

KEYWORD: Guideline D; Guideline E

DIGEST: Applicant's many years of utilizing prostitutes, incidents that he has not admitted to his wife because he is not sure how she will respond, raise reasonable concerns about his judgment and the extent to which he could be subjected to undue influence or coercion. Of course, the Judge was required to consider Applicant's character evidence and his explanations for his misconduct. In addition, we give deference to a Judge's credibility determinations. Directive ¶ E3.1.32.1. However, that deference has its limits. When a Judge fails to address record evidence that is contrary to his favorable credibility determination, it provides a serious reason to believe that he has simply substituted a favorable impression of an applicant's demeanor for record evidence. In this case, the totality of Applicant's misconduct—especially his omission of material information during his 2014 polygraph due to concern over its effect on his clearance—persuades us that the Judge's credibility determination is not entitled to the deference that we normally extend to such conclusions. Favorable decision reversed.

CASENO: 17-02785.a1

DATE: 05/08/2019

DATE: May 8, 2019

In Re: _____)
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-----) ISCR Case No. 17-02785
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Applicant for Security Clearance _____)
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Andrea Corrales, Esq., Department Counsel

FOR APPLICANT

Troy L. Nussbaum, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On September 14, 2017, 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 30, 2019, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Philip J. Katauskas 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 under both Guidelines ran contrary to the weight of the record evidence. Consistent with the following, we reverse.

The Judge's Findings of Fact

Applicant engaged the services of prostitutes from the early 1990s until at least 2014. Most of these incidents occurred in foreign countries, where prostitution was legal. However, on one occasion in 2010 or 2011 he engaged a prostitute in the U.S. He knew that this incident was not legal but did not consider it a "major crime." Decision at 3. Applicant's wife suffers from a medical condition that has substantially diminished her sex drive, although there is intimacy between them. Applicant and she have attended counseling but with limited effect. In addition, Applicant had an extramarital affair in about 2007, which lasted about six months. Applicant's wife is aware of this affair. However, she is not aware of his interactions with prostitutes.

Applicant did not disclose his affair during an October 2014 polygraph examination. He stated that the reason for this omission was that the examination focused upon prostitution. He disclosed the affair during the post-test interview along with his reasons for the prior omission. In addition, Applicant did not disclose the incident of prostitution that occurred in the U.S. on his 2017 security clearance application (SCA). However, he did disclose this incident during his October 2014 polygraph.

Applicant submitted to an evaluation by a licensed psychologist, who concluded that he was free from any major psychological diagnosis. He stated that there is no reason to believe that Applicant's security-significant conduct will recur. Applicant enjoys an excellent reputation for reliability, honesty, and trustworthiness.

The Judge's Analysis

The Judge noted that Applicant last engaged a prostitute four years ago and that he has stated that he will never do so again. He testified credibly that he cannot be blackmailed, plausibly explaining why he has not disclosed his misconduct to his wife. Regarding Guideline E, the Judge cited to Applicant's explanation for having failed to disclose his extramarital affair during his October 2014 polygraph. He found credible Applicant's claim that the exam had focused on prostitution and that he believed that his affair was not something that he had to admit.

Discussion

There is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). The applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate admitted or proven facts. The applicant has the burden of persuasion as to obtaining a favorable decision. Directive ¶ E3.1.15. 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 national security eligibility will be resolved in favor of the national security.” Directive, Enclosure 2, App. A ¶ 2(b).

In deciding whether the Judge's rulings or conclusions are erroneous, we will review the decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See* ISCR Case No. 14-02563 at 3-4 (App. Bd. Aug. 28, 2015).

A security clearance decision must be based upon a reasonable interpretation of the record evidence viewed as a cumulative whole. *See, e.g.*, ISCR Case No. 12-04813 at 4 (App. Bd. Jul. 31, 2015). A Judge is presumed to have considered all of the evidence in the record. However, a Judge should not ignore significant record evidence that a reasonable person would expect to be addressed. *See, e.g.*, ISCR Case No. 15-02903 at 3 (App. Bd. Mar. 9, 2017). Department Counsel argues that the Judge's decision did not devote attention to significant contrary evidence. She argues that the decision is not sustainable because it runs contrary to the greater weight of the evidence.

We find Department Counsel's argument to be persuasive. We note the following findings and /or record evidence that undercut the Judge's favorable decision:

Applicant engaged the services of prostitutes over a period of several years. Decision at 2-3; Response to SOR at 1; Tr. at 39.

Applicant was first approved for a clearance in 2008. Government Exhibit (GE) 1, 2017 Security Clearance Application at 38. He engaged prostitutes about eleven times between 2010 and 2014. Tr. at 39. Therefore, many of these incidents took place while Applicant held a clearance.

Although most of the incidents occurred in foreign countries where such conduct was legal, one of them occurred in the U.S., where it was illegal. Decision at 3; Tr. at 40, 80.

Applicant did not disclose this U.S. offense in his 2017 SCA. Decision at 4; GE 1 at 38. The offense in the U.S. is the only one which Applicant understood to have been illegal. Decision at 4.

Applicant has not disclosed his prostitution offenses to his wife, because he is concerned about the effect it will have on her. Tr. at 48.

Applicant engaged in a six-month extramarital affair, of which his wife is aware. Decision at 4; Tr. at 89.

However, Applicant did not disclose this affair during the October 2014 polygraph examination. He did disclose it during the post-test interview following a subsequent polygraph. He stated that the reason that he had not disclosed it in 2014 was that “[he] was afraid that it would [a]ffect his security processing, and [he] was embarrassed.” Polygraph Report dated March 3, 2015, included in GE 3.

This evidence demonstrates that Applicant’s alleged sexual behavior occurred while he held a clearance; that it included an incident that was illegal in the U.S. jurisdiction where it occurred; and that he failed to be totally candid about his security-significant offenses during the investigation and adjudication of his case. We find persuasive Department Counsel’s argument that the Judge’s favorable decision failed adequately to address this evidence as a whole. In particular, we note that the Judge did not address Applicant’s admission that, during his 2014 polygraph, he had withheld information about his affair because he was afraid of the affect it might have on his access to classified information. The Directive is clear that it is of special concern for an applicant to fail to provide truthful and candid answers during the processing of an SCA. It also states that “[t]he following will normally result in an unfavorable national security eligibility determination . . . : (b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security . . . determination.” Directive, Encl. 2, App. A ¶ 15. Accordingly, Applicant’s failure to have admitted his six-month affair until it was discovered during the course of a subsequent polygraph examination raises serious concerns about his willingness to disclose security-significant conduct. This was a matter that the Judge should have addressed forthrightly.

Moreover, Applicant’s many years of utilizing prostitutes, incidents that he has not admitted to his wife because he is not sure how she will respond, raise reasonable concerns about his judgment and the extent to which he could be subjected to undue influence or coercion.¹ Of course, the Judge was required to consider Applicant’s character evidence and his explanations for his misconduct. In addition, we give deference to a Judge’s credibility determinations. Directive ¶ E3.1.32.1. However, that deference has its limits. When a Judge fails to address record evidence

¹See Directive, Encl. 2, App. A ¶ 12: “*The Concern*: Sexual behavior that involves a criminal offense; reflects a lack of judgment or discretion; or may subject the individual to undue influence of coercion, exploitation, or duress. These issues, together or individually, may raise questions about an individual’s judgment, reliability, trustworthiness, and ability to protect classified or sensitive information.”

that is contrary to his favorable credibility determination, it provides a serious reason to believe that he has simply substituted a favorable impression of an applicant's demeanor for record evidence. *See, e.g.*, ISCR Case No. 15-05565 at 4-5 (App. Bd. Aug. 2, 2017). In this case, the totality of Applicant's misconduct—especially his omission of material information during his 2014 polygraph due to concern over its effect on his clearance—persuades us that the Judge's credibility determination is not entitled to the deference that we normally extend to such conclusions.

Given the above, we conclude that the Judge's decision fails to consider relevant factors and runs contrary to the weight of the record evidence. In light of the totality of the evidence, we conclude that the Judge erred in finding that Applicant had met his burden of persuasion as to mitigation.

Order

The Decision is **REVERSED**.

Signed: Michael Ra'anan

Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy

James F. Duffy
Administrative Judge
Member, Appeal Board