KEYWORD: Guideline E

DIGEST: About six years ago, Applicant's security clearance was revoked, in part, because Applicant wrongfully used a company computer to view pornographic images; solicited prostitutes on more than 50 occasions from about 1990 to 2008; and provided his second wife with $30,000 after she threatened to expose his illicit sexual activities to neighbors; and frequented strip clubs after his SCI access was revoked. Applicant has stated that his last encounter with prostitutes was in 2008, but he has since had sexual encounters with women other than his cohabitant. He paid for massages from these women and sometimes ran errands for them. He views these women as "friends with benefits." This sexual activity involved three or four women from 2013 to 2016. He engaged in this activity about a dozen times in both 2014 and 2015, and a handful of times in 2016. He has not told his cohabitant about his sexual activity with the other women. Favorable decision reversed.

CASENO: 16-03763.a1

DATE: 11/20/2018

DATE: November 20, 2018

In Re:	)	
	)	
----------	)	ISCR Case No. 16-03763
	)	
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 February 1, 2017, 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 D (Sexual Behavior) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On July 27, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Michael H. Leonard granted Applicant's request for a security clearance.[1] 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, who is in his 50s, has been working over 30 years for his employer. Divorced twice, he has lived with a cohabitant for over the past ten years.

About six years ago, Applicant's security clearance was revoked in a DOHA proceeding. In that case, which raised security concerns under multiple guidelines, the Judge concluded, in part, that Applicant wrongfully used a company computer to view pornographic images; solicited prostitutes on more than 50 occasions from about 1990 to 2008; was diagnosed with alcohol dependence; provided his second wife with about $30,000 after she threatened to expose his illicit sexual activities to neighbors; and frequented strip clubs after his SCI access was revoked. None of those matters were alleged in the current SOR, "as the Department presumably decided those matters were no longer a concern." Decision at 3.

Applicant has reapplied for a security clearance. In responding to DoD interrogatories, he stated that his last encounter with prostitutes was in 2008, but disclosed he has since then had sexual encounters with women other than his cohabitant. He paid for massages from these women and sometimes ran errands for them, but he did not pay money for sex. He referred to his relationship with these women as "friends with benefits." Decision at 4. This sexual activity involved three or four women from 2013 to 2016. He engaged in this activity about a dozen times in both 2014 and 2015, a handful of times in 2016, and not at all in 2017. He testified that he would cease to engage in any sexual encounters outside his primary relationship. He has not told his cohabitant about his sexual activity with the other women.

The Judge's Analysis

Applicant gave full, frank, and candid responses to pertinent questions in answering the interrogatories and in testifying during the hearing. The Judge stated:

[1] The hearing in this case was held on July 13, 2017.

This case has two main issues. The first is whether Applicant's sexual activity during 2013-2016 with multiple women outside of his primary relationship poses undue security concerns under Guideline E and D. The second is whether Applicant's sexual activity, which is unbeknownst to his cohabitant, poses undue security concerns under Guideline E.

The former is mitigated because Applicant's sexual activity with other women during 2013-2016 was private, casual, consensual behavior in which he exercised caution (e.g., use of condoms) and discretion (e.g., it took place at private residences and he was attentive to signs of prostitution). It is further mitigated because his sexual activity with other women ceased in 2016, and he has pledged to not engage in similar behavior. Accordingly, the behavior no longer serves as a basis for coercion, exploitation, or duress.

The latter is mitigated because, although Applicant has not disclosed his sexual activity to his cohabitant, by stopping the behavior in 2016 and pledging to not engage in similar behavior, he has taken sufficient positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress. In reaching this conclusion, I note Applicant's willingness to disclose to the Department matters of a highly personal nature. His willingness to voluntarily and fully disclose such matters suggests that he will voluntarily self-report any potential security infraction or violation or other matter related to his eligibility for access to classified or sensitive information.

* * *

Applicant is a flawed and imperfect person, as we all are, and he was not an acceptable security risk when his previous case was decided in 2012. But there has since been a substantial change of circumstances, and he is now an acceptable security risk.[2]

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

[2] Decision at 8-9.

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.

There is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied,* 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. *See* Directive ¶ E3.1.15. "The application of disqualifying and mitigating conditions and whole person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole." *See, e.g.,* ISCR Case No. 16-02322 at 3 (App. Bd. Mar. 14, 2018).

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. *Id.*

Department Counsel contends the Judge erred in his analysis of the case. He argues that the Judge took a narrow, piecemeal approach in analyzing the evidence; minimized or ignored the security significance of Applicant's conduct; and substituted a favorable credibility determination for record evidence. Department Counsel's arguments have merit.

Department Counsel argues that the Judge was naive in failing to conclude that Applicant paid to engage in sexual activity with the masseuses from 2013-2016. We need not address that issue. The current SOR did not allege that Applicant solicited or hired prostitutes. Instead, it alleged that he engaged in high-risk sexual conduct on multiple occasions since 2013 and did so unbeknownst to his cohabitant. Although the Judge did not make any findings or conclusions that specific disqualifying conditions applied, he apparently concluded some applied because he conducted a mitigation analysis that addressed both Guideline E and D.

Department Counsel asserts that the Judge summarily dismissed Applicant's prior unfavorable security clearance adjudication. In this regard, he highlights the Judge's finding that, because that previous conduct was not alleged in the current SOR, "Department Counsel presumably decided those matters were no longer a concern."[3] Department Counsel also notes the absence of a detailed whole-person analysis in the decision and argues the Judge elected to not consider Applicant's previously adjudicated conduct in conjunction with the current allegations in his

[3] Contrary to the Judge's finding that Department Counsel presumably no longer had a concern about the previous conduct, Department Counsel informed the Judge at the beginning of the hearing that the unfavorable security clearance decision was being offered into evidence "because it lends itself to showing the whole person analysis and a pattern of concerns." Tr. at 26.

analysis. At the hearing, Department Counsel offered into evidence Applicant's unfavorable clearance decision as well as an affidavit, which pre-dates that decision. Government Exhibits (GE) 5 and 8. Those exhibits detailed Applicant's previous conduct. It is well established that a Judge is required to consider all the evidence in the record. *See, e.g.*, ISCR Case No. 15-03019 at 3 (App. Bd. Jul. 5, 2017). As we have also stated, a Judge may consider non-alleged conduct (a) in assessing an applicant's credibility; (b) in evaluating an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) in considering whether the applicant has demonstrated successful rehabilitation; and (d) in applying the whole-person concept. *See*, *e.g.*, ISCR Case No. 15-07369 at 3 (App. Bd. Aug. 16, 2017).[4] In admitting the prior unfavorable clearance decision into evidence, the Judge stated that to exclude that evidence would "essentially result in me putting blinders on and compartmentalizing . . . ." Tr. at 172. The Board agrees. For the same reason, it was reversible error for the Judge to have analyzed Applicant's more recent alleged conduct without relating it to his prior misconduct of a similar nature as reflected in the prior adverse adjudication and other record evidence.[5]

More specifically, it merits noting that Applicant testified that he last engaged in sexual activity with a masseuse in December 2016, which was about seven months before the hearing. Tr. at 148. The Judge erred in failing to address Applicant's 26-year history of sexual indiscretions in analyzing whether his cessation of such behavior for about seven months was a sufficient period of reform and rehabilitation to conclude he mitigated the alleged security concerns. Additionally, Applicant also testified extensively about his enjoyment of sex and the sexual dysfunction between

[4] Both parties addressed the issue of the non-alleged conduct in their briefs. In general, our decisions state that a Judge **may** consider non-alleged conduct for certain purposes. *Id. See also*, ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006)(using the term "may") and ISCR Case No. 14-03497 at 3 (App. Bd. Mar. 9, 2015) (using the phase "It is permissible for DOHA to consider non-alleged conduct and circumstances . . . ."). On the other hand, we have also routinely concluded that a Judge may commit error by failing to consider relevant evidence. *See, e.g.*, ISCR Case No. 17-00569 at 4-5 (App. Bd. Sep. 18, 2018) and ISCR Case No. 15-07539 at 7 (App. Bd. Oct 18, 2018). Whether a Judge's failure to consider non-alleged conduct or circumstances constitutes harmful error depends upon the significance of that evidence. Normally, the proper disposition when non-alleged conduct becomes a significant factor in the outcome of a case is to remand it to the Judge with instructions to amend the SOR and give the parties an opportunity to address that conduct. *See, e.g.*, ISCR Case No. 17-02952 at 3-4 (App. Bd. Aug. 3, 2018) and ISCR Case No. 08-02404 at 5 (App. Bd. Jun. 5, 2009). Given the circumstances in this case, however, such action is not needed. The non-alleged conduct was previously adjudicated at a DOHA proceeding. Applicant was afforded due process rights under the Directive to address that conduct at the prior proceeding. Department Counsel sent Applicant the prior unfavorable clearance decision and related documents as proposed Government exhibits on March 29, 2017, which was more than three months before the current hearing. Tr. at 15-16. Applicant was placed on notice that his prior non-alleged conduct would be presented to the Judge for consideration. He is collaterally estopped from attacking the findings and conclusions of the prior DOHA Judge. *See generally* ISCR Case No. 03-24233 at 7-8 (App. Bd. Oct 12, 2005). As discussed below, the Judge's favorable analysis under Guidelines E and D is not sustainable in light of the evidence as a whole. Based on the foregoing, we conclude no purpose would be served by remanding the case to amend the SOR.

[5] In the prior decision, the Judge found "Additionally, starting in about 1990, he solicited prostitutes approximately 50 times. This often occurred at massage parlors." GE 8. In the current proceeding, Applicant was asked, "And how is it that you meet the women who you are qualifying as friend with benefits?" He responded, "Well, these are women I had known for years before . . . . I suppose most of them were people that I had massages from." Tr. at 139.

him and his cohabitant.[6] Tr. at 114-127 and 134. The Judge did not address Applicant's testimony about those matters to determine whether his high-risk sexual conduct is unlikely to recur. Those omissions undercut the Judge's mitigation analysis.

The Judge concluded that Applicant was a credible witness, that he ceased engaging in sexual activity with other women in 2016, and that he pledged to not engage in similar behavior. While we must give deference to a Judge's credibility determination (Directive ¶ E3.1.32.1), such deference is not without limits. Where, as here, the record contains evidence that detracts from a favorable credibility assessment, the Judge should address that aspect of the record, explicitly explaining why he or she finds an applicant's version of events to be worthy of belief in light of the contrary evidence. Failure to do so suggests that a Judge has merely substituted a favorable impression of an applicant's demeanor for record evidence. *See, e.g.*, ISCR Case No. 03-23504 at 6 (App. Bd. Dec. 12, 2007) (in holding for Applicant, the Judge relied too heavily on his interpretation of Applicant's demeanor and did not evaluate Applicant's credibility in light of the record as a whole). *See also Fieldcrest Cannon, Inc. v. N.L.R.B.*, 97 F.3d. 65 at 69-70 (4th Cir. 1996), to the effect that a Judge's credibility determinations can be rejected if they are unreasonable, contradict other findings of fact, are based on an inadequate reason, or on no reason at all. In this case, the Judge's failure to analyze the evidence discussed in the preceding paragraph undermines his conclusion that Applicant would never engage in problematic sexual conduct again.

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). In this case, Applicant has a 26-year history of engaging in sexual indiscretions. He solicited prostitutes on more than 50 occasions from 1990 to 2008 and provided his ex-wife with $30,000 in 2004 after she threatened to expose his illicit sexual activities. GE 8. His prior security clearance adjudication placed him on notice of the security significance of sexual indiscretions. Despite having his security clearance previously revoked, in part, for sexual behavior, he engaged in problematic sexual conduct with various masseuses on about 30 occasions from 2013-2016 without the knowledge of his conhabitant. No record evidence reflects that his cohabitant has ever been informed of his recent sexual indiscretions. Applicant himself characterized his conduct as adulterous. GE 6, Interrogatories, at 9. He continued to engage in high-risk sexual conduct even after he reapplied for a security clearance in January 2016, underwent a background interview in March 2016, and responded to interrogatories in September 2016. GE 1, 3, and 6. He only ceased engaging in that problematic conduct about seven months before the hearing. The timing of Applicant's decision to cease engaging in such conduct impacts upon the degree to which mitigating factors apply. *See, e.g.*, ISCR Case No. 08-06058 at 7 (App. Bd. Sep. 21 2009). When the record evidence is viewed in its totality, Applicant's high-risk sexual conduct from 2013-2016 continues to cast doubt on his judgment and continues to place him in a situation in which he could be vulnerable to coercion, exploitation, or duress.

[6] The Judge found that Applicant described his sexual relations with his cohabitant as "bad sex" (Decision at 4-5), but the Judge failed to address that finding in his analysis.

We conclude that the Judge's favorable security clearance decision is arbitrary, capricious, and contrary to law. It fails to consider important aspects of the case and runs contrary to the record evidence. 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