

KEYWORD: Guideline I; Guideline D; Guideline E

DIGEST: The Judge's finding that Applicant sought out and obtained appropriate, non-sexual contact with young girls runs counter to the record evidence. The presumption that the polygrapher carried out his with good faith and regularity has not been overcome. The Judge improperly substituted a favorable credibility determination for record evidence. Favorable decision Remanded.

CASENO: 07-17801.a1

DATE: 12/06/2012

DATE: December 5, 2012

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In Re:)	
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-----)	ISCR Case No. 07-17801
)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Joseph Testan, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On February 4, 2011, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline I (Psychological Conditions), 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 April 25, 2012, after the hearing, Administrative Judge Richard A. Cefola granted Applicant’s request for a security clearance. Department Counsel appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30. In a Remand Order dated August 17, 2012, the Appeal Board remanded the case to the Judge. The remand resulted from the Board’s conclusion that the Judge has failed to consider an important aspect of the case, namely Applicant’s allegedly improper contact with young girls. On September 10, 2012, the Judge issued a Remand Decision again granting Applicant’s request for a security clearance. Department Counsel again appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: (a) whether the Judge failed to discuss critical aspects of the evidentiary record; (b) whether the Judge’s conclusions under Guideline D are arbitrary and capricious; (c) whether the Judge’s conclusions under Guideline E are arbitrary and capricious; and (d) whether the Judge’s whole-person analysis is unsustainable. For the reasons discussed below, the Board remands the Judge’s favorable Remand Decision.

In his Remand Decision the Judge made the following pertinent findings of fact: Applicant held a security clearance from 1977 to 1985 and again from 1995 to 2007. He has never had a security violation. His security officer speaks most highly of the Applicant.

Applicant grew up in what was, in many ways, a dysfunctional family. In his mother’s eyes he was “supposed to be a girl,” and she treated him as she would a daughter. By age five, Applicant was cross dressing, and by age eight, he began engaging in sadomasochistic acts by injuring himself. His sadomasochistic behavior ceased in about 2004, and his treating psychiatrist gives Applicant injections of medication to control his obsessive behavior. Applicant admits he has sought appropriate, non-sexual contact with young girls. However, Applicant denies that he is sexually attracted to, or has fantasies about inappropriate conduct with, young girls. He avers that the Government polygrapher put words in his mouth. Based on observations of the Applicant, and on the extensive outpouring of support by those who know Applicant, as evidenced by 14 letters of support, his denials and testimony are most credible.

From 1980 to 1983 Applicant saw Psychiatrist A for a condition initially diagnosed as Anxiety Reaction, and later changed to Depressive Neurosis. He was prescribed medication to treat his depression. When Psychiatrist A moved, Applicant saw Psychiatrist B about every two weeks from 1983 until Psychiatrist B passed away in 1998. In 1995, Psychiatrist B noted that Applicant was suffering from depression, anxiety, and obsessive-compulsive behavior. He found no immoral or deviant behavior. Applicant’s prognosis was fair, and the doctor noted that good progress was made. The doctor found no impairment in judgment or reliability. Since 1998, Applicant has seen Psychiatrist C every two weeks for treatment of Obsessive Compulsive Disorder. In September

2009, this treating psychiatrist noted that he was satisfied with the current state of therapy. He noted that Applicant had good control of his behavior and is highly unlikely to be influenced, coerced, or manipulated because of his fantasies. In March 2011, Psychiatrist C further noted that Applicant is truthful and conscientious and would not permit his private fantasies to interfere with his ability to protect sensitive government information.

In 2007, another government agency denied Applicant access to Sensitive Compartmented Information (SCI), based on allegations similar to those contained in the SOR.

In December 2008, Applicant met with a government psychologist for an hour. Based on that meeting and a review of unspecified records, the psychologist found a DSM IV diagnosis of Obsessive Compulsive Disorder, Major Depression, recurrent, Pedophilia, Transvestic Fetishism (sic) and Sexual Masochism and Sadism. He further found a defect in judgment, and less so in reliability at that time, and concluded that these manifestations were likely to continue in the future. In September 2010, the same government psychologist, armed with a review of specified records, gave a more thorough psychological report. He reiterated his previous diagnosis, but noted that Applicant displayed no evidence of a defect in judgment, reliability or trustworthiness at work. The psychologist noted that when Applicant had sufficient duties at work to keep him preoccupied, he felt productive, effective, appropriate, and like a valued contributor.

In February 2012, Psychiatrist C stated that Applicant does not have a medical condition, nor is he receiving medical treatment that impairs his judgment, reliability, or trustworthiness in safeguarding classified information

The Judge reached the following conclusions: A government psychologist saw the Applicant in December of 2008 and rendered an opinion regarding a condition that caused the psychologist to question Applicant's judgment. This is countered, however, by the opinion of Applicant's treating psychiatrist, who has seen Applicant every two weeks for the last 14 years. Mitigation applies as there is no indication of a current problem. Most recently, the treating psychiatrist opined that Applicant does not have a medical condition, nor is he receiving medical treatment that impairs his judgment, reliability, or trustworthiness in safeguarding classified national security information. Disqualifying conditions under the Sexual Behavior Guideline are arguably applicable here. Applicant has a history of sadomasochistic acts. However, his last act of sadomasochism occurred more than seven years ago, and he is administered injections to prevent any future such acts. The behavior no longer serves as a basis for coercion, exploitation, or duress. The Applicant's security officer knows of his condition, and the Applicant's spouse is also aware of it. Under the Personal Conduct Guideline, the Applicant was denied access to SCI by another government agency in 2007. This is countered, however, by the fact that so much time has passed. . . that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment. Since then, his treating psychiatrist has deemed the Applicant to be trustworthy. Applicant has the unqualified support of those who know him in the work place and the community. There are no questions or doubts as to Applicant's eligibility and suitability for a security clearance.

The main thrust of Department Counsel's arguments on appeal is that, after remand, the Judge's consideration and analysis of the issue of Applicant's thoughts and interactions with young girls remains both erroneous and inadequate. Department Counsel argues that the Judge's failure to properly address this issue affected his overall analysis of the case under the multiple Adjudicative Guidelines set forth in the SOR. The Board agrees. In our Remand Order, the Board concluded that the record evidence of Applicant's encounters with female children was an important aspect of the case that the Judge's original Decision did not address. Despite a slightly expanded analysis, the Board concludes that the Judge's Remand Decision suffers from the same basic infirmity.

There is a large volume of evidence in this case regarding the issue of Applicant and female children. The record evidence reveals that this issue has essentially two components: (a) Applicant's thoughts and desires concerning young female children, and (b) actual physical contact between Applicant and young female children. Applicant also has a history of psychological problems separate and apart from any interest in young girls. Any meaningful analysis of the government's security concerns must include an overall evaluation of these components in relation to one another under all the Adjudicative Guidelines proffered in the SOR. Applicant's thoughts about young girls are directly related to his actions with young girls and *vice versa*. These issues should also be evaluated in the context of Applicant's other psychological manifestations. The Judge's Remand Decision takes a piecemeal approach where some of these issues are discussed under individual guidelines but others are not addressed at all. It is instructive to note that the evidence of a diagnosis of pedophilia, as well as Applicant's thoughts and interactions regarding young girls—arguably the most potent evidence of concern in the evidentiary record—is not specifically mentioned or discussed anywhere in the analysis section of the Judge's Remand Decision.

Department Counsel objects to the Judge's findings regarding Applicant's issues with young girls. She states that the Judge's fact-finding is clearly erroneous and is contradicted by admissions made by Applicant. She states that the Judge essentially substituted a favorable credibility determination for a critical examination of record facts. She then asserts that there is no reasonable basis for the credibility determination made by the Judge. These arguments have merit.

In the original Decision, the full extent of the Judge's fact-finding on the issue of Applicant's interest in young girls consisted only of the Judge's notation that Applicant denied the allegations in the SOR, (fantasies about inappropriate conduct with young girls, non-sexual contact with young girls) and claimed that a government polygrapher put words in his mouth. The Judge then stated that an extensive outpouring of support for Applicant by those who knew him plus his observations of Applicant supported a finding that Applicant's denials and his testimony were most credible. The findings in the Remand Decision differ only slightly from those in the original, and, practically speaking, include only one additional sentence.¹ In that sentence, the Judge notes that Applicant

¹ This section of the Judge's Remand Decision also added a brief portion of the testimony of Applicant's security officer, wherein the witness stated she was familiar with the evidence against Applicant, and the allegations against him. The witness then opined that Applicant could handle classified information appropriately, that he should have his clearance reinstated, that he was not a pedophile, and that she would trust him alone with her granddaughters.

admits he has sought appropriate, non-sexual contact with young girls. The Judge’s earlier notations about Applicant’s denials of sexual attraction, fantasies about inappropriate conduct, and his averment that the government polygrapher put words in his mouth were repeated. As in the original Decision, the Judge then referenced his observations of Applicant and the indication of support from others when finding that Applicant’s denials were credible.

The Board concluded in its Remand Order that the Judge’s original finding that Applicant had not sought out contact with young girls was unsustainable. Now the Judge has found that Applicant has sought out and obtained appropriate, non-sexual contact with young girls. Department Counsel argues that such a finding runs contrary to the record evidence. The Board agrees. We examine a Judge’s findings to see if they are supported by substantial record evidence, which 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.” Directive ¶ E3.1.32.2. *See also* ISCR Case No. 11-02087 at 3 (App. Bd. Mar. 20, 2012). In this case the record evidence includes the following: (a) an admission in 2006 that during the preceding 10 to 15 years, Applicant realized he was attracted to girls from age three to twelve²; (b) an admission that he had the desire to touch a young girl in a sexual manner and that he had “. . . lots of desires in my head.”³; (c) an admission by Applicant that there is something in his head that is “considerably dangerous” and that he worries about it⁴; (d) an admission that as long as he only did things to himself, he was reasonably safe, but there were worse things a person could do, and he was attracted to young girls, and he knew that this was the most dangerous thing⁵; (e) an admission that he might masturbate to the memory of contacts with little girls or might want to wrap his arms around a young girl and masturbate later.⁶; (f) a statement admitting a desire to lick a young girl’s genitals⁷; (g) testimony from Applicant where he indicated that he approached the polygraph and interviews (the source of the admissions and evidence listed above) in a manner that was fully cooperative, and that he was “blisteringly honest”

The Judge offers no comments about this testimony, other than to find, by way of introduction, that “His Security Officer speaks most highly of the Applicant.” The Judge does not relate the colloquy to any other evidence. Its probative value is limited in that it provides no specifics as to which thoughts and actions of Applicant toward young girls the witness was aware of. The witness also offered a medical opinion that she was not qualified to make. Therefore, the inclusion of this package of testimony, though an expansion of the Judge’s original decision, does not satisfy the Board’s Remand Order instruction to address an important aspect of the case, either considered alone, or in conjunction with the additional sentence referenced above.

²Govt. Exhibit 3, Govt. Exhibit 10.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

with the polygraph examiner⁸; (h) an opinion from Applicant's treating psychiatrist that he believed Applicant had been honest with the polygrapher⁹; (i) evidence, partly derived from the treatment notes of Applicant's treating psychiatrist, of numerous instances of physical contact with young girls, to include kissing, scratching, rubbing of the back, wrapping of the arms around them, and having them sit in his lap¹⁰; (j) evidence of incidents such as Applicant seeking and engaging in contact with a young girl in a park which provoked a strong response from the girl's father, Applicant kissing four-year-old girls on the head at his son's preschool which prompted a complaint from a parent and a warning from the school, and a forty minute encounter with a five-year-old girl at a library where Applicant sat her on his lap and put his arms around her and later described the incident as a "courtship"¹¹; and (k) while denying during his testimony at his hearing that there was any sexual gratification motivation behind his obsession with little girls, he did state that the physical contact gave him a "warm and protective" feeling.¹²

This large body of evidence was barely mentioned by the Judge in his findings of fact, and, as indicated earlier, it was mentioned only in the context of noting Applicant's general denial of any improper or questionable conduct. The Judge then found Applicant credible, and accepted Applicant's denial without making any attempt to analyze the evidence or evaluate it in the context of other record evidence. Applicant's later denials of improper conduct or sexual thoughts or motivations toward young girls was evidence that the Judge was entitled to consider. Also, the expert opinion evidence regarding pedophilia can best be described as mixed. However, setting aside the issue of whether or not Applicant's attraction to and contact with young girls had a sexual component, given the record evidence cited in the preceding paragraph, the Board concludes that the record provides no basis for any reasonable person to view Applicant's interactions with young girls as appropriate conduct.

Without a meaningful discussion of the evidence regarding the issue of Applicant and young girls, little is left in the Judge's Remand Decision beyond a credibility determination. The Judge found Applicant's denials of sexual or inappropriate conduct credible, notwithstanding the fact that the denials conflict significantly with numerous previous admissions made by Applicant over an extended period of time. The deference owed to a Judge's credibility determinations does not immunize them from review, nor does it preclude the Board from concluding that a challenged credibility determination cannot be sustained. *See, e.g.*, ISCR Case No. 97-0356 at 3 (App. Bd. Apr. 21, 1998). The Judge's credibility determination is flawed inasmuch as it ignores the inconsistencies in Applicant's version of events while at the same time insinuating that the government polygrapher engaged in improper conduct in interviewing Applicant and recording his responses. The Board

⁸ Transcript at 64, 65, 79.

⁹ Applicant's Exhibit A, 2009 Statement.

¹⁰ Government Exhibit 3, Government Exhibit 10; Transcript at 85-89, 90-91, 100.

¹¹ Government Exhibit 10.

¹² Transcript at 88-89.

has long recognized that Federal agencies and their employees, like the polygrapher, are entitled to a presumption of good faith and regularity in the performance of their responsibilities. *See, e.g.*, ISCR Case No. 11-03452 at 4 (App. Bd. Jun. 6, 2012). This presumption is not overcome by the Judge's reliance solely on the testimony of Applicant without additional objective evidence corroborating misconduct on the part of the polygrapher or malfeasance in the performance of his duties.

Moreover, the Judge proffers Applicant's averment "that the Government polygrapher put words in his mouth" as a blanket statement, presumably to discount all evidence of Applicant's sexually motivated or inappropriate thoughts and actions involving young girls. The record does not support this blanket finding of fact. The only instance where Applicant offers any evidence at all about the polygrapher suggesting an answer or forcing him into an answer he did not believe to be true was the discussion about Applicant's thoughts concerning licking a young girl's genitals.¹³ Even if Applicant's version of events is accepted in this specific instance, it would not significantly undercut the numerous other admissions made by Applicant regarding young girls, where Applicant has made no suggestion that the contents of the polygrapher's reports of investigation are inaccurate.

The Judge's credibility determination is also based in large part on the "extensive outpouring of support by those who know Applicant." This, too, was evidence that the Judge was entitled to consider, and it has some probative value in assessing Applicant's character and reputation. However, the probative value of such evidence as a determinant of Applicant's credibility is significantly limited by the fact that none of the 14 letters of support indicate any knowledge of the allegations in the SOR. The letters are overwhelmingly concerned with Applicant's professional skills and reputation. Those that comment on his honesty (approximately half) do not do so outside the context of the workplace. Only two of the letters indicate that the writers knew about Applicant's loss of an earlier security clearance. Only one mentions his personal life. The Judge fails to explain how the content of these letters bolsters the believability of Applicant's denials, given the countervailing evidence in the record.

To summarize, the Board concludes that the Judge's favorable credibility determination of Applicant was improperly used as a substitute for record evidence in this case. The credibility determination itself is unsustainable absent a more cogent explanation than currently exists as to why Applicant's current denials are more believable than his extensive earlier admissions.

Department Counsel asserts, accurately, that the record demonstrates that Applicant had a complex mental health condition that has manifested itself in many ways over his lifetime. Her further assertion that the Judge's Remand Decision does not fully examine the complexity of this profile is fair criticism. The failure of the Judge to adequately consider Applicant's issues with young girls has already been discussed. Additionally, the Judge's analysis under Guideline I does not discuss the various other components of Applicant's psychological profile, such as his self-damaging sadomasochistic behavior or his sexually violent fantasies toward adult women. The state of the expert opinion evidence regarding Applicant's mental condition, which the Judge does

¹³ Transcript at 80-82; Applicant's Answer to the SOR.

mention, is conflicting, and as such does not mandate a particular conclusion. However, the expert opinion evidence must be evaluated in the context of Applicant's psychological history as a whole as well as Applicant's behavior.

Similarly, the Judge's analysis under Guideline D talks only about the history of sadomasochistic acts while neglecting to analyze, or at least comment upon, those acts in the context of Applicant's fantasies and his contact with young girls. In light of the Board's conclusions concerning the sustainability of the Judge's findings of fact and his credibility determination, the issue of whether there was a sexual context involved with Applicant's attraction to young girls should be re-evaluated.

Under Guideline E, the Judge's Remand Decision mentions only the denial of access to SCI by another government agency in 2007, without any analysis as to underlying conduct. Given the Board's conclusion that the record evidence establishes that Applicant's interactions with young girls were inappropriate, and given the Board's conclusion that there is significant evidence indicating that Applicant's interest in young girls had a sexual orientation, a specific discussion is needed as to whether this evidences questionable judgment that is of security concern regardless of the passage of time.

Both Department Counsel and Applicant make various other arguments on appeal. The Board will not address these. In essence, these arguments amount to each side offering its interpretation of the record evidence. While each side offers an interpretation that is plausible, neither establishes that the other interpretation is unsupported by the record evidence.

In his Remand Decision, the Judge made a slightly modified finding of fact (that the Applicant sought out and engaged in appropriate conduct with young girls as opposed to a finding that he had not sought out contact with young girls in his original Decision). This modified finding is not sustainable. The Judge did not correct his earlier failure to engage in a meaningful discussion of Applicant's issues with young girls, nor did he relate those issues to other evidence in the case. The Judge also engaged in a piecemeal analysis of Guidelines I, J and E, and left out important aspects of the case in his analysis of each. The Board remands the case to the Judge for correction of these errors and the others discussed in this Decision.

Order

In accordance with the Board's preceding discussion, the Judge's Remand Decision is REMANDED. The Judge shall issue a new Decision consistent with the analysis contained herein.

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