

Date: February 9, 2022

In the matter of:)
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-----) ISCR Case No. 20-00354
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Applicant for Security Clearance)
_____)

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Ryan C. Nerney, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On November 9, 2020, 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). Department Counsel requested a hearing. On November 9, 2021, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Wilford H. Ross denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Under Guideline (GL) D, the SOR alleged that Applicant sexually molested his minor stepdaughter on multiple occasions between 2012 and 2014 (SOR ¶ 1.a.); sexually harassed his minor step-niece in 2014 (SOR ¶ 1.b.); and sent a sexually suggestive email to an 18-year-old family friend in 2015 (SOR ¶ 1.c.). Under GL E, the SOR cross-alleged the GL D allegations (SOR ¶ 2.a.) and separately alleged that Applicant, in responding to DOHA interrogatories, deliberately failed to disclose several additional complaints of child sexual abuse (SOR ¶ 2.b.).

Although Applicant admitted in minor part to some allegations, he denied the gravamen of all allegations.

The Judge found in favor of Applicant on two allegations under GL D (SOR ¶¶ 1.b. and 1.c.) and on the failure-to-disclose allegation under GL E (SOR ¶ 2.b.). Those favorable findings were not raised as an issue on appeal and are not discussed below. The Judge found against Applicant on the GL D allegation that he sexually molested his step-daughter and on the cross-alleged GL E allegation concerning the same behavior (SOR ¶¶ 1.a. and 2.a.).

Applicant raised the following issue on appeal: whether the Judge failed to properly consider all available evidence, rendering his adverse decision arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant is in his forties and married to his third wife. In 2017, he retired from the military, having spent most of his active-duty career in his service's criminal investigative division.

From 2013 to 2015, Applicant was married to his second wife, RL. Her three children lived with the couple during the marriage. In the summer of 2015, after their divorce, RL reported to local law enforcement that her daughter EM had been sexually assaulted. This report of an alleged assault did not involve Applicant. When EM was subsequently interviewed, she initially discussed a recent sexual assault, but then disclosed sexual contact by the Applicant. The report stated in part:

[EM] reported that her ex step-dad [sic], [Applicant], sexually abused her in 2014. She stated that he touched her when her mom was out of town for work. [EM] reported that it happened more than one time. She stated that [Applicant] would rub on her thighs and try to "finger" her. [EM] reported that [Applicant] would rub her genitalia on the inside and outside of her pants. [EM] reported that one time they were watching a movie when [Applicant] put his hand in her pants. She stated the [Applicant] inserted his fingers on the inside of her vagina. [EM] reported that [Applicant] pulled his pants down, showed her his penis and asked her to touch it. She stated that she told him "no". . . . She indicated that there was another time where [Applicant] digitally penetrated her anally and vaginally. [EM] reported that [Applicant] looked at her, told her that he should not have done that and not to tell her mom. . . . [EM] reported that some of the incidents happened on the couch in the living room. She stated that her siblings would be in their bedrooms. She stated that she told her mom and [AM] She stated that he touched her on the inside of her pants when she would sleep in the bed with him. [EM] reported that [Applicant] told her he made a mistake and not to tell her mom. She stated that she still told her mom. [EM] reported that [Applicant] and her mom convinced her that it was a dream and that it did not actually happen. She stated that the last time anything happened was while her mom was in the hospital which was around her mom's birthday. [EM] reported that her mom's birthday is October 12th 2014. (Applicant Exhibit R at 21-24). [Decision at 3.]

The local civilian prosecutor declined prosecution due to “inability to sustain a conviction,” Decision at 3, citing Applicant Exhibit Q, and law enforcement then forwarded the case to Applicant’s command. The military initiated an investigation, during which they interviewed a number of EM’s family and friends. Two teenaged girls told investigators that EM had previously confided in them that her step-father had touched her inappropriately. During the course of the investigation, at least two persons interviewed called into question EM’s truthfulness or her mother’s truthfulness.

After the military investigation closed, the service preferred charges against Applicant based on EM’s allegations: Applicant was charged with two counts of Sexual Assault of a Child and two counts of Sexual Abuse of a Child. At a preliminary hearing on the charges, EM did not testify, but provided a written statement, in which she further described the incidents she had earlier disclosed and discussed a few other incidents of touching. The Preliminary Hearing Officer, a senior judge advocate, submitted a report in which he concluded that there was probable cause to believe that Applicant committed the charged offenses. However, he recommended dismissal of the charges due to the difficulty in securing convictions in child sexual assault cases:

On the evidence before me, there is no reasonably [sic] possibility of success on the merits. In the “best” of circumstances, child sexual assault/sexual abuse cases are notoriously hard to prove beyond a reasonable doubt. There are numerous circumstances here that will make it even more difficult. Though not uncommon not to have third-party witnesses to such offenses, here neither EM’s mother, younger brother, younger sister, or [sic] adult household resident [AM] will provide any substantive information to corroborate EM’s allegations. Thus, proof beyond a reasonable doubt will hang on EM’s credibility. The Government will have a difficult time establishing that as the Defense will likely subject EM to a devastating cross-examination.

This analysis is not whether the offenses did or did not occur or whether EM is or is not telling what she believes to be the truth about. This analysis is simply an experienced and objective overview of the difficulty of proving these allegations beyond a reasonable doubt . . . (Applicant Exhibit O.) [Decision at 6–7.]

Upon receipt of the Preliminary Hearing Officer’s Report, the legal advisor to the general court-martial convening authority recommended that the charges be dismissed without referral to court-martial. The convening authority dismissed the charges and specifications in April 2017.

The following month, a military commander issued Applicant a letter of reprimand. The conduct for which Applicant was reprimanded is the same conduct alleged in the SOR. In June 2017, Applicant was permanently disqualified from being a criminal investigative agent. Upon his request, Applicant was approved for retirement shortly thereafter.

Later in 2017, a state administrative law judge (ALJ) concluded that a state agency failed to show by a preponderance of the evidence that a particular penetration incident regarding EM

occurred. The ALJ recommended that the record be expunged as to that allegation. The ALJ's decision does not set forth the facts surrounding the particular allegation that she considered.

At his security clearance hearing, Applicant "absolutely denied that any inappropriate sexual activity happened between him and EM." Decision at 7. He called two witnesses, both of whom were friends. One of them was a retired criminal investigative agent who also knew RL and EM and testified negatively regarding their truthfulness. Evidence was introduced that RL had made unfounded sexual misconduct allegations against another former husband. Applicant provided letters from co-workers and documentary evidence about his military career. This evidence established that Applicant had a successful career and that co-workers continued to recommend him for a position of trust even with knowledge of the allegations against him.

The Judge's Analysis

Applicant has consistently denied that he engaged in criminal sexual activity with EM. "He submits that the decision not to try [him] in state court or by court-martial, evidence of RL's history of making false accusations, evidentiary issues with EM's reputation for veracity, and the findings of the state . . . ALJ support his innocence. I disagree." Decision at 12.

A critical fact to consider is that EM did not initially go to the police to submit a report against Applicant. During the course of an unrelated investigation, EM revealed Applicant's misconduct. "In other words, the predicate for the investigation was not the alleged conduct by Applicant." *Id.*

EM described the incidents four separate times: to a teenaged relative, to a teenaged friend, to a clinical social worker, and in a written statement to the Hearing Officer. She described Applicant's conduct in detail. While there were inconsistent details, she was consistent on the basic facts. Applicant argues that RL may have prompted her daughter to make a false report about Applicant to the police, but that does not explain EM's disclosure to the two girls. "The decisions of other tribunals have been viewed and considered by me, but are not controlling. Based on the state of the record, I find that Applicant did engage in criminal sexual acts with . . . EM." *Id.*

Under GL E, "Applicant's conduct with his stepdaughter, as set forth above, shows extremely poor judgment. Applicant's failure to accept responsibility for it means it cannot be mitigated either as a minor incident, or due to the passage of time. [No] mitigating conditions apply." *Id.* at 14.

Discussion

Applicant argues that the Judge failed to properly consider all evidence, particularly evidence regarding the credibility of EM and RL, and that the evidence does not support the Judge's conclusion that he committed offenses against his stepdaughter. Applicant refers repeatedly to three separate entities that investigated the allegations and determined either that Applicant did not engage in the misconduct alleged in the SOR or determined that there was not enough evidence to show that Applicant committed a crime. Appeal Brief at 12, 13, and 21. In

light of the state's decision not to prosecute, Applicant argues that the Judge's "unilateral determination" that Applicant did engage in criminal sexual acts with EM is arbitrary, capricious, and contrary to law. *Id.* at 7.

Here, Applicant is both misconstruing the evidence of record and conflating the standards of proof. First, as to the evidence, the record does not establish that three separate entities found no misconduct. The police department's investigation was forwarded to the local prosecutor, who declined prosecution "due to inability to sustain a conviction." Applicant Exhibit Q at 1. The military's criminal investigation was forwarded to a Preliminary Hearing Officer, who found probable cause but – like his civilian counterpart – determined that it would be difficult to prove the case beyond a reasonable doubt. Neither criminal investigation determined that Applicant did not commit the offenses. Indeed, Applicant's commander issued him a letter of reprimand based upon the military investigation and permanently decertified him as a special agent. These adverse personnel actions by Applicant's command, based upon its own criminal investigation, directly contradict Applicant's assertion that the investigation cleared him of misconduct.

Turning to the issue of the standard of proof, Applicant conflates the standard of proof at criminal proceedings with the standard at his administrative hearing. The standard of proof in DOHA proceedings is not proof beyond a reasonable doubt, but instead is substantial evidence, that is, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." Directive E3.1.32.1. *See, e.g.*, ISCR Case No. 16-04094 at 2 (App. Bd. Apr. 20, 2018). A prosecutor's decision not to pursue criminal charges because of evidentiary problems is not a determination of innocence nor does it preclude the Judge from concluding that Applicant engaged in such conduct. "In DOHA proceedings, a Judge can make a finding of criminal conduct even if the applicant has not been formally charged with a criminal offense by the relevant criminal justice authorities." 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."). The Directive itself highlights that a security concern may arise from "sexual behavior of a criminal nature, whether or not the individual has been prosecuted." Directive, Encl. 2, App. A ¶ 13(a). The Judge's "unilateral determination" that Applicant sexually abused his minor stepdaughter was well within his authority under the Directive. *See, e.g.*, ISCR Case No. 18-02018 at 3–4 (App. Bd. Nov. 4, 2021).

Applicant argues that the Judge did not consider all of the evidence, misweighed the evidence, and did not properly apply the mitigating conditions and whole-person concept, rendering his conclusions arbitrary, capricious, and contrary to law. In deciding whether the Judge's rulings or conclusions are arbitrary, capricious, or contrary to law, we will review the Judge's 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, e.g.*, ISCR Case No. 14-02563 at 3–4 (App. Bd. Aug. 28, 2015).

From our review of the record, the Judge's findings and his conclusion that Applicant sexually abused his minor stepdaughter are based on substantial evidence, to include the military investigation. We have previously stated that an employer's decisions and characterizations of events are entitled to some deference in the context of an employer's internal investigation. *See, e.g.,* ISCR Case No. 18-00496 at 4 (App. Bd. Nov. 8, 2019). Such deference is particularly appropriate in this context, in which Applicant's law enforcement command relied upon its own criminal investigation for its adverse personnel decisions. We find no error in the Judge's finding and conclusions, which are consistent with the command's stated reasons for reprimanding Applicant and removing his law enforcement qualifications and which are supported by other evidence of record. Moreover, we note that the Judge highlighted, discussed, and weighed the evidence regarding EM's reputation for truthfulness, as well as her mother's. Decision at 4, 5, and 12. A party's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.,* ISCR Case No. 18-02581 at 4 (App. Bd. Jan. 14, 2020).

The Judge's favorable findings on several unrelated allegations, following a detailed recitation of facts and analysis, further demonstrate his thorough consideration of all the evidence in the record. Applicant has failed to rebut the presumption that the Judge considered all of the record evidence, failed to demonstrate the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law, and failed to establish that he should be granted any relief. 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: James F. Duffy
James F. Duffy
Administrative Judge
Chairperson, Appeal Board

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

Signed: Moira Modzelewski
Moira Modzelewski
Administrative Judge
Member, Appeal Board