KEYWORD: Guideline E, Guideline F

DIGEST: A Judge can find that an applicant engaged in misconduct despite evidence that charges were dropped or resulted in an acquittal. By the same token, evidence that no charges have been brought at all does not does not compel a Judge to find that an applicant is factually innocent. Adverse decision affirmed.

CASENO: 14-03312.a1

DATE: 05/24/2016

DATE: May 24, 2016

In Re:	)	
	)	
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	)	
	)	
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 March 25, 2015, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under Guideline E (Personal Conduct) and Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Department Counsel requested a hearing. On February 17, 2016, 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's findings of fact contain errors and whether the Judge's mitigation analysis was erroneous. The Judge's favorable findings under Guideline F are not at issue in this appeal. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant is married and has three adult children. He has previously been employed by Government agencies. He is currently employed by a contractor in a position that requires a security clearance.

In 1989, Applicant's older daughter told her babysitter that Applicant had sexually abused her. She was placed in foster care while the allegations were investigated. In 1999, his younger daughter made similar accusations. The child protective services (CPS) referred Applicant for a psychological evaluation. He admitted to kissing and fondling his older daughter's genitalia but denied intercourse, contrary to what his daughter told CPS.

Regarding the younger daughter, Applicant told counselors that he had examined her for a yeast infection and, later, showed her how to masturbate. He denied any contact with the younger daughter for any purpose other than health and hygiene. The counselors recommended that Applicant receive specialized counseling but doubted that he would be amenable to treatment. They concluded that he was a "narcissistic, hedonistic, totally self-absorbed person who is without empathy, guilt, or remorse and labors under extreme cognitive distortions." Decision at 3. They further concluded that Applicant presented a continuing risk of having sexual activities with prepubescent children.

In 2005, Applicant submitted a clearance application (SCA). He provided an affidavit to investigators and sat for an interview. He claimed that he had taken a polygraph and a "psychosexual exam" and has passed both. The next year, Applicant was referred for a psychological evaluation and polygraph. He denied any history of child molestation. The psychologist concluded that Applicant responded to the questions as he would like the facts to be rather than truthfully. The psychologist concluded that Applicant is at increased risk of impaired judgment and reliability.

Applicant received a letter of intent to deny him a clearance, along with an SOR. In 2007, Applicant made a personal appearance before a DOHA Judge, who made extensive findings, concluding that Applicant had engaged in criminal sexual conduct with his daughters and that he

had made false statements during the processing of his SCA. The Judge recommended that Applicant not receive a clearance. The agency Personnel Security Appeal Board concluded that Applicant had not mitigated the concerns arising from his conduct with his daughters and from his false statements.

When interviewed pursuant to his current SCA, Applicant stated that on some of the dates alleged by his daughters he was away from home pursuant to official duties. The gist of his answers to the interviewer was a denial of sexual acts with his daughters. At the hearing in the current case, Applicant continued to deny the alleged misconduct. There have been no further allegations against Applicant, and his lifestyle has changed. He no longer sees his elder daughter. The younger is married, and he sees her and her family several times a year.

The Judge's Analysis

The Judge stated that he concurred with the findings contained in the earlier DOHA recommended decision. He concluded that none of the mitigating conditions fully applied. He stated that the misconduct in question is serious and noted the opinions of two mental health professionals concerning Applicant's continuing risk of further offenses and concerning his risk of impaired judgment regarding protecting classified information. He found that there was substantial evidence that Applicant's daughter was placed in a foster home because Applicant was abusing her. He concluded that these concerns were not mitigated merely by the passage of time since the last incident (the false statements in 2005).

Discussion

Applicant challenges several of the Judge's findings of fact, reiterating his testimony from the hearing and other evidence to the effect that he did not molest his daughters, as well as his versions of the circumstances surrounding the events. He states that his daughter was placed in foster care because of her chemical dependency. He also asserts that the transcript contained errors. We have examined the Judge's findings and conclude that they are supported by substantial evidence, including but not limited to the reports of the psychological examinations performed on Applicant, the interview summaries from his previous and current SCAs, the transcripts of the prior and current adjudications, and the prior Judge's recommended decision.[1] Applicant has not cited to any error in the Judge's findings that likely affected the outcome of the case. The Judge's material findings of security concern are based upon "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." Directive ¶ E3.1.32.1.

[1]*See, e.g.*, Government Exhibit 4, Psychosexual Evaluation and Treatment Plan. Applicant "admits to French kissing her [older daughter] on two occasions and fondling her vagina with his hand on at least one occasion. He says it was at a time when he was very depressed and suicidal due to financial problems . . . He says he was 'too stressed, lonely and desperate and looking for solace.'"

Applicant argues that the Judge's analysis of the mitigating evidence in his case was erroneous. His brief cites to evidence that he contends the Judge did not consider. However, a Judge is presumed to have considered all of the evidence in a case. Applicant's brief is not sufficient to rebut that presumption. *See, e.g.*, ISCR Case No. 14-06093 at 3 (App. Bd. Dec. 4, 2015). Applicant reiterates his contentions that he did not molest his daughters, noting that he has never been prosecuted for these things. However, a Judge can find that an applicant engaged in misconduct despite evidence that charges were dropped or resulted in an acquittal. *See, e.g.*, ISCR Case No. 10-05039 at 3 (App. Bd., Oct. 17, 2011). By the same token, evidence that no charges have been brought at all does not does not compel a Judge to find that an applicant is factually innocent. Applicant's arguments consist in large measure of a disagreement with the Judge's weighing of the evidence. However, his arguments are not enough to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 14-06093, *supra*.

The Judge examined the relevant data and articulated a satisfactory explanation for the decision. 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; James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

Signed: Catherine M. Engstrom
Catherine M. Engstrom
Administrative Judge

Member, Appeal Board