a fellow [company] employee." GE 4 at 2. *Compare* with GE 3, Response to Proposed Denial of SCI Access, executed nearly 20 months earlier: "I described to the investigator a work assignment I once had involving searching a particular collection of evidence. My [G]overnment sponsor was involved in collecting and then analyzing data from certain foreign sources. My office wanted to determine whether additional money should be allocated to identifying sexually explicit images or to identifying commercial products. Therefore, my assignment involved looking at a set of files to see what types of video and still images it contained. As it happens, I did not find any sexually explicit images in the evidence collection." GE 3 at 298.

The Judge's Analysis

The Judge concluded that the record contained substantial evidence supporting both allegations in the SOR. Regarding Guideline D, the Judge stated that Applicant's 2005 and 2008 interviews had not been satisfactorily rebutted. The Judge cited to evidence that Applicant downloaded images of children to disks and that he turned off the computer screen when his wife came into the room. He stated that the record demonstrated that Applicant viewed sexually explicit images on his work computer from 1999 to 2002 and that he showed the images to other employees. In doing these things, Applicant showed poor judgment. Concerning Applicant's case for mitigation, the Judge noted that the record contained no evidence that Applicant had viewed sexual images of underage girls since 2008 or that he had viewed sexual material on his work computer since 2002.

> However, the extensive number of explanations minimizing or denying any conscious viewing of nude and sexually-explicit pictures of underage girls and his discrepant positions about viewing sexually-explicit pictures of adults on his work computer raise continuing security concerns about his judgment, reliability and trustworthiness. AG ¶¶ 14(b) and 14(c) are not applicable. Decision at 10.

The Judge also concluded that Applicant's misconduct raised concerns under Guideline E that he could be vulnerable to pressure. Regarding mitigation, the Judge stated that the misconduct was not minor. He also stated that Applicant may not have been completely forthright with his wife. In the whole-person analysis, the Judge explained in detail why he concluded that Applicant's presentation at the hearing had not been credible. He stated, for example, that Applicant's contention that he had overstated the extent of his viewing of child pornography was not reasonable and that Applicant's claim that he could not remember making some of the inculpatory statements "cannot be overlooked." Decision at 13. The Judge stated that, viewing all of the facts and circumstances in light of the whole-person concept, Applicant had failed to mitigate the concerns arising from his misconduct.

Discussion

Applicant challenges the statement in the Analysis to the effect that his having minimized or denied the misconduct in question raised security concerns about his judgement and reliability. Applicant contends that in making this statement, the Judge based his adverse decision on conduct not alleged in the SOR.

The Directive requires that an applicant's clearance may not be denied or revoked unless he or she is given a written statement of reasons and an opportunity to respond. An applicant is entitled to reasonable time in which to prepare his or her case. Directive, Enclosure 1, SECTION 3. The SOR may be amended at a hearing by the Judge *sua sponte*, or on motion by either of the parties. When a SOR is amended, the Judge may grant a request for additional time in which to prepare. Directive ¶ E3.1.17. Applicant notes that the Judge did not amend the SOR and argues that, as a consequence, his treatment of Applicant's various explanations violated the requirements of the Directive.

In presenting this assignment of error, Applicant relies on a previous decision by the Appeal Board. ISCR Case No. 03-08625 (App. Bd. Sep. 29, 2005) addressed a Judge's having predicated an adverse decision on his negative assessment of the applicant's credibility. The case involved allegations of Drug Involvement. The Judge concluded that the applicant had succeeded in mitigating these allegations. However, he went on to say that evidence that the applicant had been dishonest with various persons, including his wife, a social worker, and a DSS agent, precluded a favorable decision. Dishonest conduct was not alleged in the SOR. We held that the Judge had committed reversible error, in that he had based his decision not on the allegations contained in the SOR but on matters extraneous to it. Although conduct evidencing a lack of honesty may properly be raised under Guideline E, the Judge did not amend the SOR to conform to such evidence. "Without such a amendment, it was not permissible to render an unfavorable decision relying on Guideline E or the conduct normally covered by the Guideline." ISCR Case No. 03-08625 at 4. Applicant contends that the Judge in the case presently under consideration committed a similar error.

We have considered Applicant's argument in light of the record as a whole. When reviewing a Judge's decision, we do not consider individual sentences in isolation. Rather, we consider them in light of the decision in its entirety. *See, e.g.*, ISCR Case No. 12-05850 at 3 (App. Bd. Apr. 12, 2013). We conclude that the circumstances of Applicant's case are different from those of the earlier one upon which he relies. In that case, the Judge had found the concerns raised in the SOR had been mitigated, but he went on to enter adverse findings based on conduct not alleged. In Applicant's case, however, the Judge did not conclude that the SOR concerns had been mitigated. Rather, he concluded that they had not been mitigated and discussed Applicant's problematic statements in explaining why. In a DOHA proceeding, the applicant bears the burden of persuasion as to mitigation; and conduct, such as inconsistent or meretricious statements, even though not alleged in a SOR, may be considered in evaluating whether the applicant has met his or her burden. *See, e.g.*, ISCR Case No. 09-07219 at 5 (App. Bd. Sep. 27, 2012).[2] Contrary to ISCR Case No. 03-08625, the Judge in Applicant's case did not treat Applicant's inconsistent explanations as a separate basis for denying him a clearance. We interpret the Judge's language to mean that the concerns raised by Applicant's alleged and proven misconduct continued, that is, remained unmitigated, at the close of the record. Although the Judge could have phrased a portion of his analysis differently, reading the Decision as a whole, we conclude that he evaluated Applicant's inconsistent statements in their proper context. To the extent that there is error in the Judge's phraseology, it did not likely exert an influence on the outcome of the case and, therefore, was harmless.

Applicant alleges that the Judge substituted a credibility determination for record evidence. We defer to a Judge's credibility determination. Directive ¶ E3.1.32.1. *See* ISCR Case No. 11-08546 at 4 (App. Bd. Feb. 27, 2013). However, in the absence of record evidence a Judge's mere disbelief in an applicant's statements is an insufficient basis to find that the applicant engaged in the

[2]"[A] Judge may consider non-alleged conduct for such issues as an applicant's credibility; his evidence in mitigation; the extent of an applicant's rehabilitation; the applicability of a particular provision of the Directive; or for a whole-person analysis."

conduct alleged. *See, e.g.*, ISCR Case No. 05-03472 at 5-6 (App. Bd. Mar. 12, 2007). The case before us does not present that infirmity. That is, the Judge did not find that Applicant engaged in acts of security concern simply because he found Applicant's various explanatory statements to be unbelievable. To the contrary, he based his findings on evidence such as Applicant's admissions made in connection with polygraph testing. He concluded that these statements bore indicia of reliability. He also concluded Applicant's later efforts to minimize his conduct or his claims not to recall having made the inculpatory statements were unworthy of belief. These conclusions were consistent with the record that was before the Judge and constitute a reasonable interpretation of that record. We resolve this assignment of error adversely to Applicant.

The Judge examined the relevant data and articulated a satisfactory explanation for the decision, both in regard to the mitigating conditions and the whole-person factors. The Judge's whole-person analysis complies with the requirements of the Directive, in that he considered Applicant's conduct in light of the record as a whole. *See, e.g.*, ISCR Case No. 11-08063 at 4 (App. Bd. Jul. 19, 2013). The decision is sustainable on this record. "The general standard is that 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: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board