DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
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ARLINGTON, VIRGINIA 22203
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KEYWORD: Guideline J; Guideline D

DIGEST: A decision to grant a security clearance to an applicant, however, does not give the applicant any vested right or entitlement in keeping a security clearance. A prior grant of a security clearance does not preclude the Federal Government from considering, at a future date, whether to continue that grant or to revoke it. To put it differently, the Federal Government is not equitably estopped from denying or revoking a security clearance. Adverse Decision is Affirmed.

CASE No: 20-03647.a1

DATE: 12/07/2021

Date: December 7, 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
Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On April 5, 2021, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that

decision—security concerns raised under Guideline J (Criminal Conduct) and Guideline D (Sexual Behavior) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On October 5, 2021, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Richard A. Cefola denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Under Guideline J, the SOR alleged that Applicant was arrested and charged with Electronic Enticement of a Minor in 2017. He was convicted of felony attempted sexual assault, sentenced to confinement for 18 months, placed on probation until mid-2023, and required to register as a sex offender. This allegation was cross-alleged under Guideline D. At the hearing, Applicant admitted the material facts alleged in the Guideline J allegation. Tr. at 20-22. "Applicant solicited a sexual liaison with an alleged minor, who was actually someone in law enforcement." Decision at 2. He served 18 months of confinement before being placed on probation. *Id*. "Although [Applicant] provided evidence of a successful work history with his employer . . . , that evidence does not outweigh the fact that he is now on probation." *Id*. at 4. The Judge found against Applicant under both guidelines.

In his brief, Applicant does not challenge any of the Judge's specific findings of fact. He argues that "[b]eing on probation until July 2023 is irrelevant to the amount of time that has passed and is not a disqualifying condition." Appeal Brief at 3. This argument lacks merit. Disqualifying Condition 31(c) lists "individual is currently on parole or probation" as a condition that could raise a security concern and may be disqualifying. Directive, Encl. 2, App. A ¶ 31(c).

Applicant also argues that facts were presented during his hearing but were not given adequate consideration. These include, for example, that he was initially granted an interim security clearance after disclosing the alleged criminal conduct in a security clearance application. Appeal Brief at 2. A decision to grant a security clearance to an applicant, however, does not give the applicant any vested right or entitlement in keeping a security clearance. A prior grant of a security clearance does not preclude the Federal Government from considering, at a future date, whether to continue that grant or to revoke it. To put it differently, the Federal Government is not equitably estopped from denying or revoking a security clearance. *See, e.g.*, ISCR Case No. 99-0519 at 15 (App. Bd. Feb. 23, 2001). To the extent that Applicant may be arguing the Judge did not consider all the evidence, that argument is not persuasive. There is a rebuttable presumption that the Administrative Judge considered all of the record evidence, and the appealing party has a heavy burden when trying to rebut that presumption. *See, e.g.*, ISCR Case No. 18-00110 at 5 (App. Bd. Mar. 31, 2020). None of Applicant's arguments are sufficient to rebut that presumption.

The balance of Applicant's arguments amounts to a disagreement with the Judge's weighing of the evidence. He argues, for example, that his conduct at issue occurred over four years ago, that it was an isolated incident that occurred under unusual circumstances, that his conduct was the result of inattention to detail and he was not seeking to engage in illegal activity, and that he is successfully participating in a treatment program. Appeal Brief at 2-5. He also argues the Judge did not properly apply the whole-person concept. None of his arguments are sufficient to demonstrate the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 15-08684 at 2 (App. Bd. Nov. 22, 2017).

Applicant 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 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 Ra'anan
Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: Jennifer I. Goldstein
Jennifer I. Goldstein
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board