KEYWORD: Guideline D; Guideline E

DIGEST: Applicant's contention that he is not participating in prostitution brings to mind a Latin phrase, "*res ipsa loquitur*," i.e., the thing speaks for itself. He paid money to engage in casual, sexual encounters. Despite his claim to the contrary, the routine practice of paying a fee to remove random women from bars and then later on that same occasion engage in sexual activity with them is a form of prostitution. Favorable decision reversed.

CASENO: 16-03690.a1

DATE: 08/15/2018

DATE: August 15, 2018

In Re:	)	
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	)	
	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Andrea Corrales, Esq., Department Counsel

FOR APPLICANT
John T. Heaney, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On January 6, 2017, 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 3, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Richard A. Cefola granted Applicant's request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: whether the Judge's decision was arbitrary, capricious, or contrary to law. Consistent with the following, we reverse.

The Judge's Findings of Fact

Applicant is a 53-year-old employee of a defense contractor. He is divorced. From about 2011 to 2016, he traveled to Thailand. While there, he frequented bars in which he would pay the bar owner to date one of the female employees during her normal working hours. The payment was to compensate the bar owner for the female's lost employment and also the female for her lost wages. "Sexual activity often occurs during these dates, but not always . . . . There is nothing illegal about this dating practice, and it is not alleged as being illegal." Decision at 2. Applicant revealed this conduct during a polygraph examination and indicated that he paid the women for companionship, not sex. He intends to continue to engage in this practice in Thailand and the United States, as long as it is legal. His family, friends, and coworkers are aware of this conduct.

The Judge's Analysis

Applicant has not concealed his conduct. The dating practice is consensual and totally legal. The evidence is insufficient to raise security concerns.

Discussion

A Judge is required to "examine the relevant data and articulate 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 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). "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." Directive, Encl. 2, App. A ¶ 2(b). The Appeal Board may reverse the Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶¶ E3.1.32.3 and E3.1.33.3.

In deciding whether the Judge's rulings or conclusions are erroneous, we will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See, e.g.,* ISCR Case No. 16-02322 at 3 (App. Bd. Mar. 14, 2018).

Department Counsel contends the Judge erred in concluding that the Government failed to establish any of the disqualifying conditions under Guidelines D or E. More specifically, Department Counsel argues that the Judge "failed to properly view Applicant's conduct for what it obviously was, the payment of prostitutes and their managers for sex" and "[t]he Judge's unquestioning acceptance of Applicant's argument that he was merely dating Thai women he met in a bar amounts to the turning of a blind eye to what was obviously occurring." Appeal Brief at 6 and 7. We find Department Counsel's arguments persuasive. Security clearance determinations must be "an overall common sense judgment" based on the adjudicative guidelines and whole-person concept. Directive, Encl. 2, App. A ¶ 2(c). The evidence reflects that Applicant traveled to Thailand eight times between 2011 and 2016. Government Exhibit (GE) 3, Applicant Exhibit (AX) A, and Tr. at 59-60.[1] He traveled with a friend on some trips and on the others he went by himself. In a background interview, he described the process of paying "bar fees" or "bar fines" that he encountered during his first trip in 2011.[2] He stated:

> [He and his friend] each dated a couple of different women on this trip, they paid their bar fees, went to dinner and/ or dancing, and engaged in consensual sexual activity. [He] engaged in sex with at least one to two women while on this trip. When they pay the bar fee, it does not mean they are paying for sex, sex is never discussed, and the women are not obligated to sleep with the men who pay their bar fee to take them out. Prostitution is illegal in Thailand. The women that they engaged in sexual activity with were adults, and it was always consensual sex (no other details recalled).[3]

In discussing some of his other trips to Thailand, Applicant went on to say, "On every trip he also engaged in sexual activity with at least one or two **random** women that he met at various bars and

[1] Six of Applicant's visits to Thailand are discussed in his background interview. GE 3. AX A lists seven trips. At the hearing, he testified that the last time he visited Thailand was "[t]he end of last year." Tr. at 59-60. This last trip would have occurred in late 2016 and was not discussed in the background interview, which occurred in April 2016, or listed in AX A.

[2] At the hearing, Applicant referred to the fee as a "bar fine." Tr. at 37.

[3] GE 3 at 2.

clubs exactly like on the first trip he took in . . . 2011."[4] [Emphasis added] *Id.* Additionally, Applicant stated, "[He] only sees the women that he has sex with for one night, and he never keeps in touch with them; there is never any close and continuing contact."[5] *Id.* Applicant's contention that he is not participating in prostitution brings to mind a Latin phrase, "*res ipsa loquitur*," *i.e.*, the thing speaks for itself. He paid money to engage in casual, sexual encounters. Despite his claim to the contrary, the routine practice of paying a fee to remove random women from bars and then later on that same occasion engage in sexual activity with them is a form of prostitution. In the above indented quote, Applicant admitted that prostitution is illegal in Thailand.[6] Disqualifying Condition 13(a) was established.[7]

Additionally, Applicant's conduct is at the very least high-risk sexual behavior that calls into question his judgment. Such behavior establishes disqualifying conditions under Guideline E that address conduct involving questionable judgment.[8]

Department Counsel also argues that Applicant has not mitigated the security concerns arising from the SOR allegations. Of note, Applicant was clear in his background interview and in his testimony at the hearing that he intends to continue to engage in the alleged sexual behavior. GE 3 and Tr. at 59-60.

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[4] Applicant testified that he did not engage in sexual activity with every women he has taken from the bars. Tr. at 39. He also testified that, even though he never took a woman to a backroom of the bar to engage in sex, he stated, "I'm sure there are some [bars] that have rooms that they can do that." Tr. at 40-41.

[5] Applicant testified that one woman he meet in a bar he has had contact with two or three times. Tr. at 45-46. *See also*, GE 3.

[6] In the Appeal Brief, Department Counsel also notes that the U.S. State Department issued a Thailand Travel Advisory in 2018 that states prostitution is illegal in Thailand.

[7] Directive, Encl. 2, App. A ¶ 13(a) states, "sexual behavior of a criminal nature, whether or not the individual has been prosecuted[.]"

[8] *See*, Directive, Encl. 2, App. A ¶¶ 16(c) and 16(d). These state:

> (c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information; [and]
>
> (d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. . . .

We conclude that the Judge's decision is arbitrary, capricious, and contrary to law. It fails to consider important aspects of the case, reflects an error in judgment, and is so implausible that it cannot be ascribed to a mere difference of opinion. The record evidence establishes disqualifying conditions under Guideline D and E. Furthermore, we conclude that the record evidence, viewed as a whole, is not sufficient to mitigate the Government's security concerns under the *Egan* standard.

Order

The Decision is **REVERSED**.

Signed: Michael Ra'anan
Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

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

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board