



**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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Date: November 10, 2022

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

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Bryan Olmos, Esq., Department Counsel  
 James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

*Pro se*

The Department of Defense (DoD) declined to grant Applicant a security clearance. On February 28, 2020, DoD issued a statement of reasons (SOR) advising Applicant of the basis of that decision—security concerns raised under Guideline D (Sexual Behavior), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct) of DoD Directive 5220.6 (January 2, 1992, as amended) (Directive). Applicant requested a hearing. On March 22, 2022, after close of the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert Robinson Gales granted Applicant’s request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

On June 13, 2022, this case was remanded to the Judge to ensure the record was complete. In the Remand Decision, dated July 20, 2022, the Judge issued a favorable decision again, and Department Counsel appealed. In this appeal brief, Department Counsel noted the Judge admitted an exhibit into evidence (medical records marked as Applicant’s Exhibit (AE) H) during the

remand without providing them a copy of that exhibit or providing them an opportunity to object to it. On September 15, 2022, the Board forwarded to Department Counsel a copy of AE H, provided them an opportunity to object to it, and authorized them to amend their appeal brief accordingly. In an amended appeal brief, Department Counsel raised no objection to AE H being admitted into evidence.

In the amended appeal brief, Department Counsel raise the following issue: 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 and Analysis**

Applicant, who is in his thirties, married in 2020 and has an infant child. In mid-2019, he pled no contest to a charge of exposure of sexual organ and received a suspended imposition of sentence that placed him on probation for six months, ordered him to stay away from the location of the offense and to have no contact with the victims, and directed him to continue counseling. This offense occurred in mid-2018 when Applicant, while standing outside a campus cafeteria, exposed his genitals through a window to people inside that facility. The next morning there was a news story about the incident. At that point, Applicant called the police, informed them that he was the person of interest in the news story, and met with a detective. As a result of this incident, he was terminated from his job. He successfully completed his probation in late 2019.

The same month as the exposure offense, Applicant voluntarily sought the services of a licensed psychologist, and they met for 25 sessions between 2018 and 2019. The psychologist diagnosed and treated Applicant for Major Depressive Disorder and Exhibitionist Disorder. The psychologist concluded that "the Exhibitionist Disorder is in full remission at this time, as he 'has not acted on the urges with a nonconsenting person, and there has been no distress or impairment in social, occupational or other areas of functioning' [Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition] since 2018." Decision at 5, quoting from Applicant's Exhibit (AE) E. They agreed to recurring psychotherapy services for the foreseeable future to assist Applicant with ongoing mental health issues.

In early 2019, Applicant submitted a security clearance application (SCA) in which he disclosed the indecent exposure incident. In a subsequent background interview and at the hearing, Applicant disclosed he engaged in prior indecent exposure incidents (about four to five) in which he flashed primarily young women. These other incidents occurred between 2015 and 2018. He engaged in that conduct to gratify his sexual desires. At the hearing, Applicant acknowledged that he still had thoughts about exposing himself, but he has blocked those thoughts and urges.

In his analysis, the Judge concluded disqualifying conditions under Guidelines D, E, and J were established, but the security concerns arising under those guidelines were mitigated. In reaching that latter conclusion, the Judge emphasized that Applicant self-reported the mid-2018 incident to the police, his employer, and his family; that he sought and received professional mental health treatment; that a licensed psychologist concluded his Exhibitionist Disorder is in full remission; and that Applicant's non-alleged Major Depressive Disorder seems to be controlled by prescribed medication.

## Discussion

There is no presumption of error below. *See, e.g.*, ISCR Case No.19-01689 at 3 (App. Bd. Jun. 8, 2020). The appealing party has the burden of raising and establishing the Judge committed factual or legal error that is prejudicial. *Id.* On appeal, Department Counsel’s principal argument is that the Judge’s decision “reflects a piecemeal analysis and is arbitrary, capricious and contrary to law, and unsupported by any reasonable reading of the record evidence as a whole.” Appeal Brief at 11. We do not find Department Counsel’s arguments persuasive.

Department Counsel have not challenged any of the Judge’s specific findings of fact. They do, however, assert that “[c]ontrary to the findings in the Remand Decision, there was no evidence in the record that Applicant was again taking prescription medications for his mental health.” Appeal Brief at 8. Regarding this issue, the Judge found, “[f]rom December 2018 until about June 2019, Applicant’s physician prescribed Escitalopram (commonly called Lexapro) to treat his major depressive disorder, single episode, unspecified.” Decision at 6, citing AE F. Contrary to Department Counsel’s interpretation, we do not read the Judge’s challenged conclusion (*i.e.*, “that disorder [major depression] seems to be controlled by prescription medication” (Decision at 9)) as indicating Applicant was still taking a prescription medication for that condition.

Department Counsel’s brief asserts that Applicant testified that he continues to have thoughts and urges to engage in acts of exhibitionism. The Judge, however, addressed this issue by concluding, “[w]hile Applicant has not exposed himself since the July 2018 incident – now four years ago – he did acknowledge that he has had thoughts about doing so, but he has successfully blocked thoughts and urges.” Decision at 6, citing Tr. at 35-36, 46, 50. Department Counsel have not shown the Judge committed prejudicial error in reaching that conclusion.

Department Counsel challenge the Judge’s apparent favorable credibility determination by pointing out that Applicant indicated during his background interview that he exposed himself on “at least 3 prior instances” (Government Exhibit 2 at 5), while at the hearing he testified he did so “about four or five times.” Tr. at 26. While these statements are not identical, they are not inconsistent. Furthermore, as the Board has previously stated, evidence of a witness making inconsistent statements about an issue does not, as a matter of law, require the Judge to find he or she was not credible on other matters pertaining to the case. *See, e.g.*, DISCR OSD Case No. 92-0447 at 3 (App. Bd. Aug. 5, 1993). The fact that Applicant admitted to still having thoughts about exposing himself was a factor the Judge could consider in assessing his credibility. We find no reason not to give deference to the Judge’s credibility determination.

In the appeal brief, Department Counsel contend the Judge “failed to address the actual conduct and Applicant’s judgment.” Appeal Brief at 12-13. The Judge, however, made specific findings about Applicant’s indecent exposure conduct, including that such conduct resulted in Applicant being terminated from a job and in him receiving a suspended imposition of sentence during a criminal prosecution. In analyzing this case, the Judge concluded various disqualifying conditions under Guidelines D, E, and J were applicable to the alleged conduct. Department Counsel have failed to show the Judge did not consider important aspects of the case. Additionally, Department Counsel argue “this case focuses on Applicant’s sexual and criminal **conduct** and

**judgment**, not a specific mental health diagnosis[.]” but the next sentence undercuts this argument by acknowledging that “Applicant’s mental health is part-and-parcel of the allegations[.]” *Id.* at 13, emphasis in original. In general, Department Counsel’s arguments appear to boil down to a disagreement with the Judge’s weighing of the evidence. A party’s ability to argue for an alternative interpretation of the evidence is not sufficient to demonstrate error. *See, e.g.*, ISCR Case No. 19-01400 at 2 (App. Bd. Jun. 3, 2020).

In short, Department Counsel failed to establish the Judge committed harmful error. None of their arguments are enough to rebut the presumption that the Judge considered all of the record evidence or sufficient to demonstrate the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *Id.* The Judge’s decision is sustainable on the record.

### **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