KEYWORD: Guideline D; Guideline J; Guideline E

DIGEST: The Board cannot consider new evidence on appeal. A Judge is presumed to have considered all of the evidence in the record. Judge's conclusion that neither the Guideline D nor Guideline E concerns had been mitigated due to Applicant's continued lack of candor regarding his security significant conduct is sustainable on this record. Adverse decision affirmed.

CASE NO: 10-03291.a1

DATE: 01/16/2013

DATE: January 16, 2013

In Re:	)	
	)	
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	)	
	)	
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 July 20, 2012 DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline D (Sexual Behavior), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive).[1] Applicant requested a hearing. On October 25, 2012, after the close of the record, Administrative Judge Edward W. Loughran denied Applicant's

[1]Upon motion by Department Counsel at the hearing, the SOR was amended by striking the allegation under Guideline J.

request for a security clearance.[2] Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: (1) whether the Judge erroneously made findings of fact based on evidence obtained from an investigative interview of Applicant in 2007; (2) whether the Judge erroneously discounted evidence provided by Applicant which refuted admissions made by him in the 2007 interview; (3) whether the Judge erroneously evaluated matters in mitigation; and (4) whether the Judge considered all the record evidence. For the following reasons, the Board affirms the Judge's unfavorable security clearance decision.

The Judge made the following findings of pertinent fact: Applicant is 52 years old. He is an engineer and has a master's degree. Applicant was interviewed by an investigator on behalf of another government agency in October 2007. The interviewer reported that Applicant told him about inappropriate conduct, including conduct with his infant sons. The investigative report indicated that Applicant would take baths and showers with his infant and toddler sons, sleep naked with them, and sometimes become aroused when he made physical contact with them in the bed. Applicant would also play naked on the bed with his sons before getting dressed. Occasionally, the boys would brush his genitals and Applicant became sexually aroused. On one occasion, Applicant's year-old son grabbed Applicant's penis and placed it in his mouth. Applicant stated that he waited longer than he should to move his son away from his genitals, but stated he enjoyed the act and was aroused by it. Applicant initially denied masturbating after becoming aroused from playing with his sons, but later admitted that he probably did. He indicated that this behavior bothered him and was not right, so he stopped putting himself in a position that could cause a problem. Applicant started wearing shorts to bed when his youngest son was born in 1996.

During the interview, Applicant also indicated he had searched the internet for pornographic images of adult women. He indicated that the images included mostly nude girls, but also nude boys, and they were occasionally involved in sexual acts. Applicant stated that the individuals looked a little young.

In April 2009, the other government agency revoked Applicant's access to classified information. The agency notified Applicant that the revocation was based on the sexual conduct discussed by Applicant during the interview and some other incidents of questionable behavior.

Applicant now denies that the incidents with his children happened the way they were reported by the interviewer in 2007. In a May 2009 letter to the other agency, written when he was seeking a review of his security clearance revocation, Applicant described instances where he was naked with his children and stated that any arguably questionable physical contact was inadvertent, a product of his dozing off or lightly napping. He claims that his self-reported negative statements in 2007 were completely fabricated and resulted from the pressures of the interview. Applicant

[2] The Judge entered a formal finding favorable to Applicant under a Guideline D subparagraph alleging that Applicant viewed underage pornography. This favorable finding is not challenged on appeal.

stated that during the interview process he experienced severe panic attacks, and he made the statements under extreme duress, and the statements did not reflect reality or truth.

Determining precisely what occurred between Applicant and his children in the early 1990's is difficult, but it was more than he admitted to in 2009 and at the hearing. Applicant remains deeply troubled by the event. It is unlikely that what he described more recently, *i.e.*, an inadvertent event with at most incidental contact, would cause such a significant enduring trauma.

Applicant was interviewed by an OPM investigator for his Department of Defense clearance on August 17, 2009. He discussed the revocation of his clearance by the other agency. He stated the issues leading to the revocation were the viewing of underage pornography and other incidents of questionable behavior. He never discussed the inappropriate contact with his children, and he stated that there was no other reason for the revocation of his clearance. Applicant's reluctance to discuss the behavior involving his children may have been due to his discomfort and embarrassment about the conduct, as opposed to an attempt to keep the information from the Department of Defense. Nonetheless, no matter the motive, his statement that there was no other reason for the revocation of his clearance was false, and Applicant knew it was false when he made it.

Applicant does not have a criminal record, he has no security violations, and he has not been the subject of adverse disciplinary actions. He is highly regarded by co-workers, colleagues, and neighbors.

The Judge reached the following conclusions: Applicant is still haunted by what transpired between him and his sons in the early 1990's. The events described by Applicant in his testimony would not constitute criminal activity. The events described to the interviewer in 2007 crossed the line into criminal conduct. What actually occurred was closer to what was described in 2007. It has been about 20 years since the events between Applicant and his sons. However, Applicant is still significantly affected by the acts, and he has not fully faced what occurred. That is evident by his failure to address it in his OPM interview. The behavior still serves as a basis for coercion, exploitation, and duress; and it continues to cast doubt on his current reliability, trustworthiness and good judgment. There are no applicable mitigating conditions.

Applicant intentionally provided false and misleading information to the OPM investigator in August 2009, when he failed to name the inappropriate contact with his children as one of the bases for the revocation of his clearance, and he stated that there was no other reason for the revocation. He has not been completely forthcoming about what occurred between him and his sons when they were infants. There are no mitigating conditions applicable.

Under a whole-person analysis, Applicant's favorable character evidence and his long work record in the defense industry are noted. However, Applicant has not faced what transpired between him and his children for about 20 years. It still troubles him to the point that he lied rather than discuss it honestly and completely. There are significant doubts about his judgment, honesty, and trustworthiness.

Applicant asserts that the Judge erred by "relying" on the earlier 2007 statements that he made, and did not fully consider "clearer, more detailed, and more accurate available information provided later in the investigation." The bulk of Applicant's brief consists of his restating of his version of the record evidence. Some of the contents of his narrative constitute new matters not contained in the record. The Board cannot consider these new matters on appeal. *See* Directive ¶ E3.1.29. Applicant argues that the Judge's conclusions are in error because, by relying on the "earlier version" of events, *i.e.*, Applicant's statements during the 2007 interview, the Judge made incorrect findings about what happened between him and his sons.

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*. *See, e.g.*, ISCR Case No. 06-10320 at 3 (App. Bd. Nov. 7, 2007). In this case the Judge was also charged with resolving a conflict in the evidence, namely the two versions in the record concerning what took place between Applicant and his infant sons in the 1990's. While Applicant's more recent portrayal of those events, along with his explanation as to why his earlier statements were erroneous, were evidence that the Judge was required to consider, the Judge was not bound by Applicant's more recent statements. 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 2 (App. Bd. Oct. 12, 2007).

A review of the Judge's decision reveals that, regarding both Guidelines D and E, the Judge provided a rational explanation for both his resolution of conflicting evidence under Guideline D and his conclusion that Applicant had engaged in a willful falsification in a statement to a government investigator in August, 2009. Applicant also asserts that the Judge committed error when he concluded that no mitigating factors applied in the case. He noted that he self-reported the incidents with his sons, and that the conduct in question was remote in time (20 years). Applicant has not established error on the part of the Judge. The Judge specifically listed a number of potentially applicable mitigating conditions under both Guideline D and Guideline E. He then offered a narrative explanation as to why the disqualifying conduct was not mitigated. Central to his analysis was his conclusion that neither the Guideline D conduct nor the Guideline E conduct was mitigated by the passage of time, or for any other reason, because Applicant is still not being completely forthcoming about what occurred with his sons in the 1990's. This conclusion is sustainable on this record.

Without providing specifics, Applicant argues that the Judge did not consider all the evidence in the case. A Judge is presumed to have considered all the evidence in the record unless he or she specifically states otherwise. *See, e.g.*, ISCR Case No. 07-00196 at 3 (App. Bd. Feb. 20, 2009). Applicant fails to overcome this presumption.

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 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: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board