

KEYWORD: Guideline D; Guideline E

DIGEST: A Judge is presumed to have considered all the record evidence. Adverse decision affirmed.

CASENO: 09-05617.a1

DATE: 07/26/2011

DATE: July 26, 2011

In Re:)	
)	
----)	ISCR Case No. 09-05617
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Alison O’Connell, Esq., Department Counsel

FOR APPLICANT

John N. Griffith, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On March 15, 2010, DOHA 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). DOHA subsequently amended the SOR by (1) deleting the Guideline D security concerns; (2) modifying one allegation under Guideline E and (3) adding allegations under Guideline E. Applicant requested a hearing. On May 4, 2011, after the hearing, Administrative Judge Elizabeth M. Matchinski 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's application of the pertinent mitigating conditions was erroneous and whether the Judge's whole-person analysis was erroneous. Consistent with the following, we affirm the Judge's decision.

Facts

The Judge made the following pertinent findings of fact: Applicant is a 49-year-old operations manager for a Defense contractor. He has previously held a Top Secret clearance with Sensitive Compartmented Information (SCI) access. He served in the U.S. military from 1980 until 1990. His first marriage ended in divorce, and he has a daughter from that marriage.

While living and working in a foreign country, he met a citizen of that country, whom he married. When assigned to work in this country, Applicant was granted "special program access" and agreed in writing to refrain from disclosing certain aspects of his job, specific program information, and links to specific government agencies. His job required him to receive annual security briefings.

Subsequently, he committed some security infractions. He left some classified documents in the open where uncleared persons could have seen them, although there is no evidence of actual compromise. On another occasion, while traveling in Europe, he inadvertently removed a disk containing classified information and went to lunch with the disk in his pocket. He informed the appropriate security representatives.

As a result of a corporate acquisition, he began working for his current employer in the late 1990s. Between 1999 and 2002, he brought six homemade music compact disks into his classified work area without having them scanned. He was not aware that he should not do this, even if the disks were not inserted into government sponsored computers. Later, he inadvertently brought his cell phone with him into the workplace on two occasions. He did not inform security officials of these violations.

Previously, in the mid-1990s, Applicant took a series of polygraph exams. He volunteered to the examiners that he had disclosed certain aspects of his job to his wife.

In 2001, Applicant became involved in on-line games of a sexual nature. He engaged in "cyber-sex" with several women. During a polygraph exam in 2004 he estimated the number of encounters as 50 to 100 with over 50 women, although he later stated that this was an overestimate. He revised the number to 20 occasions with 5 women. He informed some of his contacts that he was an engineer holding a security clearance. He had a sexual encounter with one of the women, a

schoolteacher from another country. When he met the woman, he was wearing patches associated with his job, which were classified.

He also developed an on-line friendship with an American woman who was married, and they became intimate. He met her through his position as the host of an on-line radio program. In 2004, he used an unclassified work computer to contact women. He did so on six occasions. Much of the information concerning Applicant's on-line sexual contacts and security infractions came to light during a polygraph exam.

In 2004, Applicant's SCI access was revoked, and he was removed from working on the special access program. Neither could he continue to reside in the foreign country, because he no longer had a job. He told his wife why they were forced to leave the country and move to the U.S. He told her about his on-line activities but initially did not mention his affair with the schoolteacher. He later did so, after receiving the SOR.

He engaged in a cyber-sexual activity on one additional occasion, in 2009, during the course of his on-line radio show. He has expressed remorse for his on-line activities, his affair, and his failure to confess these activities to his wife earlier.

Applicant enjoys a good reputation for the quality of his work, his character, and his trustworthiness.

In performing her analysis of Applicant's case, the Judge concluded that allegations pertaining to his having failed to advise his wife of his sexual misconduct and to his security violations had been mitigated. However, she concluded that he had failed to demonstrate mitigation as to the balance of the allegations. She noted that Applicant appeared to consider himself a victim of the women with whom he interacted on line and of the polygraph process, his employer, and, to an extent, the Government. She stated that his 2009 incident of cyber-sex vitiates his efforts to show mitigation of security concerns arising from that kind of activity.

Discussion

Applicant contends that the Judge failed to consider all of the record evidence, for example his testimony concerning the number of times he engaged in cyber-sex and his attempts to explain the discrepancies among his various statements on the subject. However, a Judge is presumed to have considered all of the record evidence. *See, e.g.*, ISCR Case No. 09-01735 at 2 (App. Bd. Aug. 31, 2010). In the case under consideration here, the Judge explicitly discussed the evidence cited by Applicant. She treated this matter in the context of Applicant's having failed to be completely candid during his polygraph questioning, which is consistent with the record that was before her. Applicant has not rebutted the presumption that the Judge considered all of the record evidence.

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 decision 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