

KEYWORD: Guideline E; Guideline D; Guideline F

DIGEST: Applicant failed to disclose several foreign trips. He frequented brothels on several of his foreign trips.. Applicant's disagreements with the Judge's weighing of the evidence is not sufficient to demonstrate error. Adverse decision affirmed.

CASENO: 10-00218.a1

DATE: 10/17/2011

DATE: October 17, 2011

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In Re:)	
)	
-----)	ISCR Case No. 10-00218
)	
)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Alison O'Connell, Esq., Department Counsel

FOR APPLICANT

Darin Groteboer, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On November 23, 2010, DOHA issued a statement of reasons (SOR) advising Applicant

of the basis for that decision—security concerns raised under Guideline E (Personal Conduct), Guideline D (Sexual Behavior), and Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On July 15, 2011, after the hearing, Administrative Judge Juan J. Rivera denied Applicant’s request for a security clearance. Applicant appealed pursuant to the 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. For the following reasons, the Board affirms the Judge’s unfavorable decision.

The Judge made the following pertinent findings of fact: Applicant is 56 years old. He immigrated to the United States from Afghanistan in 1979. He became a naturalized U.S. citizen in 1990. He has two U.S.-born children. In November 2008, Applicant submitted a security clearance application (SCA). He disclosed that he traveled to Thailand between February 2002 and April 2002, and between May 2003 and June 2003. He also disclosed that he traveled to the Kyrgyz Republic in January 2003, September 2003, December-January 2003-2004, and between July 2004 and January 2005. Applicant also disclosed a trip to Holland in February 2003. Further investigation revealed that, regarding his November 2008 SCA, Applicant failed to disclose trips to Thailand in January 2002, November 2002, January 2005, February 2005, October 2005, and two trips in May of 2007. He also failed to disclose a May 2006 trip to Brazil and a May 2007 trip to Turkey. In January 2009, Applicant completed a counterintelligence screening questionnaire in which he was asked to disclose all of his foreign travel. He again failed to disclose the same foreign trips he failed to disclose on his November 2008 security clearance application. In May 2010, DOHA asked Applicant to complete a set of interrogatories. When asked whether he had traveled outside the United States since January 2005, Applicant failed to disclose that he traveled to Thailand in February 2005, October 2005, and twice in May 2007. He also failed to disclose his May 2006 trip to Brazil, and his May 2007 trip to Turkey.

During an August 2009 security clearance background interview, Applicant indicated that when he traveled to Thailand and Kyrgyzstan, he and a friend would visit brothels and have sex with adult prostitutes on a nightly basis. During the interview, Applicant stated that he intended to continue traveling abroad to places where prostitution was legal to visit with prostitutes whenever he felt the need to do so. At his hearing, Applicant recanted material aspects of his August 2009 statement. He denied that he traveled to Thailand, Kyrgyzstan, Brazil, and Turkey for the purpose of soliciting prostitutes. He stated that he did not have sex with prostitutes during most of the trips. He admitted to soliciting and having sex with a prostitute only during his January 2003 trip to Thailand.

Applicant claimed that he failed to disclose his foreign travel because he forgot some of it, the stamps on his passport were illegible, he completed the documents in a crowded office environment, he was under stress, he was rushed to complete some of the forms and someone else filled out the SCA for him. Applicant’s U.S. passport legibly reflects most of his foreign travel. Regarding the frequency and nature of his foreign trips and his August 2009 statement regarding his sexual activities, Applicant claimed the investigator misunderstood his answers.

Applicant expresses remorse for engaging in sex with prostitutes. He stated that he loves his wife and told her and his children about his sexual encounters in January 2011. He does not intend to have sex with prostitutes in the future.¹

The Judge reached the following conclusions: Applicant deliberately failed to disclose nine of his trips to Thailand and his trips to Brazil and Turkey. Applicant claimed that he made an honest mistake when he failed to disclose the above information. His explanations are not credible. Applicant's credibility is questionable based on his irreconcilable conflicting statements. Also under Guideline E, his travel to foreign countries to visit brothels and engage in prostitution is potentially disqualifying. None of the Guideline E mitigating conditions apply. Applicant engaged prostitutes in a foreign country and exposed himself to possible coercion. His falsifications are serious, recent, felony-level offenses. Furthermore, during his hearing testimony he was not truthful. His overall behavior shows questionable judgment, untrustworthiness, unreliability, lack of candor, and an unwillingness to comply with rules and regulations. Applicant's behavior raises similar concerns under Guideline D. He engaged in questionable behavior when he repeatedly visited foreign countries and solicited prostitutes. Applicant receives partial mitigating credit under Guideline D Mitigating Condition ¶ 14(c),² but it does not fully mitigate the sexual behavior security concerns. Applicant is still ashamed of his past sexual behavior as demonstrated by his lack of veracity at his hearing. Under the whole-person concept, Applicant receives praise for his professionalism and the high quality of his workmanship. He is a good husband and father. Notwithstanding, serious security concerns remain.

Applicant asserts that the Judge erred in not applying Guideline E Mitigating Conditions ¶ 17(c)³ and ¶ 17(e),⁴ Guideline D Mitigating Condition ¶ 14(b)⁵ and also erred when failing to fully apply Guideline D Mitigating Condition ¶ 14(c). Applicant also contends that the Judge erred when applying Guideline E Disqualifying Condition ¶ 16(e)⁶ and failed to properly consider the whole-person concept. Applicant's assertions do not establish error on the part of the Judge.

Regarding the Guideline E mitigating conditions, Applicant argues that the passage of time and the fact that he has eliminated the possibility of exploitation or coercion stemming from his

¹The Judge made findings favorable to Applicant under Guideline F. Those findings are not at issue on appeal.

²[T]he behavior no longer serves as a basis for coercion, exploitation, or duress.

³“[T]he offense is so minor, or the behavior is so infrequent, or happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness or good judgment.”

⁴“[T]he individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress[.]”

⁵“[T]he sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment[.]”

⁶“[P]ersonal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress . . . ”

behavior mandates favorable application of the cited mitigating conditions. He argues that the behavior happened under circumstances unlikely to occur and that it does not cast doubt on his reliability, trustworthiness or good judgment. 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. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

In this case, the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct and considered the possible application of relevant conditions and factors. He discussed the applicability of the mitigating factors listed under Guidelines E and D, and indicated why the mitigating conditions did not apply, or if partially applicable, did not apply in sufficient strength to justify an ultimate favorable outcome. Critical to the Judge's ultimate determination in this case were his conclusions that Applicant gave inconsistent statements concerning his travel history and sexual encounters. This led to the Judge's conclusion that Applicant's credibility was suspect. The Judge also concluded that Applicant's lack of forthrightness continued during the hearing. These conclusions are reasonably supported by the record evidence, and provide an adequate basis for the Judge's rejection of Guideline E Mitigating Conditions ¶17(c) and ¶17(e). They also provide an adequate basis for the Judge's rejection of Guideline D Mitigating Condition ¶14(b) and his limited application of Guideline D Mitigating Condition ¶14(c). Applicant's arguments are premised, in part, on his assertion that his failure to disclose all of his international travel was the result of oversight and excusable neglect and was not the product of deliberate concealment. The Judge reached the opposite conclusion on this point, and his conclusion is reasonably supported by the record evidence.

Regarding Guideline E Disqualifying Condition ¶16(e), Applicant argues that the Judge's reliance on it was error owing to the fact that, by disclosing his past sexual conduct to his family, he has eliminated the possibility of future vulnerability to exploitation and coercion. The Judge based application of this disqualifying condition on the fact that Applicant continued his evasive explanations about his past during the hearing, which was held a number of months after his disclosure of his past to his family. The Judge's reliance on Guideline E Disqualifying Condition ¶16(e) was appropriate on this record.

The Judge's application of other disqualifying conditions under Guidelines D and E and *The Concern* paragraph of Guideline E is not challenged on appeal.

Applicant argues that the Judge's whole-person analysis was flawed and insufficient. However, a reading of that analysis reveals that the Judge took into consideration the positive aspects of Applicant's background in addition to the conduct alleged in the SOR. Applicant's arguments here are based on the same arguments he made with regard to the application of the various mitigating conditions cited under Guidelines E and D. Applicant has failed to establish error.

In support of his appeal, Applicant has submitted new matters not contained in the record below. The Board cannot consider new evidence on appeal. *See* Directive ¶ E3.1.29.

Applicant discusses in some detail a decision by the Hearing Office, which he argues supports his request for a favorable determination. The Board gives due consideration to this case. However, each case must be decided on its own merits. Directive, Enclosure 2 ¶ 2(b). Moreover, Hearing Office decisions are binding neither on other Hearing Office Judges nor on the Board. *See* ISCR Case No. 06-24121 at 2 (App. Bd. Feb. 5, 2008). Applicant's arguments regarding the Hearing Office Case do not establish error on the part of the Judge.

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. 06-11172 at 3 (App. Bd. Sep. 4, 2007). After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for his 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). Therefore, the Judge's ultimate unfavorable security clearance decision is sustainable.

Order

The decision of the Judge denying Applicant a security clearance is AFFIRMED.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairperson, Appeal Board

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

Signed: James E. Moody
James E. Moody
Administrative Judge

Member, Appeal Board