



DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
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Date: December 7, 2023

In the matter of:)	
)	
-----)	ISCR Case No. 21-01371
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Julie R. Mendez, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On September 8, 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 the National Security Adjudicative Guidelines (AG) in Appendix A of Security Executive Agent Directive 4 (effective June 8, 2017) and Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On September 27, 2023, after the hearing, Defense Office of Hearings and Appeals Administrative Judge Eric C. Price denied Applicant’s security clearance eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Under Guideline D, the SOR alleges that Applicant groped a female colleague at a bar in or about June 2018 and that he groped and sexually assaulted a female colleague at her home in or about March 2019. The same behavior was cross-alleged under Guideline J, in addition to an allegation that Applicant was discharged from the military in November 2020 under other than honorable conditions in lieu of trial by court-martial. The Guideline D and J allegations were cross-

alleged under Guideline E. Applicant admitted the allegation regarding his discharge from the military and denied the other allegations. The Judge found against Applicant on all allegations. On appeal, Applicant argues that the Judge erred in his credibility assessment, 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 are summarized in pertinent part.

Applicant is in his early thirties and served in the military from 2010 to 2020. Deployed on multiple occasions into combat operations, Applicant is highly decorated. He has an honorable discharge from his initial term of service, which ended in 2017. In November 2020, as a result of an incident alleged in the SOR, Applicant was discharged from his second term of service under other than honorable conditions.

The SOR allegations arise from two separate incidents. In April 2019, a complaining witness (CW1) stated to investigators that Applicant had grabbed her and attempted to kiss her without her consent in about June 2018. She initially disclosed the incident to her supervisor, as well as two incidents with other male members of her unit, in explanation of why she sought a transfer to another unit. Her description of the event included the following details: she met Applicant at a bar while socializing with members of her new unit; he followed her outside when she went to smoke, asked to kiss her, grabbed her around the waist and tried to kiss her after she said no; and she put her hands on his chest and pushed him away. Applicant was not charged with any offenses arising from this incident.

At hearing, Applicant admitted that he first met CW1 on that evening and that he followed her outside the bar, but he denied asking her to kiss and denied that he grabbed her or groped her. He challenged her motives, noting that she failed to report the alleged incident until nine months later and in the context of a reassignment request. Applicant submitted a letter from EH, a servicemember who served with Applicant and had been his roommate from late 2016 to early 2020, which stated: "I am aware of the allegations made against [Applicant] and I believe them to be false in nature. I believe [Applicant] fell victim to someone who accused multiple other people of similar allegations and that [Applicant] told the whole truth during his testimonies." Decision at 4 (citing Answer at Ex. 9); Applicant Exhibit G at 91-92.

In May 2019, investigators interviewed another complaining witness (CW2), who reported that Applicant groped and sexually assaulted her in March 2019. Her account to investigators included the following details: Applicant asked if he could stay at her residence after a night out, and she agreed; CW2 vomited in a taxi while they were enroute back to her residence and fell while exiting the vehicle; while she was in the bathroom preparing to shower, Applicant entered the room naked, grabbed her and fondled her; she repeatedly told him to stop; and her roommate [Roommate] told Applicant to leave and escorted him out of the residence.

Roommate's statement to investigators included the following details: on the evening in issue, she saw CW2 at their residence, intoxicated and leaning on Applicant; Roommate helped CW2 to the shower, where CW2 told her that she did not want Applicant at the house; Roommate asked Applicant to leave, but he walked into the bathroom and locked the door; Roommate heard

CW2 tell Applicant to leave, the bathroom door opened, and Applicant ran out of the bathroom nude; when CW2 returned to the bathroom to vomit, Applicant followed her and locked the door; Roommate again heard CW2 ask Applicant to leave, and Roommate escorted him out of the residence. “CW2 later told Roommate that ‘she never felt so close [to] being raped,’ and that Applicant had picked her up, placed her on the counter, and attempted to perform oral sex on her.” Decision at 4 (quoting Government Exhibit 2 at 2).

At hearing, Applicant denied any nonconsensual sexual behavior with CW2 and stated that CW2’s statement to investigators was untruthful. His testimony about the evening included the following details: CW2 asked him to spend the night at her residence after several hours of drinking at a party; she exited the taxi to vomit on the way to her residence; she stumbled while exiting the vehicle; she went into the bathroom alone upon arriving at her residence; he decided to go home after a short time; when he went to say goodbye to CW2 in the bathroom, she opened the door naked, invited him to join her in a shower, and helped him undress; CW2 suggested they go to her bedroom to avoid Roommate hearing; they encountered Roommate while naked and enroute to CW2’s bedroom; Roommate scolded them both and suggested he leave, and he agreed because CW2 was drunk.

Applicant sent an apologetic text after he left the residence. At hearing, he explained that he did so “because he didn’t want their kissing and disrobing to negatively affect their friendship or relationship at work.” *Id.* at 6. He had no explanation for why CW2 or Roommate would lie about the incident. He claimed that CW2 had broken up with her boyfriend shortly before the incident and possibly reconciled after she made the allegations against him. Although Applicant alleged that there were inconsistencies between CW2’s and Roommate’s statements in other documents, he did not specify what those discrepancies were or submit any corroborating evidence.

In October 2019, Applicant was charged with offenses arising from the incident at CW2’s residence, including one sexual act and one attempted sexual act upon a female servicemember, as well as unlawful entry and indecent exposure. At his request, Applicant was administratively discharged from the military in November 2020 in lieu of trial by court-martial. His request for the administrative discharge—characterized as under other than honorable conditions—did not include an admission of guilt. Applicant stated that the administrative discharge enabled him to maintain veteran’s benefits based upon his previous period of honorable service and allowed him to avoid the risks associated with a possible court-martial conviction.

Applicant submitted numerous character references and letters of recommendation from service members, friends, neighbors, and colleagues. Those letters attest to “his honesty, integrity, trustworthiness, judgment, patriotism, dependability, work ethic, professionalism, leadership, handling of classified information, adherence to rules and regulations, commitment to U.S. national security and his mission, and superior performance in combat that saved lives of friendly forces.” *Id.* at 7. Additionally, many of the letters explicitly recommend approval of his continued access to classified information.

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

The statements in evidence from CW1, CW2, and Roommate provide substantial evidence that Applicant sexually assaulted and groped CW2 and that he grabbed CW1 around the waist and attempted to kiss her without consent. Applicant presented no evidence that rebutted those statements and no testimony or evidence that corroborated his denials of nonconsensual contact with either CW1 or CW2. “The evidence in support of his denials of any criminal conduct was limited to his testimony, support from his favorable character evidence, his military service, and [EH’s] opinion that the allegations were false.” *Id.* at 10.

I do not find Applicant’s claims that CW2 opened her bathroom door, invited him to join her in the shower, and then consensually engaged in sexual activity with him credible. His claims are unsupported by other evidence and directly contradicted by CW2’s and Roommate’s statements. CW2, Applicant’s close friend and colleague, detailed his nonconsensual sexual misconduct. CW2’s statement was corroborated, in large part, by Roommate, who also provided her own account . . . His assertions that CW2 may have falsely accused him of sexual misconduct because of her break-up and subsequent reconciliation with a boyfriend, and concerns that her roommate would negatively judge her for engaging in sexual activity with Applicant were neither corroborated nor credible.

. . .

I also find CW1’s rendition of events more credible than Applicant’s. . . CW1 said that: (1) while outside the bar Applicant asked to kiss her and she twice told him no; (2) he then “grabbed [her] around her waist and attempted to kiss her;” (3) she pushed him away and he went back inside the bar, and (4) that when she subsequently saw him around the squadron “[he] avoided her at all costs.” Applicant denied any physical contact with CW1, except possibly a friendly goodbye hug at the end a collegial evening and did not recount any conversations or recall any other social interaction with her though he was “sure [they] flew together, deployed together and so on.” (Tr. 57, 62-63) His lack of recollection of professional or social interaction with CW1 in the 10-month period they served together after first meeting . . . is less credible than her claims that he inappropriately touched her outside the bar and avoided her thereafter. I gave little weight to [EH’s] opinions because he provided no evidentiary basis for his belief that CW1 lied about the offense and because there is no evidence Applicant provided a statement or testimony regarding the misconduct alleged at any time before [EH’s] November 2021 letter.

As discussed above, I did not find Applicant’s denials that he committed the misconduct alleged in the SOR credible. I found his testimony and demeanor at the hearing to be unconvincing and inconsistent with someone who was reliably telling the truth. . . I found his minimization of visible manifestations of CW2’s intoxication, fanciful rendition of their sexual interaction, and explanations for his

attempts to apologize to her unconvincing. I also found his demeanor and answers to questions about his relationship and contact with CW1 after the alleged incident with her somewhat nonresponsive and evasive.

Statements from CW1, CW2, and Roommate, corroborated in part by Applicant, provided substantial, reliable evidence that he committed the criminal conduct alleged in the SOR. Notwithstanding his strong character evidence and combat record, Applicant's testimony was insufficient to overcome the evidence against him. [*Id.* at 10-12.]

Discussion

Applicant has not challenged any of the Judge's specific findings of fact but contends instead that the Judge erred in his credibility determinations in that he "did not find credibility to myself or to my statements made during the hearing," but "found that the statements made . . . by both CW 1 and CW 2 were fully credible with no supporting reasoning or documentation validating their credibility." Appeal Brief at 1. Applicant highlights that he submitted numerous character references "from members in high standing within the Military and Federal government" who themselves hold clearances. *Id.* Those character references, he argues, should "hold some weight when attempting to determine my credibility in this case," but the Judge "seemingly dismissed them all together." *Id.* We are not persuaded by this argument.

First, we give deference to a judge's credibility determinations. Directive ¶ E3.1.32.1. Although a judge's credibility determination is not immune from review, the party challenging it has a heavy burden of persuasion on appeal. *See, e.g.,* ISCR Case No. 03-05072 at 5 (App. Bd. Jul. 14, 2005).

Second, contrary to Applicant's assertions, the record confirms that the Judge considered the character references, as his decision refers to them on multiple occasions. *See* Decision at 7, 10, 12. Indeed, the Judge explicitly acknowledges the character references as weighing on the issue of credibility. After highlighting that Applicant's "favorable character evidence" buttressed his denials of any criminal conduct, the Judge later concluded that "(n)otwithstanding his strong character evidence and combat record, Applicant's testimony was insufficient to overcome the evidence against him." *Id.* at 10, 12. In sum, the record contains ample evidence that the Judge considered all evidence submitted on the issue of credibility, to include the numerous letters attesting to Applicant's character.

Third, turning to Applicant's assertion that the Judge found CW1's and CW2's statements credible "with no supporting reasoning," we note that the Judge articulated in considerable detail why he found CW1's and CW2's renditions of the incidents more credible than Applicant's, as evident in the excerpts above from the Judge's analysis. Presented with conflicting evidence on whether Applicant engaged in nonconsensual acts with CW1 and CW2, the Judge had the opportunity to observe Applicant's demeanor during his testimony, assess the credibility of

Applicant's testimony on the two incidents, and weigh Applicant's denials of wrongdoing in light of the record evidence as a whole. Giving due deference to the Judge's credibility determination, the record evidence provides a legally sufficient basis for the Judge to conclude that CW1's and CW2's statements regarding the incidents were more credible than Applicant's and that Applicant committed the acts against CW1 and CW2 as alleged. *See, e.g.*, ISCR Case No. 02-03248 at 4 (App. Bd. Apr. 27, 2005). 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.

None of Applicant's arguments 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. Applicant has failed to establish that the Judge committed any harmful error or that he should be granted any relief on appeal. A review of the record shows the Judge examined the relevant evidence and articulated a satisfactory explanation for the decision, and the decision is sustainable on the record. "The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). *See also* AG ¶ 2(b): "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

Order

The decision is **AFFIRMED**.

Signed: Moira Modzelewski

Moira Modzelewski
Administrative Judge
Chair, Appeal Board

Signed: Gregg A. Cervi

Gregg A. Cervi
Administrative Judge
Member, Appeal Board

Signed: Allison Marie

Allison Marie
Administrative Judge
Member, Appeal Board