

KEYWORD: Guideline D; Guideline E

DIGEST: The Judge's failure to list the applicable mitigating conditions is not harmful error. The Board does not review a Judge's decision against a standard of perfection. Adverse decision affirmed.

CASENO: 11-03433.a1

DATE: 03/13/2012

DATE: March 13, 2012

In Re:)
)
)
-----) ISCR Case No. 11-03433
)
)
Applicant for Security Clearance)
)
)

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

William S. Aramony, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 13, 2011, 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). Department Counsel requested a hearing. On December 15, 2011, after the hearing, Administrative Judge Noreen A. Lynch denied Applicant’s request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issue on appeal: whether the Judge’s conclusions are arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge’s unfavorable security clearance decision.

The Judge made the following findings of fact: Applicant is 41 years old. He is married and has two children. Applicant admitted that he solicited prostitutes from December 2003 until 2008. He spent approximately \$10,000 for this activity. Applicant met them at their home or in a hotel room. He explained that he started the activity when he was on work travel by going online and looking for massage services. When he spoke to an investigator in 2008, Applicant stated that he would like to discontinue the “bad habit,” but he believed that there was the possibility that he would solicit prostitutes in the future when he had a day off. During a series of polygraphs dating from 2003, Applicant did not discuss his use of prostitutes when asked questions about his lifestyle. During a 2008 polygraph, the polygrapher believed that he was not discussing something that had to do with criminal activity. At that point, Applicant responded that, for several years, he contacted various agencies via the internet and made appointments to meet women at a hotel or residence. Applicant did not disclose his activity with prostitutes to his wife until after he received the SOR in July 2011. They sought marriage counseling to heal their relationship. However, after failing to make contact with a counselor, they decided to seek “spiritual healing.” They became members of a church. After their 2011 baptism, they will have access to counseling services from the church.

Applicant believed his activity was not a major crime. It was against his marriage and not really a concern for his security clearance. He now realizes that the guidelines he violated are serious in nature. At the time of the misconduct, he did not believe he was putting his clearance in jeopardy. He believes he has mitigated the concern because he told the truth about the prostitution in 2008 and his wife now knows about the situation. Applicant believes this eliminates any vulnerability. He states that he has not engaged in activities of this nature since 2008. He is apologetic about his actions.

The Judge reached the following conclusions: Under Guideline D, Applicant’s behavior is not mitigated. He has only recently acknowledged the behavior. He has not received counseling. His wife has just learned about the activity, but there are others who do not know. The behavior was not isolated in nature. He did not believe it was a major crime that affected his security clearance. Under Guideline E, Applicant used poor judgment and questionable behavior that is criminal in nature. He did not disclose the behavior until after a series of polygraphs in 2008. He was not certain that he would not continue the behavior. The security concern under personal conduct is not mitigated. He has minimized the seriousness of the conduct. He recently expressed sorrow because he needs his security clearance. He told his wife after receiving the SOR. Although he has attempted to heal his marriage, he does not seem aware that he has violated a government trust.

There are doubts about whether he understands the seriousness of his activities and also about his reliability and judgment.

Applicant asserts that the Judge focused on the disqualifying facts and either did not apply pertinent mitigating conditions, or did not base her decision on a careful consideration of the facts relevant to the mitigating conditions. Applicant has failed to establish error on the part of the Judge.

There is a presumption in favor of regularity and good faith on the part of DOHA Judges as they engage in the process of deciding cases. *See, e.g.*, ISCR Case No. 99-0019 at 5 (App. Bd. Nov. 22, 1999). Thus, there is a presumption that the Judge properly considered those mitigating conditions in the Adjudicative Guidelines that were applicable to the case. Similarly, 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 these presumptions.

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 2 (App. Bd. Nov. 7, 2007). 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).

Applicant's appeal brief essentially argues for an alternate interpretation of the record evidence. A review of the Judge's decision reveals that, regarding Guideline D, the Judge listed the potentially applicable mitigating conditions and then discussed several components of those factors in her analysis. Applicant is correct in pointing out that the Judge's exposition of her analysis of the mitigating conditions under Guideline E was more perfunctory. The Judge did not list the potentially applicable mitigating conditions under Guideline E in her decision. In this case it would have been preferable for the Judge to list those conditions, as she did under Guideline D. However, the Board does not review a Judge's decision against a standard of perfection. *See, e.g.*, ISCR Case No. 00-0311 at 2 (App. Bd. Mar. 8, 2001). The Judge did offer a narrative explanation as to why the disqualifying conduct was not mitigated, and, although her language did not track the precise language contained in the Guideline E mitigating conditions, the Judge did offer a detailed explanation as to why she had continuing doubts as to Applicant's reliability and judgment, and she based the lack of mitigation on those doubts. The Board concludes that the Judge appropriately weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct and adequately discussed why the disqualifying conduct established under Guideline E was not mitigated. Also, even assuming that the Judge's analysis under Guideline E was flawed, her findings and conclusions under Guideline D provide an adequate basis for her adverse security clearance decision.

Applicant cites a prior Board decision for the proposition that it is improper for a DOHA Judge to articulate a *per se* rule that certain disqualifying conduct cannot be mitigated.¹ Applicant then argues that the Judge in the instant case applied a *per se* rule when she stated with regard to Guideline E, “None of the mitigating conditions apply under these circumstances.” Given the qualifying language “under these circumstances,” the statement, standing alone, does not constitute the application of a *per se* rule. Moreover, the Board does not consider portions, passages, or words used in a decision in isolation. *See, e.g.*, ISCR Case No. 03-02374 at 3 (App. Bd. Jan 26, 2006). The language cited by Applicant appeared at the end of a paragraph wherein she discusses in some detail why Applicant’s conduct was not mitigated given the particular factual circumstances of the case. The Board concludes that Applicant did not improperly employ a *per se* rule.

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

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board

Signed: James E. Moody

¹ISCR Case No. 97-0595 at 6 (App. Bd. May 22, 1998).

James E. Moody
Administrative Judge
Member, Appeal Board