

KEYWORD: Guideline B; Guideline E

DIGEST: Judge’s finding that Applicant had sexual encounters with prostitutes after he starting dating his wife was supported by substantial record evidence. Applicant failed to rebut the presumption that the Judge considered all of the record evidence. Adverse decision affirmed.

CASE NO: 07-17076.a1

DATE: 05/11/2011

DATE: May 11, 2011

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In Re:)	
)	
-----)	ISCR Case No. 07-17076
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Hany A. Zohdy, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 20, 2010, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 28, 2011, after the hearing, Administrative Judge Mark Harvey 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 considered all of the

record evidence; whether the Judge erred in his credibility determination; whether certain of the Judge's findings were supported by substantial record evidence; whether the Judge erred in his application of the pertinent mitigating conditions; whether the Judge's whole-person analysis was erroneous; and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. The Judge's favorable findings under Guideline B, and his favorable findings under allegations 2(a) to 2(d) and 2(f) to 2(i) are not at issue in this appeal. Consistent with the following, we affirm the Judge's decision.

The Judge made the following pertinent findings of fact: Applicant is a linguist employed by Defense contractors. Born in Egypt, he moved to the U.S. and became a citizen of this country in the early 1990s. Applicant is married and has two children from a previous marriage.

From 2003 to 2005 Applicant had sexual encounters with prostitutes on approximately 15 occasions in two foreign countries. Some of these encounters occurred while Applicant was dating his future wife. Applicant disclosed to his spouse that he had visited prostitutes before dating her.

During an OPM interview, Applicant stated that his wife is aware of the encounters prior to their having started dating, but that she "has no knowledge of the instances that took place while we were dating . . . She would be heartbroken. She would be extremely hurt. I don't think she would leave me but it would take a lot to mend the hurt." Decision at 10, quoting Government Exhibit (GE) 4, Affidavit to OPM Center for Federal Investigative Services, dated September 9, 2008.

In the Analysis portion of the Decision, the Judge concluded that Applicant's encounters with prostitutes remains a security concern. He stated that Applicant was deceptive at the hearing¹ and that Applicant was more candid in his answers in the OPM affidavit, quoted above. Although the Judge entered favorable findings on all other SOR allegations, he concluded that Applicant had failed to meet his burden of persuasion as to mitigation regarding his encounters with prostitutes.

Applicant challenges the Judge's finding that he had had sexual encounters with prostitutes after he began dating his wife. Viewed in light of GE 4 and the record as a whole, the challenged finding is supported by substantial record evidence. *See* Directive ¶ E3.1.32.1. (Substantial evidence is "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"). In support of his appeal, Applicant submits new evidence not contained in the record, including a chart of his foreign travels and a witness statement. We cannot consider this new evidence. *See* Directive ¶ E3.1.29. ("No new evidence shall be received or considered by the Appeal Board"). *See also* ISCR Case No. 09-03616 at 2 (App. Bd. Mar. 25, 2011).

Applicant contends that the Judge failed to consider all of the record evidence, such as his evidence of good character and his accolades from the U.S. military. He also contends that the Judge failed to consider, or that he mis-weighed, his testimony concerning when he stopped

¹"[W]hen I went to [two Southwest Asia countries], I specifically went there to meet with and sleep with prostitutes. This is the main reason why I used to go. But after I met my wife, I continued to go to [two Southwest Asia countries] with other friends but never slept with prostitutes. I just met with them because they are almost impossible to avoid. They are everywhere." Decision at 11, quoting Tr. at 140-141.

engaging in sexual activity with prostitutes. However, a Judge is presumed to have considered all of the record evidence. *See, e.g.*, ISCR Case No. 09-07395 at 3 (App. Bd. Sep. 14, 2010). Applicant has failed to rebut this presumption. Neither has he demonstrated that the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. Moreover, the Judge's determination of the relative credibility of Applicant's testimony and of his 2008 affidavit constitutes a reasonable interpretation of the record evidence. Applicant has not provided a reason to disturb the Judge's credibility determination. *See, e.g.*, ISCR Case No. 09-00395 at 3 (App. Bd. Jun. 8, 2010).

The record supports a conclusion that the Judge examined the relevant data and articulated a satisfactory explanation for the decision, "including a 'rational connection between the facts found and the choice made,'" both as to the mitigating conditions and the whole-person factors. *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 Judge's adverse 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 Judge's adverse security clearance determination is AFFIRMED.

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board