

KEYWORD: Guideline D; Guideline E; Guideline M; Guideline J

DIGEST: Applicant failed to mitigate the security concerns in his case. Any errors in the Judge’s decision were harmless. Applicant failed to rebut the presumption that the Judge was impartial. Adverse decision affirmed.

CASENO: 07-10485

DATE: 05/21/2009

DATE: May 21, 2009

In Re:)	
)	
-----)	ISCR Case No. 07-10485
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 13, 2008, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guideline D (Sexual Behavior), Guideline E (Personal Conduct), Guideline M (Use of Information Technology Systems), and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive). Department Counsel requested a hearing. On March 10, 2009, after the hearing, Administrative Judge Rita C. O’Brien denied Applicant’s request for a security clearance. Applicant appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge failed to give sufficient weight to his evidence of mitigation; whether the Judge erred in mischaracterizing Applicant's viewing of pornography in 2008 as child pornography rather than adult pornography; and whether that characterization influenced the Judge's reasoning and prevented her from reaching a fair and impartial decision.

The Judge made the following pertinent findings of fact: Applicant is 38 years old and has held a security clearance since 1990. When Applicant was 14, he inappropriately touched a 6-year-old girl he was babysitting. He was not prosecuted. Thereafter, while babysitting, Applicant had inappropriate sexual thoughts while changing the diaper of a 6-month-old girl, but did not act on them. Applicant viewed pornographic videotapes while in college. At the same time, Applicant discovered child pornography, which gave him "more of a high." The child pornography Applicant accessed twice during college was textual rather than pictorial. Between 1998 and 2004, Applicant used his work computer to view child pornography approximately twelve times. Between 1996 and 2005, Applicant used his work computer to view adult pornography approximately twice per month. Applicant knew that viewing child pornography was illegal. While he was not aware of the exact language of his employer's policy on personal use of company computers to view pornography, he was aware that such use was "not in accord with how [company] wishes to do business." Decision at 3, *citing* transcript at 67-69. Applicant viewed pornography at work in an area where someone might discover that he was doing it, and he "enjoyed the thrill of engaging in forbidden behavior." Decision at 3.

Applicant underwent a polygraph examination at a government agency in January 2005. Applicant stated that the examination forced him to confront his pornography habit. A few days later, Applicant purchased content-monitoring software that blocks access to pornography sites and installed it on his work computer. He purchased a later version in 2008 because the earlier version interfered with his work. Applicant can disable or remove the software at any time. In 2008, approximately six months before the hearing, Applicant disabled the software and accessed adult pornography at work.

After the polygraph examination, Applicant told his wife about his viewing of pornography. In 2006 and 2007, Applicant met with his pastor for counseling. Only Applicant's wife and pastor are aware of his habit. Others know that his access to classified materials was limited after the polygraph examination, but they do not know why. Applicant admitted all the allegations in the SOR except for a portion of one allegation under Guideline D.

In his appeal, Applicant argues that the Judge did not give adequate weight to his mitigating evidence. The Judge referred to Applicant's testimony and discussed the possible application of mitigating conditions in Applicant's case. The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. A party's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 07-00553 at 2 (May 23, 2008). With one

exception to be discussed below, the record in this case supports the Judge's conclusions.

Applicant identifies an error by the Judge. When discussing her conclusions under Guideline J, the Judge incorrectly stated that Applicant had viewed child pornography at work six months before the hearing, when in fact Applicant testified that he had viewed adult pornography at that time. Elsewhere in her decision, the Judge identified the pornography viewed at that time as adult pornography. The error by itself is harmless. The Judge was unlikely to reach a different decision in the absence of that error, since Applicant admitted to allegations under four guidelines and the Judge found against Applicant under all four.¹

Applicant contends that the Judge considered all pornography, not just child pornography, to be illegal and therefore was unable to reach an impartial decision in his case. This is analogous to a claim of bias. There is a rebuttable presumption that a Judge is impartial and unbiased. A party seeking to overcome that presumption has a heavy burden of persuasion. *See, e.g.*, ISCR Case No. 02-08032 at 4 (App. Bd. May 14, 2004). The Board has noted that the issue is not whether Applicant believes the Judge was biased or prejudiced against Applicant. Rather the issue is whether the record contains any indication that the Judge acted in a manner that would lead a reasonable person to question the fairness or impartiality of the Judge. *See, e.g.*, ISCR Case No. 07-02253 at 3 (App. Bd. Mar. 28, 2008). In this case after a review of the Judge's decision and the entirety of the record, the Board concludes that Applicant has failed to meet his burden of demonstrating bias on the part of the Judge.

After reviewing the record as a whole, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for her 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). Accordingly, the Judge's ultimate unfavorable security clearance decision is sustainable.

¹Applicant admits viewing child and adult pornography on his work computer over a period of time. Applicant distinguishes between child pornography and adult pornography in part because the viewing of child pornography violates federal law, while the viewing of adult pornography does not. However, for at least part of the time, Applicant was aware that the viewing of any pornography on his work computer was a violation of his employer's policy.

Order

The Judge's decision denying Applicant a security clearance is AFFIRMED.

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

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

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