KEYWORD: Guideline E; Guideline D

DIGEST: The Judge's material findings were supported by substantial record evidence. Applicant failed to rebut the presumption that the Judge considered all of the record evidence. Adverse decision affirmed.

CASE NO: 10-08550.a1

DATE: 03/20/2012

DATE: March 20, 2012

In Re:	)	
----------------	)	ISCR Case No. 10-08550
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Janiffer Pearce, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 20, 2011, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under Guideline E (Personal Conduct) and Guideline D (Sexual Behavior) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On December 28, 2011, after the hearing, Administrative Judge Jennifer I. Goldstein 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 erred in some of her findings of fact; whether the Judge erred in her credibility determination regarding Applicant's testimony; whether the Judge failed to consider, or mis-weighed, record evidence favorable to Applicant; whether the Judge's application of the mitigating conditions was erroneous; and whether the Judge's whole-person analysis was erroneous. Consistent with the following, we affirm the Judge's decision.

The Judge made the following pertinent findings of fact: Applicant is an employee of a Defense contractor, with a degree from a prestigious U.S. university. He has held a security clearance since 2001. Additionally, he was granted a program access clearance in 2008.

In 2009, Applicant underwent polygraph testing in connection with his program access clearance. He submitted to three polygraph tests in all because, he stated, the polygraphers "needed to check on certain answers." Decision at 2. During one of the interviews, Applicant admitted to having viewed pornography. He was further questioned as to whether the pornography included images of minors.

Later that year, Applicant received a letter stating that his program access had been revoked.[1] The basis for the revocation was Applicant's admission of having downloaded and viewed child pornography–seven videos of females under 18 engaging in sexual activity with adult males and five photographs of females under 18 engaging in sexual activity with adult males. The letter stated that Applicant had watched each video once and then deleted them from his home computer. It stated that he had saved the photographs on his home computer for a day or two before deleting them. This activity occurred from the late 1990s to the mid- to-late-2000s.

At the hearing, Applicant testified that GE 3 took his answers out of context. He testified that he had advised polygraphers that he did not know for certain that the women depicted in the videos and photographs were 18 or older. One of his exhibits displayed disclaimers from websites he had visited, stating that all models were 18 years or older. However, the disclaimers were obtained a week before the hearing. There was no evidence as to the content of any disclaimers during the times Applicant actually visited the adult websites.

In 2010, Applicant completed his security clearance application (SCA). Section 25 of the SCA asked if he had "EVER had a clearance or access authorization denied, suspended, or revoked[.]" Decision at 3. Applicant answered "no" to this question. He testified that he had originally answered "yes," but had changed his answer upon the advice of his facility security officer (FSO).

Applicant's wife, mother-in-law, and several co-workers provided letters of support. These letters commend Applicant for his honesty and moral probity. The Judge stated that it was not clear if each of the writers knew about the specific allegations.

---

[1]This letter was admitted into evidence as Government Exhibit (GE) 3.

In the Analysis, the Judge noted differences between Applicant's statements as reflected in GE 3 and those he made subsequently, including his hearing testimony. She concluded that his hearing testimony was not credible. She noted the specificity of his answers to the polygraph interviews contained in GE 3, as well as his statement in the Affidavit he signed in connection with his 2010 SCA, that he promised "to never look at or download any child porno *again*."[2] Decision at 6, Judge's emphasis. She also referred to her finding that the website disclaimers did not relate to the times Applicant had accessed pornography. Rejecting Applicant's denials, the Judge stated that he had downloaded videos and photographs of underage females engaging in sexual behavior and that this was not an isolated incident but, rather, occurred over several years. She stated that, moreover, he had failed to disclose the revocation of his access clearance in his SCA. She further stated that Applicant had not acknowledged his misconduct, which made it difficult to conclude that it will not recur.

Applicant's brief challenges the Judge's findings that Applicant had knowingly downloaded and viewed child pornography and that he had deliberately falsified his SCA. We review a Judge's findings of fact to determine if they are based upon "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 ¶ E3.1.32.1.

We have considered Applicant's arguments in light of the record, viewed as a whole. The challenged finding regarding child pornography is supported by the evidence. GE 3 is a Decision Statement, which is a document generally admissible in DOHA proceedings. *See, e.g.*, ISCR Case No. 07-18324 at 5 (App. Bd. Mar. 22, 2011). The Judge described this document as detailed and credible, a characterization that is reasonable and consistent with the totality of the record evidence.

Concerning the falsification, the Judge did not specifically state that Applicant's omission to the SCA was deliberate; however, that was the clear implication of her findings on this matter. Given Applicant's high level of education, the clarity of the question at issue here, and the absence of evidence corroborating Applicant's claim to have been acting on the advice of his FSO, the Judge's findings concerning the omission are sustainable. *See, e.g.*, ISCR Case No. 09-08023 at 3 (App. Bd. Sep. 6, 2011) (In analyzing whether an omission is deliberate, a Judge must examine the omission in light of the entire record).

Applicant challenges the Judge's credibility determination. However, her analysis of Applicant's inconsistent statements and the absence of significant corroborating evidence support her conclusion as to Applicant's credibility.

Applicant contends that the Judge ignored evidence favorable to him, such as his testimony that (1) he never intentionally downloaded child pornography; (2) he did not believe his signing the

---

[2]This Affidavit was admitted as GE 2.

Affidavit (GE 2) constituted an admission of the contents therein;[3] (3) his FSO had advised him to answer "no" to the pertinent question on the SCA; and (4) the websites contained the disclaimers reflected in his documentary evidence.

A Judge is presumed to have considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 10-10068 at 2 (App. Bd. Dec. 20, 2011). A Judge is not required to discuss every piece of record evidence. *See, e.g.*, ISCR Case No. 09-07597 at 3 (App. Bd. Oct. 19, 2011). In this case, the Judge actually made extensive findings on most of the issues which Applicant has cited and drew sustainable conclusions from them in the Analysis portion of the Decision. She did not explicitly address his claim that GE 2 was not an admission of wrongdoing. However, she treated GE 2 as containing such admissions, which is sustainable in light of the record as a whole. Her treatment of this exhibit does not support Applicant's argument that she failed to consider his testimony. Applicant has not rebutted the presumption that the Judge considered all of the record evidence, nor has he demonstrated that she weighed his evidence in an arbitrary and capricious manner. *See, e.g.*, ISCR Case No. 08-11345 at 3 (App. Bd. Oct. 6, 2010). That the Judge did not find much of Applicant's evidence credible does not mean that she failed to consider the evidence or that she mis-weighed it.

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."

---

[3]Applicant's testimony concerning GE 2 implied that he had understood the Affidavit merely to be repeating allegations contained in GE 3. *See, e.g.*, Tr. at 46: "Q: It says you admitted to downloading child pornography, including seven videos of girls under the age of 18. A: I don't know if that came out of the Statement of Reasons from December of 2009." *See also* Tr. at 81: The Affidavit "was rehashing the summary of what was alleged" in GE 3. His assertion in his Appeal Brief that he did not understand his signature to be an admission, but, rather, simply an acknowledgment of the allegations against him, is based upon his hearing testimony. However, GE 2 contains statements by Applicant which can reasonably be interpreted as admissions of wrongdoing. For example, Applicant promised "never to access any of these porno web sites or download any pictures of . . . .girls under the age of 18." He stated elsewhere in GE 2 that "I have learned my lesson and promise to never look at or download any child porno again." He also stated that he "did not believe that the special programs security office or the customer would communicate with the DoD" on this matter. The following appears immediately above Applicant's signature: "This document is true and complete to the best of my knowledge and belief and is made of my own free will, without any threat, promise of immunity, or inducement. I understand that the information which I have given . . . may be shown to, or discussed with, the interested parties."

Order

The Judge's adverse security clearance decision 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