

KEYWORD: Guideline E

DIGEST: The Judge's conclusions regarding the lack of knowledge on the part of Applicant's family and associates about Applicant's conduct are sustainable. Adverse decision affirmed.

CASENO: 09-01896.a1

DATE: 04/29/2010

DATE: April 29, 2010

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In Re:)	
)	
-----)	ISCR Case No. 09-01896
)	
)	
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 September 2, 2009, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 4, 2010, after the hearing, Administrative Judge Joan Caton Anthony denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issue on appeal: whether the Judge’s adverse security clearance decision is arbitrary, capricious, or contrary to law. Finding no error, the Board affirms the Judge’s adverse decision.

The Judge made the following relevant findings of fact: Applicant admitted the three allegations of disqualifying conduct in the SOR. Applicant admitted masturbating in various public locations and stated that he had not engaged in such conduct since 2004. Applicant also admitted involvement in two affairs while he was married to his first wife—a ten-year affair with a man and an affair late in his first marriage to the woman he eventually married. Applicant attributed the affairs to his first wife’s depression and the effect it had on their physical relationship. Applicant is now happily married and is involved in a faith community with his current wife. Applicant also admitted engaging in sexual relations with prostitutes. Applicant attended a military service academy and retired from the military as a colonel with 26 years of service. Applicant has two grown sons from his first marriage. Applicant’s current spouse is aware of his ten-year affair, but is unaware of the other behavior of security concern discussed above. Applicant’s sons are not aware of any of that behavior. Applicant submitted character references and performance evaluations from former military superiors and from civilian employers. Those individuals are aware of little or none of the behavior. The Judge discussed and quoted from both parties’ exhibits, including Applicant’s character references and performance evaluations.

Applicant does not allege factual error on the part of the Judge, but objects to her characterization of the evidence and her adverse conclusions. In making his objections, Applicant provides detail which was not revealed at the hearing. The Board is not able to consider such detail, since it constitutes new evidence. *See* Directive ¶ E3.1.29. Based on the record as a whole, the Board finds that the Judge’s findings and conclusions are based on substantial evidence or constitute reasonable characterization or inferences that could be drawn from the record. Applicant has not demonstrated error in this regard. *See, e.g.*, ISCR Case No. 08-06605 at 4 (App. Bd. Feb. 4, 2010).

With regard to the fact that Applicant has not told certain people about his past behavior, he points out that the Directive does not require him to do so. However, paragraph 16 of the Adjudicative Guidelines lists “[c]onditions that could raise a security concern and may be disqualifying[.]” One of the items on the list is “personal conduct, or concealment of information about one’s conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person’s personal, professional, or community standing[.]” *See* Directive ¶ E2.16(e). The Judge’s conclusions regarding the lack of knowledge by Applicant’s family and associates about Applicant’s behavior are sustainable.

Applicant underwent a psychological evaluation and submitted a copy of the resulting report at the hearing. Applicant maintains that the Judge focused only on one small portion of the report. There is a rebuttable presumption that the Judge considered all the record evidence unless the Judge clearly states otherwise. *See, e.g.*, ISCR Case No. 07-18303 at 2 (App. Bd. Nov. 13, 2008). It is not necessary for the Judge to mention every item of evidence that she considered, but here the Judge actually referred to other portions of the report in her decision. Applicant has not demonstrated error on this point.

Applicant also argues that the Judge should have found his conduct to be mitigated because he no longer participates in such conduct and because the conduct is so remote in time. The Judge considered Applicant's evidence of mitigation. However, 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. 07-10454 at 2 (App. Bd. Aug. 12, 2008).

In this case, the Judge weighed the mitigating evidence offered by Applicant against the length and seriousness of the disqualifying conduct. The Judge considered the possible application of relevant mitigating conditions and discussed why she did not apply them in Applicant's case. The Judge explained why the evidence Applicant presented in mitigation was insufficient to overcome the government's security concerns. The Board does not review a case *de novo*. The favorable evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 08-02653 at 3 (App. Bd. Mar. 25, 2009). Given the record that was before her, the Judge's ultimate unfavorable clearance decision under Guideline E is sustainable.

After reviewing the record, 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 Judge's decision is sustainable on this record. *See also Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) ("The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'")

As an alternative to granting him a clearance outright, Applicant mentions the granting of a clearance "with a warning that any future incidents of a similar nature will result in a revocation of the clearance." The Board has no authority to grant such conditional clearances. *See, e.g.*, ISCR Case No. 08-07904 at 3 (Mar. 3, 2010).

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