DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
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KEYWORD: Guideline E; Guideline D

DIGEST: In this case, the Judge's determination that Applicant committed a sexual assault is merely an administrative conclusion that substantial evidence exists in the record to establish Applicant engaged in security-significant conduct. Applicant failed to establish that the Judge acted beyond the authority provided him in the Directive when he concluded Applicant committed a sexual assault. Adverse Decision is Affirmed.

CASE NO: 18-02018.a1

DATE: 11/04/2021

Date: November 4, 2021

In the matter of:	)	
	)	
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	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

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

FOR APPLICANT
Lindsay Bierman, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On January 11, 2019, DoD 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 August 10, 2021, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Edward W. Loughran denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

The Judge found in favor of Applicant on the Guideline E allegations and against him on the sole Guideline D allegation. The favorable findings have not been raised as an issue on appeal. Applicant raised the following issues on appeal: whether the Judge overstepped his authority in findings against him on the Guideline D allegation, whether the Judge erred in concluding Applicant committed a sexual assault, whether the Judge was biased against him, and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant, who is in his forties, married for the second time about two years ago. He has no children. He has worked for his current employer since 2016. He served on active duty in the U.S. military for about six years and retired honorably with a disability. He holds the equivalent of a bachelor's degree from a foreign university. He provided documents attesting to his excellent work performance and praising him for his reliability, professionalism, and trustworthiness.

About five years ago, Applicant lived with a girlfriend who had a daughter, an eight-year-old granddaughter, and five-year-old grandson. During that period, the daughter reported to police that Applicant molested her daughter (hereinafter referred to as the granddaughter). While driving her children to school, the daughter overheard her children talking about Applicant putting medicine on the granddaughter's vagina. The daughter told police that her mother had left the children in Applicant's care when she went to a store. The police report reflects the granddaughter told her mother that she had scraped her knee on a bicycle. The granddaughter went inside the house to lie down on the couch. While there, Applicant took the granddaughter into the bedroom and began rubbing lotion on her leg and slowly began moving upward. "When [Applicant] reached the top of the leg, he then placed his hand inside of her panties and began to rub her vagina in an up and down motion ten times." Decision at 3, quoting from Government Exhibit (GE) 4, the police report.[1] Upon being asked, the granddaughter told Applicant that she felt uncomfortable. Applicant departed the bedroom, and the granddaughter ran outside to her brother. The police recommended that the granddaughter be examined at a children's hospital and referred to child protective services (CPS). A detective who went to the hospital to talk to daughter and granddaughter reported to an assistant district attorney that the daughter refused to allow the granddaughter to testify. The case was closed for lack of cooperation.

Applicant denied any inappropriate contact with the granddaughter. He indicated the daughter did not like him because of his religion and made up the incident so that he would break off his relationship with her mother. A licensed clinical social worker who had access to the SOR

[1] There is confusion in the record regarding the numbering of the Government exhibits. The police report is marked as GE 4. In the decision, the Judge noted this quote came from GE 5, which is the summary of Applicant's background interview. At the beginning of the hearing, the Judge also identified the police report as GE 5. Tr. at 10-11.

concluded that "Applicant had 'a low probability of a Sexual Addition Disorder or Sexual or Paraphilic Disorders.'" Decision at 3, quoting from Applicant's Exhibit (AE) L.

The Judge's Analysis

> After considering all the evidence, including Applicant's testimony, strong character evidence, and that he was never arrested, charged, or convicted of the charge, I find by substantial evidence [footnote omitted] that he committed the sexual assault on Granddaughter, essentially as described in the police report. I considered that Applicant provided a motive for Daughter to fabricate the story. While that is possible, that would mean that the Daughter was willing, at least initially, to lie to the police, put her daughter through an investigation and medical examination, and involve CPS. Additionally, the details of the case lend an aspect of believability. . . . His behavior continues to cast doubt on his reliability, trustworthiness, and good judgment. [footnote omitted] [Decision at 5-6.]

Discussion

Applicant contends the Judge "overstepped his authority in deciding that [Applicant] was guilty of a crime, despite evidence to the contrary." Appeal Brief at 2. Applicant also contends:

> The Directive does not give an Administrative Judge [sic] to decide the outcome of any case, criminal or civil. Determining criminal guilt on the "substantial evidence" standard is a heinous offense of legal system. Criminal offenses are decided by "beyond a reasonable doubt." Civil offenses are decided by a "preponderance of the evidence," which is at least 50%. Substantial evidence on the other hand, is described as "such relevant evidence as a reasonable mind might accept as adequate to support conclusions in light of all contrary evidence in the same record." [Appeal Board citation omitted.]
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> There is no phrase or order in the Directive that permits an administrative judge to rule upon criminal (or civil) matters. They are only allowed to rule upon evidence that is in front of them. It would be a different matter if [Applicant] was criminally charged or any of the similar circumstances, but this is not the case. [Applicant] was not charged, convicted, or even expunged of the matter. The prosecutors decided not to charge him. Any person can muse as to why this occurred, but in the field of law, the answer is clear—he is not presumed or convicted as a guilty person. Guilt of a criminal allegation must be proven beyond a reasonable doubt—the highest standard of proof in American law. Guilt of a civil litigation must be proven beyond a preponderance of the evidence—which is essentially 51%. Administrative judges are not presumed to prove a criminal (or civil) allegation. As per the Directive, they are solely allowed to weigh evidence given to them—not decide upon said evidence. "The ultimate decision that determines innocence or guilt are either decided between the judge and/or the jury. This case demonstrates that he tossed our judicial standards in exchange for his own.

> "The right to be heard by a fair and impartial adjudicator has long been considered a fundamental right in American courts." 403 U.S. 212, 216 (1971). Without a doubt, the administrative judge in this case is anything but impartial. Administrative judges are not given the power to make these decisions. [Applicant's brief at 7.]

Applicant's contention about the Judge overstepping his authority lacks merit. Contrary to Applicant's argument, the Judge did not find him "guilty of a crime" or convict him of a criminal offense. On the other hand, it is fair to say the decision by the law enforcement authorities in this case not to pursue criminal charges against Applicant due to the mother's decision not to let her daughter testify does not amount to a finding of "not guilty" or a determination of innocence. Although there is no evidence that Applicant was arrested for, charged with, or convicted of a sexual assault, the Judge was not precluded from concluding Applicant engaged in such conduct. "In DOHA proceedings, a Judge can make findings of criminal conduct even if the applicant has not been formally charged with a criminal offense by the relevant criminal authorities." *See, e.g.*, ISCR Case No. 03-04931 at 4 (App. Bd. Jun. 3, 2005). *See also,* ISCR Case No. 17-00506 at 3 (App. Bd. Aug. 7, 2018) ("Even if criminal charges are reduced, dropped, or result in an acquittal, the Judge may still consider the underlying conduct in evaluating an applicant's security clearance eligibility."). A disqualifying condition at issue in this case highlights this point. Under Disqualifying Condition 13(a), a security concern could arise from "sexual behavior of a criminal nature, whether or not the individual has been prosecuted." Directive, Encl. 2, App. A ¶ 13(a) (emphasis added). In this case, the Judge's determination that Applicant committed a sexual assault is merely an administrative conclusion that substantial evidence exists in the record to establish Applicant engaged in security-significant conduct. Applicant failed to establish that the Judge acted beyond the authority provided him in the Directive when he concluded Applicant committed a sexual assault.

As to Applicant's contention that he did not commit the alleged offense, we do not find this argument persuasive. From our review of the record, the Judge's material findings and conclusions that Applicant committed a sexual assault are based on substantial evidence or constitute reasonable inferences that could be drawn from the evidence. *See, e.g.*, ISCR Case No. 17-02225 at 2-3 (App. Bd. Jun. 25, 2019).

We also do not find persuasive Applicant's contention that the Judge was not impartial. This contention is apparently based on Applicant's incorrect belief that the Judge acted beyond his authority in concluding he committed a sexual assault. Applicant has not directed our attention to anything in the record that would likely persuade a reasonable person that the Judge was lacking in the requisite impartiality. His argument fails to meet the heavy burden on him to rebut the presumption that a Judge is impartial and unbiased. *See, e. g.*, ISCR Case No. 18-02722 at 5 (App. Bd. Jan. 30, 2020).

Applicant also argues the Judge did not consider all of the evidence, mis-weighed the evidence, and did not properly apply the mitigating conditions and whole-person concept. He argues, for example, the alleged behavior never occurred is, therefore, unlikely to recur. He also takes issue with the Judge's conclusion that "his denials only serve to indicate that he is not rehabilitated." Appeal Brief at 6, quoting from Decision at 6. None of Applicant's arguments are

enough to rebut the presumption that the Judge considered all of the record evidence or to demonstrate the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 19-01400 at 2 (App. Bd. Jun. 3, 2020).

Applicant has failed to establish that he should be granted any relief or 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 the record. "The general standard is that a clearance may be granted only when 'clearly consistent with national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). *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 national security."

Order

The decision is **AFFIRMED**.

Signed: Michael Y. Ra'anan
Michael Y. 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