

KEYWORD: Guideline D

DIGEST: Applicant's statements contain significant inconsistencies regarding the frequency of his viewing of child pornography and other matters. The extensive inconsistencies undercut his case in mitigation. Favorable decision reversed.

CASENO: 12-00609.a1

DATE: 04/04/2014

DATE: April 4, 2014

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In Re: )  
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----- ) ISCR Case No. 12-00609  
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Applicant for Security Clearance )  
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**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

John Bayard Glendon, Esq., Deputy Chief Department Counsel

**FOR APPLICANT**

*Pro se*

The Department of Defense (DoD) declined to grant Applicant a security clearance. On June 19, 2013, DoD 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). Applicant requested a hearing. On January 3, 2014, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge John Grattan Metz, Jr., granted Applicant’s request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: whether the Judge’s favorable decision was arbitrary, capricious, or contrary to law insofar as it failed to consider important aspects of the case. Consistent with the following, we reverse the Judge’s decision.

### **The Judge’s Findings of Fact**

Applicant is employed by a Defense contractor. He has held a clearance since approximately 2003. Between May 2000 and at least June 2008, Applicant intentionally viewed nude images of underage females. Most of this activity occurred while Applicant was in college between August 2000 and May 2004. Applicant’s conduct came to light in October 2008, when he failed a polygraph examination.

When Applicant’s security significant conduct began, he would view photographs in the “teen category on the website.” Decision at 2. He assumed that the pictures were of teenagers 18 years old or more. After the 2008 polygraph,<sup>1</sup> Applicant realized that some of the teenagers in the pictures were wearing braces, which he automatically associated with ages 13-14, the ages during which he himself had worn braces. Another Government Agency (AGA1) disapproved his application for upgraded access and revoked his existing access.

Applicant underwent a periodic reinvestigation in August 2010, and the Defense Industrial Security Clearance Office (DISCO) granted the requested clearance in November 2010. A second Government Agency (AGA 2) administered another polygraph to Applicant in May 2010 and denied him access in June 2011. Applicant has not viewed pornography since 2008. He married in 2009, and he and his wife are expecting their first child in April 2014.

Applicant enjoys an excellent reputation among his supervisor and co-workers, who find him honest and trustworthy. They are all aware of the circumstances leading to the revocation of his special access in 2008 and the denial of his application for special access in 2011. Applicant’s program manager and his wife commend his work ethic and adherence to company policies.

### **The Judge’s Analysis**

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<sup>1</sup>The record states that Applicant underwent two tests in 2008, one in May and a later one the following June. Clearance Decision Letter, dated October 27, 2008, included in Government Exhibit (GE) 3, Answers to Interrogatories.

The Judge concluded that Applicant's conduct raised concerns under both Guidelines cited in the SOR.<sup>2</sup> He stated that Applicant's conduct was criminal, insofar as at least some of the images were of underage females. He also stated that Applicant's behavior evidenced immaturity and poor judgment. In concluding that Applicant had mitigated the concerns raised in the SOR, the Judge found that the conduct had not been repeated since 2008 and that Applicant had undergone significant life changes, such as his marriage and the impending birth of his first child. The Judge also cited evidence of the high quality of Applicant's work performance.

## **Discussion**

The standard applicable in security clearance decisions "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). "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b). In deciding whether the Judge's rulings or conclusions are erroneous, we will review the Judge's decision to determine whether, *inter alia*, it fails to consider an important aspect of the case. *See* ISCR Case No. 03-22861 at 3 (App. Bd. Jun. 2, 2006).

Department Counsel argues that the Judge's analysis failed to consider contrary record evidence, in particular significant inconsistent statements by Applicant that undermined his credibility and, therefore, his efforts to demonstrate rehabilitation. We find this argument to be persuasive.

We note record evidence of the various statements and explanations that Applicant provided regarding his viewing of child pornography:

a. In conjunction with his 2008 polygraph test, Applicant stated that he had intentionally viewed child pornography on his home computer "two to three times per week over the past year and a half." Applicant initially denied having done so, asserting that the photographs in question depicted females 18 years of age or older. However, he eventually admitted that the images "depicted girls who were 13 to 14 years old engaged in [sexual acts] with adult males. [He] described the girls as lacking pubic hair and having slight builds, underdeveloped breasts, and braces on their teeth. [He] reported that he last viewed these images in June 2008, after [his] first testing session." AGA 1 Decision Statement, dated October 27, 2008, included in GE 3.

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<sup>2</sup>The Judge stated that, insofar as DISCO had favorably adjudicated Applicant's conduct, it was questionable as to whether the agency should have revisited its November 2010 decision. However, the Government is not estopped from making an adverse clearance decision despite prior favorable adjudications. "This is especially true when the most recent adjudication takes into account facts and circumstances that were not necessarily present or as significant at the time of an earlier investigation." ISCR Case No. 01-24504 at 3 (App. Bd. Feb. 11, 2013). The 2011 denial by AGA 2 was a circumstance not present at the time of the 2010 decision. Moreover, given Applicant's cursory statement during the reinvestigation interview regarding his 2008 access denial (*see* Interview Summary, included in GE 3, discussed *infra*), it is not clear from the record that his reinvestigation fully addressed his security significant conduct.

b. In January 2010, Applicant was submitted for program access under the auspices of AGA 2. During a March 2010 interview, he acknowledged that he had had a clearance suspended due to his having failed a polygraph. He advised that he had never committed a crime and that, although he had looked at pornographic websites, none involved children. However, in conjunction with a polygraph the following May, Applicant stated that he had purposely viewed “sexual images of underage nude females on approximately six occasions from May 2000 to June 2008. [He] described the images . . . as nude females, approximately 16 years old, engaged in sexual acts with adult males. [He] said [he was] confident the females were minors and that [he was] undoubtedly viewing child pornography based on their physical appearance . . . [He] said the last time [he] knowingly viewed child pornography was in June 2008. [He] conceded to the fact that [he] committed a crime by viewing child pornography.” AGA 2 Decision Statement, dated June 2, 2011, included in GE 3.

c. Applicant provided AGA 2 officials with an affidavit addressing the reasons for his failed polygraphs in 2008 and in 2010. He stated that, in 2008, polygraphers advised him that his first test had been inconclusive, necessitating a second, which he failed. He stated that he was told that the images he had been looking at were of 13 to 14 year-old girls. Applicant’s affidavit stated that he thought they were over 18. “The reason that I struggled with this question on the polygraph was because there were a couple of images . . . in which the girls looked younger than 18. The fact that these girls had braces caused me to associate the age . . . of the girls with the age at which I myself had braces[.]” GE 4, Affidavit, at 1-3.

d. In March 2010, Applicant submitted a security clearance application (SCA) for a periodic reinvestigation of his collateral clearance. When asked if he had ever had a clearance or access denied, suspended or revoked, Applicant stated that his clearance had been “denied due to failure of fullscope polygraph.” GE 1, SCA, at 50.

e. In May and June 2010, Applicant was interviewed in conjunction with the reinvestigation of his collateral clearance. The interview summary states the following: “[Applicant’s] clearance was suspended in October 2008 due to failing his polygraph. He failed the polygraph due to his reaction to the felony question. He could not provide any further information.” Interview Summary at 2, included in GE 3. *See* note 1, *supra*.

f. In his response to the SOR, received by DOHA in July 2013, Applicant stated the following: “I admit that during [the time in question] . . . I viewed pornographic images of underage nude females. It was a lack of judgment on my part . . . as well as being naive in believing that everything I was viewing would be of the legal age of 18. While half of this time period reflects my college years, the

other half of the eight years reflects four years removed from the college environment and removal from friends who were viewing the images or showing me some of the images.” Later in the response, however, Applicant appeared to back away from a categorical admission of wrongdoing. He stated that the only reason that he believed that the females were underage was that they were wearing braces, as he himself had done at age 13. He stated that, upon reflection, he realized that many people who wear braces are well into their adult years and that he will never know with 100% accuracy that the images depicted underage females. He stated that, at the time of his interviews, he did believe that they were underage.

g. During his hearing, Applicant testified that he had observed one picture of possible child pornography. “I said the individual picture I was thinking about at the time may have been under 18 years of age.” He said that, when pressed to provide a specific age, “I described the individual as having braces. At the time I was trying to make an age determination and I provided the age of 13 to 14 strictly based upon the individual wearing braces. I came to that conclusion on my own because I related back to when myself had braces and that was the age of 13 or 14.” Tr. at 55-56. Later on, he testified that the polygraphers had pressed him on the issue of crime. He testified that he had never even had a parking ticket, but, given frequent news stories about child pornography, and because he had been viewing pornography, he “questioned whether or not there might have been a picture in there. The one picture that I was thinking of in particular at that [AGA 1] polygraph was that individual with braces.” Tr. at 67-68.

Applicant’s statements contain significant inconsistencies, as to the frequency with which Applicant viewed child pornography, his certainty as to the ages of the females depicted, his description of their physical appearances—whether they appeared young only because of braces or because of other characteristics as well, his certainty as to the illegal nature of the images, and the purposefulness of his conduct. In addition, in May and June of 2010, Applicant stated to AGA 2 polygraphers that he had examined child pornography on multiple occasions. During the same period of time, he told the interviewer for his collateral clearance that he could provide no information other than that he had failed a polygraph due to his reaction concerning a question about felonies. These inconsistencies are so extensive that they are not reasonably attributable to mere failures of memory or to other honest mistakes. Indeed, Applicant made little effort at the hearing or in written matters submitted during the course of his adjudication to explain or reconcile them. Neither did the Judge address them in his analysis of Applicant’s case, although Department Counsel argues that his finding that Applicant had viewed multiple images of underage females appears implicitly to discount Applicant’s testimony of only one such event. Inconsistent statements can impugn an applicant’s credibility and, depending upon the facts of a given case, undermine a Judge’s favorable decision. *See, e.g.*, ISCR Case No. 07-18324 at 7 (App. Bd. Mar. 11, 2011). In this case, Applicant’s inconsistent and/or meretricious statements are of such a magnitude as to suggest to a reasonable mind an “ongoing pattern of minimizing his actions,” with a view not toward candor but simply toward maintaining his clearance. *See* Department Counsel Appeal Brief at 13. As Department Counsel argues, this undercuts the value of Applicant’s mitigation evidence.

In addition, the evidence shows that, during interviews with two different agencies in 2008 and again in 2010, Applicant initially claimed never to have examined illegal pornography, only to admit his misconduct after being pressed by polygraphers. This undercuts Applicant's claim that he has consistently been forthright concerning his security significant conduct and does not support the Judge's favorable conclusion that he had demonstrated mitigation.

Furthermore, the evidence demonstrates that Applicant's last known incident of viewing child pornography, in June 2008, occurred after his first fullscope polygraph exam, which had been inconclusive.<sup>3</sup> This exam was sufficient to have placed him on notice of the sort of conduct that could put his clearance in jeopardy. A reasonable person could find Applicant's behavior to have been reckless and incompatible with his claims of rehabilitation and good judgment. *See, e.g.*, ISCR Case No. 11-00391 at 2-3 (App. Bd. Dec. 1, 2011) (A pre-employment drug test should have placed the applicant on notice that drug use was incompatible with his employment. The applicant's use of marijuana after this test suggests a lack of willingness to follow rules and regulations); *see also* ISCR Case No. 07-00852 at 3 (App. Bd. May 27, 2008) (Use of marijuana after having submitted an SCA undercuts the applicant's promise to avoid such conduct in the future). The Judge's failure to address this aspect of the case impairs his whole-person analysis.

Given the record that was before the Judge, the decision failed to consider important aspects of the case. The Judge's favorable decision is not sustainable, in view of the standard set forth in *Egan, supra*.

### Order

The Decision is **REVERSED**.

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

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<sup>3</sup>Applicant testified that, after his first polygraph session, he "was struggling with the question of crime. I was searching for something that might be tripping me up in that question at that time[.]" Tr. at 55

Signed: James E. Moody \_\_\_\_\_  
James E. Moody  
Administrative Judge  
Member, Appeal Board