

Date: February 17, 2023

In the matter of:

Applicant for Security Clearance

ISCR Case No. 21-01365

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Christopher Snowden, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On September 3, 2021, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline D (Sexual Behavior), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On December 28, 2022, after the close of the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert E. Coacher denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Under Guideline D, the SOR alleges that Applicant was arrested in about June 2016; that he was charged with felony Creating Unlawful Image of a Minor and Peep/Spy: Locker/Dressing Room; that he was found guilty of Contributing to the Delinquency of a Minor and Peep/Spy into Dwelling; and that he received a suspended prison sentence of 30 days. The same behavior was cross-alleged under Guideline J and Guideline E. The Judge found against Applicant on all allegations. Applicant raised the following issues on appeal: whether the Judge made findings of fact that are unsupported by the 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.

The Judge’s Findings of Fact: The Judge’s findings of fact are summarized below, in pertinent part.

Applicant is in his late thirties and married, with three children. He earned a bachelor’s degree and served in the U.S. military for approximately 12 years before he was administratively separated in 2018 with an other than honorable discharge for the conduct alleged in the SOR.

In June 2016, Applicant entered a retail clothing store and, at some point, entered a dressing stall. The dressing stall adjacent to his was occupied. Applicant stood on a bench in the dressing stall and held his cell phone over the top of the stall, intending to take a picture of the occupant in the adjacent stall. Before he could take the photo, the occupant—a minor female who was trying on swimwear—saw the phone, screamed, and ran out of the stall. Applicant left the store, but the police identified him as a suspect and arrested Applicant at his home. Initially charged with a felony offense of “unlawful filming of a minor” and a misdemeanor offense of “peeping,” Applicant entered into a plea agreement in November 2016 under which he pleaded “No Contest” to two misdemeanors: contributing to the delinquency of a minor and peeping. Applicant was sentenced to one year of probation and was required to complete a psychosexual evaluation. Based upon the June 2016 incident, Applicant was administratively separated from the military with an other than honorable discharge.

Dr. C conducted Applicant’s court-ordered psychosexual evaluation, which consisted of a review of relevant records, clinical interviews, and psychological testing. Dr. C reported that the “examination did not reveal any underlying mental disorder or personality disorder”; that Applicant reported an obsession with pornography; and that Applicant’s sexual interest assessment indicated an interest in pornography and voyeurism. Decision at 3.

At hearing, Applicant testified that he engaged in similar conduct at a different clothing store about one month before the charged incident. During the earlier incident, he put his phone over a dressing stall and surreptitiously took a picture of a woman in her 30s, but he was not discovered by law enforcement or charged. Although Applicant claimed to have disclosed this prior incident to his counselor, Dr. C’s report only references one victim and characterizes Applicant’s offense “as an isolated incident as well as an impulsive act.” *Id.*, quoting AE B at 3.

I can reasonably infer from this evidence that Applicant did not report the earlier incident to Dr C. (evidence of this unalleged offense will not be used for disqualification purposes, but I will consider it as it may relate to Applicant’s credibility, the application of any mitigating conditions, and in my whole-person assessment). [Decision at 3.]

Other than the evaluation submitted by Dr. C, Applicant submitted no counseling reports. He asserted, however, that he has engaged in different types of counseling, to include pastoral, professional, and group. Applicant submitted a statement from a member of his group counseling sessions who claimed to be aware of the allegations against Applicant and stated that Applicant has not been involved in any other incidents. The Judge found that, “[b]ased upon this statement, it appears the author was unaware of Applicant’s earlier act of peeping that was not discovered by authorities, but admitted in his hearing testimony.” *Id.* at 4.

Applicant gave conflicting testimony regarding prior similar incidents, initially denying any prior incidents under cross-examination and then admitting the prior incident in response to a question from the Judge. Similarly, Applicant initially denied under cross-examination that he continued to view pornography and subsequently admitted that he has viewed pornography since the June 2016 incident, although infrequently. “Based upon Applicant’s inconsistencies and equivocations,” the Judge concluded that Applicant’s testimony was not credible. *Id.* at 5.

The Judge’s Analysis: The Judge’s analysis is summarized and quoted in pertinent part below:

Applicant was found guilty of contributing to the delinquency of a minor and of peeping, which occurred in a public retail store, raising security concerns under Adjudicative Guidelines D, J, and E.

Applicant’s past actions are known and no longer serve as a basis for coercion, exploitation, or duress. However, no other mitigating condition fully applies under any of the three guidelines. Although the 2016 incident is somewhat remote in time, Applicant failed to disclose a similar incident to his psychologist, calling into question his credibility, his acceptance of responsibility, and his commitment to not engage in similar behavior in the future. Additionally, Applicant continues to engage in viewing pornography, which Dr. C believed was related to his voyeuristic tendencies.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I considered Applicant’s letters of recommendations from his colleagues and his wife; his [military evaluations], awards, and his deployments; his counseling; and his personal circumstances. I weighed these factors against his conviction for peeping on a minor female, his failure to disclose a similar incident one month before the charged incident, and his inconsistent and equivocal hearing testimony. [*Id.* at 10.]

Discussion

The crux of Applicant’s argument on appeal is that the Judge erred in several findings of fact and that those erroneous findings undermined the Judge’s mitigation and whole person analyses. Specifically, Applicant contends that the Judge erred in finding that Applicant failed to disclose the prior incident during his psychosexual evaluation; that Applicant gave conflicting testimony regarding prior similar incidents; and that Applicant testified inconsistently about his pornography habits. We do not find Applicant’s arguments persuasive.

We examine a Judge’s disputed findings to see if they are supported by 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. In conducting our review, we give deference to the credibility determinations of the Judge. *Id.* The Board must consider not only whether there is record evidence supporting a Judge’s findings, but also whether there is evidence that fairly detracts from those findings, and whether the Judge’s

findings reflect a reasonable interpretation of the record evidence as a whole. Although a Judge's credibility determination is not immune from review, the party challenging said determination on appeal has a heavy burden. *See, e.g.*, ISCR Case No. 02-12199 at 2–3 (App. Bd. Aug. 8, 2005).

In this case, the Judge's disputed findings are consistent with the testimony and record that was before him. For example, our review of Dr. C's report confirms that the Judge had ample reason to infer that Applicant did not disclose the earlier peeping incident to Dr. C, as the report clearly contemplates that there was only one incident. AE B. Similarly, our review of the transcript establishes that the Judge had substantial evidence to find that Applicant was inconsistent or equivocal in responding both to questions about his continued consumption of pornography and whether he had committed other acts of voyeurism similar to the charged offense. For example, under cross-examination Applicant flatly denied continued viewing of pornography, then admitted the same, and then evaded answering any questions about frequency. When asked a direct question about the last time he viewed pornography, Applicant professed to not know the last time, but later—under questioning by the Judge—admitted it was within the last year. Tr. at 65–66, 69.

The Judge's material findings are based on substantial evidence or constitute reasonable inferences or conclusions that could be drawn from the evidence. Moreover, the Judge had the opportunity to personally observe Applicant's demeanor when he testified at the hearing and could form impressions about the credibility of his testimony based on his assessment of Applicant's demeanor. Applicant's disagreement with the Judge's negative assessment of his credibility is not sufficient to meet his heavy burden of persuasion. *See, e.g.*, ISCR Case No. 03-05072 at 5 (App. Bd. Jul. 14, 2005). We find no reason to disturb the challenged findings, and we defer to the Judge's credibility determination that flowed from those findings.

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 that 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 rebut the presumption that the Judge considered all of the record evidence, failed to demonstrate that 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: Moira Modzelewski

Moira Modzelewski
Administrative Judge
Member, Appeal Board

Signed: Allison Marie

Allison Marie
Administrative Judge
Member, Appeal Board