



**DEPARTMENT OF DEFENSE
 DEFENSE LEGAL SERVICES AGENCY
 DEFENSE OFFICE OF HEARINGS AND APPEALS
 APPEAL BOARD
 POST OFFICE BOX 3656
 ARLINGTON, VIRGINIA 22203
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Date: September 8, 2022

In the matter of:)	
)	
-----)	ISCR Case No. 21-00321
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Brittany D. Forrester, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On July 13, 2021, 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 J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On July 5, 2022, after the record closed, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Mark Harvey denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge failed to properly consider all available evidence and whether he misapplied the disqualifying and mitigating conditions, rendering his adverse decision arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

Applicant is 52 years old, divorced, with two teenaged children. He earned a Bachelor’s degree, served in the military for eight years, and subsequently earned a Master’s degree.

Under both Guidelines D and J, the SOR alleged that Applicant was arrested in 2007 and charged with Enticement of Child by Adult and Furnishing Pornographic Material to a Minor; that he was convicted of attempted enticement in 2012; that he served a sentence of five years' incarceration from 2012 to 2017; and that he is required to register as a sex offender.

Applicant admitted that he was convicted and sentenced as alleged. However, he asserted that he was factually innocent of the charge of Attempted Enticement of Child by Adult because he believed the alleged victim was over the age of 18. The person Applicant attempted to entice for sex was an undercover police officer posing online as a child.

Applicant pled not guilty at his state trial, but was convicted by a jury of the Attempted Enticement of a Child charge, a felony. He appealed the conviction to a state appellate court and filed for relief in federal court, but both efforts were unsuccessful. At hearing, he "denied that he intended to have sex with a child." Decision at 5.

After careful assessment of Applicant's case in mitigation, I conclude there is substantial reliable evidence of record that in October 2007, Applicant committed the offense of Attempted Enticement of Child by Adult. He attempted to entice [Child] to engage in a sex act with him. I am satisfied that Applicant believed [Child] was under the age of 15 I am not persuaded that Applicant believed [Child] was 15 years or older. His [explanation of events] is not credible. Because he was not truthful at his hearing about his mental state in October 2007 when he committed the offense, Applicant has not successfully rehabilitated himself (internal citations omitted.) While his offense in October 2007 is not recent, Applicant's lack of rehabilitation as shown by his false statement at his hearing shows lack of rehabilitation and continues to cast doubt on his reliability, trustworthiness, and good judgment. [Decision at 9–10.]

Discussion

Applicant has not challenged any of the Judge's specific findings of fact, but contends that the Judge erred in two regards.

First, Applicant argues that the Judge "failed to adhere to the procedures required . . . when he failed to consider all relevant evidence submitted by Appellant." Appeal Brief at 4. However, counsel cites to no evidence that the Judge failed to consider. The Appeal Board does not review a case *de novo*. "The appeal brief must state the specific issue or issues being raised, and cite specific portions of the case record supporting any alleged error." Directive ¶ E3.1.30. Applicant's counsel failed to comply with this fundamental requirement and failed to carry her burden on this issue.

Second, Applicant argues that the Judge failed to apply properly both the disqualifying and mitigating conditions under Guidelines D and J. Under Guideline D, Counsel for Applicant makes several arguments that are puzzling at best. First, she notes Adjudicative Guideline (AG) ¶ 12's admonition that "No adverse inference concerning the standards in this Guideline may be raised

solely on the basis of the sexual orientation of the individual” and then argues that the Judge was “wrongfully biased against Applicant given the evidence from Applicant’s criminal matter and this inference (sic) was disregarded.” Appeal Brief at 7. This case concerns conduct—an adult male’s attempted enticement of a purported underage female—that is devoid of any sexual orientation issue whatsoever. Counsel’s allegation of bias is wholly without foundation in the record.

Counsel also represents—without further explanation—that AG ¶ 13(a), *sexual behavior of a criminal nature*, was not established, as “[s]exual behavior never occurred.” *Id.* Applicant was convicted in state court of Attempted Enticement of a Child, a felony. The Judge concluded based on his review of the record evidence that Applicant committed the attempted enticement of a child offense. Contrary to Counsel’s assertion, the record supports the Judge’s conclusion that Guideline D security concerns were established.

Under Guideline J, Applicant fundamentally argues that the criminal conduct security concerns are mitigated by the passage of time—15 years—without further incident. This argument is unpersuasive. In his decision, the Judge concluded that Applicant’s explanation of events surrounding his arrest was not credible:

Because he was not truthful at his hearing about his mental state in October 2007 when he committed the offense, Applicant has not successfully rehabilitated himself. . . . While his offense in October 2007 is not recent, Applicant’s lack of rehabilitation as shown by his false statement at his hearing shows lack of rehabilitation and continues to cast doubt on his reliability, trustworthiness, and good judgment. [Decision at 10.]

The Directive requires the Appeal Board to give deference to a Judge’s credibility determinations. Directive ¶ E3.1.32.1. The Judge is well within his authority to consider that determination in assessing whether Applicant successfully rehabilitated himself and in evaluating whether he mitigated the Guideline J security concerns. *See, e.g.*, ISCR Case No. 20-01577 at 3 (App. Bd. Jun. 6, 2022). Moreover, when an applicant is unwilling or unable to accept responsibility for his own actions, such a failure is evidence that detracts from a finding of reform and rehabilitation. *See, e.g.*, ISCR Case 96-0360 at 5 (App. Bd. Sep. 25, 1997).

The remainder of Applicant’s brief is fundamentally an argument that the Judge misweighed the evidence. None of Applicant’s arguments, however, 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. Moreover, the Judge complied with the requirements of the Directive in his whole-person analysis by considering all evidence of record in reaching his decision. *See, e.g.*, ISCR Case No. 19-01400 at 2 (App. Bd. Jun. 3, 2020).

Applicant has failed to establish that the Judge committed any harmful error or that he should be granted any relief on appeal. 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: Jennifer I. Goldstein

Jennifer I. Goldstein
Administrative Judge
Member, Appeal Board

Signed: Moira Modzelewski

Moira Modzelewski
Administrative Judge
Member, Appeal Board