

KEYWORD: Guideline D; Guideline K; Guideline E

DIGEST: From the early 1990s to 2014, Applicant regularly masturbated in public, including in public parks, the sauna at a gym, and once on a military base near the post exchange. Up to 2009, he would engage in that behavior about four or five times a week. On a quarterly basis from about 2002 to 2011, he sunbathed naked in a park and eventually began exercising there in the nude. He also walked around his home naked with the shutters open. If his young female neighbor saw him, he had an innocent explanation, i.e., that he was home. He has not engaged in sexually aberrant behavior since November 2014. He recognizes this conduct was foolish and has no desire to engage in it again. He has neither told his wife about this conduct nor obtained any therapy to address it. Adverse decision affirmed.

CASENO: 18-00751.al

DATE: 11/07/2019

DATE: November 7, 2019

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On March 29, 2018, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline D (Sexual Behavior), Guideline K (Handling Protected Information), and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On August 30, 2019, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Marc E. Curry denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm the Judge's adverse decision.

The Judge's Finding of Fact and Analysis

From the early 1990s to 2014, Applicant regularly masturbated in public, including in public parks, the sauna at a gym, and once on a military base near the post exchange. Up to 2009, he would engage in that behavior about four or five times a week. On a quarterly basis from about 2002 to 2011, he sunbathed naked in a park and eventually began exercising there in the nude. He also walked around his home naked with the shutters open. If his young female neighbor saw him, he had an innocent explanation, *i.e.*, that he was home. He has not engaged in sexually aberrant behavior since November 2014. He recognizes this conduct was foolish and has no desire to engage in it again. He has neither told his wife about this conduct nor obtained any therapy to address it.

While working for another employer in about 2000, Applicant knowingly took home a classified computer disk two or three times. He placed the classified computer disk into his home computer to finish office work. “When asked at the hearing to explain why he never informed his employer of the security violations, he answered, ‘no harm, no foul.’” Decision at 3.

In 2010, Applicant intentionally failed to divulge his security violations during a background interview. He failed to disclose that information because he was embarrassed and was afraid it would jeopardize his chances for obtaining a security clearance. He disclosed that information during a 2014 interview.

Although Applicant has not engaged in sexually aberrant behavior in nearly five years, he has not informed his wife about that behavior or sought therapy. His failure to disclose his security violation for nearly 14 years and “his nonchalant attitude about the significance of the security violations renders any of the [Guideline K] mitigating conditions inapplicable.” Decision at 5. His explanations for failure to disclose derogatory information during background interviews do not

mitigate the Guideline E security concerns.

Discussion

Applicant admitted each SOR allegation and has not challenged any of the Judge's findings of fact on appeal. In his brief, Applicant indicates that he does not agree with the Judge's decision and questions whether the Judge thoroughly considered the evidence presented at his hearing. In his arguments, he points to such matters as the passage of time since his last misconduct, that he divulged his misconduct during a second polygraph and subsequent interviews, that his security violation did not involve sensitive Government data, and that he has participated in numerous security briefings since his security violations. In essence, these arguments are a challenge to the way in which the Judge weighed the evidence and are neither enough to rebut the presumption that the Judge considered all of the evidence in the record nor sufficient to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 14-01284 at 3 (App. Bd. Apr. 6, 2015).

Applicant also emphasizes that there is no reason to suspect that he would now fail a polygraph. The ability to pass a polygraph, however, is not a determinative factor in assessing an applicant's security clearance worthiness. "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). The Judge's decision adequately sets forth security concerns that raise serious questions about Applicant's judgment, reliability, and trustworthiness. Applicant further contends, "I find it sufficient to simply acknowledge my personal misconduct and security violation, but not be required to provide details beyond what I acknowledge and that this acknowledgment not be considered in obtaining any future clearance or update to any clearance to include Polys." Appeal Brief at 2. This contention is frivolous. The Board is bound by the procedures and guidelines set forth in the Directive. Applicants do not set the rules or procedures for security clearance investigations or adjudications.

Applicant has failed to establish that the Judge committed any harmful error. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The decision is sustainable on this record. *See also* Directive, Encl. 2, App. A ¶ 2(b): "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

Order

The Decision is **AFFIRMED**.

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