KEYWORD: Guideline D; Guideline E

DIGEST: Based on the record evidence, we find no reason for disturbing the Judge's conclusion that Applicant failed to establish that he disclosed the "full scope" of his inappropriate conduct to his employer. Adverse decision affirmed.

CASENO: 12-04943.a1

DATE: 09/13/2018

DATE: September 13, 2018

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
Ryan C. Nerney, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 19, 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 June 19, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Eric H. Borgstrom denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: 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

Applicant is a 50-year-old employee of a defense contractor. He is married with children. In 2010, Applicant was arrested for felony invasion of privacy – record sex act without consent, tampering with evidence, and harassment. Upon completion of a pretrial intervention program, which required mental-health counseling, the charges were dismissed. About two months after that arrest, Applicant's employer found inappropriate images of women on his company-owned computer. During his approximately 20 months of mental-health counseling, a psychologist diagnosed him with anxiety disorder and provided him with stress-reducing techniques to avoid triggering his compulsive behavior. Beginning in early 2013, he also experienced insomnia and depression for which he received treatment until about September 2014.

In 2015, Applicant was arrested in a retail store for invasion of privacy involving videotaping without consent. When confronted by police at the store and later in an interview, he denied the videotaping. The police investigation concluded he engaged in similar videotaping on at least six occasions during the month before his arrest. He pled guilty to disorderly conduct and was fined approximately $600. He returned to counseling with his prior psychologist until they mutually agreed to its termination.

In a 2017 background interview, Applicant admitted he concealed a phone in a handheld shopping basket to capture videos underneath women's skirts and dresses. He admitted that he repeatedly engaged in that conduct from the summer of 2015 to his arrest in the fall of that year. He attributed this behavior to "insomnia and marital, parenting, and work-related stress." Decision at 3. After issuance of the SOR, a forensic psychologist evaluated Applicant, confirmed the diagnosis of anxiety disorder, recommended continued counseling, and determined his criminal conduct is unlikely to recur if he adheres to coping skills and maintenance counseling. The forensic psychologist testified Applicant's 2015 relapse occurred because he failed to adhere to his regimen of diet, exercise, coping skills, and stress-reducing techniques. Applicant attended six counseling sessions since the issuance of the SOR.

Applicant is well regarded at work. "His supervisor testified that he was aware of the two arrests, but there is no evidence that the full scope of Applicant's conduct has been disclosed to his employer, his co-workers, or family members other than this spouse." Decision at 4.

The Judge's Analysis

For about a year before his 2010 arrest and three months before his 2015 arrest, Applicant surreptitiously videotaped up the dresses of women. Although his 2015 arrest was publically revealed, there is no evidence that the full scope of his criminal activity is known by his employers, coworkers, or family members other than his wife. While Applicant attributed his inappropriate behavior to insomnia, this was tenuous because his insomnia was largely resolved by the end of 2014. The stress Applicant experienced was not unusual or likely to cease. Even though he recently initiated maintenance counseling, the totality of his inappropriate conduct casts doubt on his reliability, trustworthiness, and judgment.

Applicant's initiation of counseling after his 2010 arrest, his 2015 arrest, and the issuance of the SOR was prompted by pending criminal or employment consequences. His credibility and mitigation are also undercut by his false statements to law enforcement officials in 2015. Considering his relapse after extensive counseling, it is too early to conclude his inappropriate conduct is unlikely to recur.

Discussion

Applicant contends the Judge erred in concluding that he did not inform his employer of the full scope of his inappropriate conduct. In support of that claim, he references a supervisor's statement in which the supervisor states, "I am aware of the issues raised in his [Applicant's] OPM interview." Applicant Exhibit (AE) D. We note that there are two OPM interview summaries in Government Exhibit (GE) 5, and together they contain a comprehensive account of Applicant's inappropriate conduct. It is unknown whether the supervisor examined both interview summaries. At the hearing, the supervisor testified that he also had seen the SOR. Tr. at 16. He stated that, even though he has worked with Applicant for the last 15 years, he learned of both incidents after the second arrest in 2015. Tr. at 15 and 21. When asked if Applicant told him about the frequency of his conduct, the supervisor stated, "I would not say we had that conversation" and indicated he had a "surface understanding" of the Applicant's conduct. Tr. at 22-23. The supervisor also acknowledged that Applicant was required to report the incidents to the security office and to no one else in the company. Tr. at 25-26. The record also contains Joint Personnel Adjudication System (JPAS) entries for each incident, but those entries are not detailed. GE 2.

From our review of the record, Applicant's challenge to the Judge's conclusion about his disclosure to the employer merits no relief. This particular disclosure is a matter in mitigation.[1] The

[1] Applicant's disclosure of his inappropriate conduct is a relevant factor in two mitigating conditions, *i.e.*, ¶ 14(b) "the behavior no longer serves as a basis for coercion, exploitation, or duress;" and ¶ 17(e) "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress[.]" *See* Directive Encl.

burden was on Applicant to present evidence in mitigation. Directive ¶ E3.1.15. Based on the record evidence, we find no reason for disturbing the Judge's conclusion that Applicant failed to establish that he disclosed the "full scope" of his inappropriate conduct to his employer. Additionally, even if the Judge erred in this regard, it was a harmless error because it likely did not affect the outcome of the case. *See, e.g.*, ISCR Case No. 11-15184 at 3 (App. Bd. Jul. 25, 2013). The Judge based his adverse decision on the totality of the evidence pertaining to Applicant's inappropriate conduct, concluding such evidence casts doubt on his reliability, trustworthiness, and good judgment.

Applicant also argues that the Judge failed to consider all of the record evidence, mis-weighed the evidence, and misapplied the mitigating conditions and whole-person concept. For example, he argues the Judge erred in not taking into account the forensic psychologist's testimony that Applicant's prognosis is good and his inappropriate conduct is unlikely to be repeated. The Judge, however, is not required to accept the uncontradicted testimony of an expert but must consider it along with the evidence as a whole. *See, e.g.*, DISCR OSD Case No. 89-0820 at 4 (App. Bd. Feb. 25, 1992). In short, Applicant's arguments are neither enough to rebut the presumption that the Judge considered all of the record evidence nor sufficient 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. 15-01717 at 4 (App. Bd. Jul. 3, 2017). We give due consideration to the Hearing Office case that Applicant's Counsel has cited, but it is neither binding precedent on the Appeal Board nor sufficient to undermine the Judge's decision. *Id.*

Applicant failed to establish the Judge committed harmful error. The Judge examined the relevant evidence 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, Encl. 2, App. A ¶ 2(b): "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

2, App. A ¶¶ 14(b) and 17(e).

Order

The Decision is **AFFIRMED**.

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