

KEYWORD: Guideline j; Guideline D; Guideline F

DIGEST: Applicant challenges the Judge’s finding that he had assaulted his daughter. Applicant’s plea of guilty and the testimony of the detective are sufficient evidence to support the challenged finding. Adverse decision affirmed.

CASENO: 13-00785.a1

DATE: 04/11/2014

DATE: April 11, 2014

In Re:)	
)	
-----)	ISCR Case No. 13-00785
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Gina L. Marine, Esq., Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On July 23, 2013, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that

decision—security concerns raised under Guideline J (Criminal Conduct), Guideline D (Sexual Behavior), and Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Department Counsel requested a hearing. On December 16, 2013, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Francisco Mendez denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30. Department Counsel cross-appealed pursuant to Directive ¶ E3.1.28.

Applicant raised the following issues on appeal: whether the Judge erred in finding that he had assaulted his daughter and whether the Judge erred in his application of the Guideline F mitigating conditions. Department Counsel raised the following issues on cross-appeal: whether the Judge erred by refusing the Government’s pre-hearing amendment to the SOR and whether the Judge erred by denying a Government motion to keep the record open for the submission of rebuttal evidence. Consistent with the following, we affirm.

The Judge’s Findings of Fact

Applicant served in the U.S. military for ten years. He was charged with sexual harassment by two female subordinates, although he testified that these charge were dropped. He was court-martialed for unauthorized absence, to which he pled guilty. He was sentenced to confinement and to demotion to E-4.

Applicant and his wife were married for nearly 20 years, though they are now separated. He blames his financial problems and his criminal conviction on his wife and their “rocky relationship.” Decision at 3.

He stated that his financial difficulties began in 1994, the year he and his wife married. The couple lived beyond their means and, when they would separate, he would stop paying on his debts. Applicant was discharged in bankruptcy, but, in 2003, he became unemployed for a year. He became fully employed in 2004 but, in 2008, he bought a house for which he was unable to meet the monthly payments. The house is in foreclosure. He stated that he is not able to resolve this debt because his wife is not cooperative. Applicant’s SOR lists 14 debts. He claims to have taken steps to resolve two of them, but the remaining ones total over \$280,000 and are ongoing. He is not willing to address them until the court assigns responsibility. He also claims that his financial problems have been affected by the loss of his security clearance.

In 2011, Applicant was arrested on felony charges related to an alleged sexual assault on his then ten-year-old daughter. His daughter had confided to her siblings that Applicant had committed sodomy on her. The daughter and other children were interviewed separately, the victim by an officer with years of experience investigating this type of crime. The victim stated that, while she slept in her parents’ bed, she awoke to discover her father inserting his finger into her anus over her clothes. The lead detective testified at the hearing, stating that the victim was clear in her description of the events and that the other children were consistent in their recollection of what the victim subsequently told them about the incident.

When interviewed by the police, Applicant initially denied the charges. He later stated that he could have rolled over on top of the victim while he was asleep or that, if he did touch his daughter, it was while he was asleep in a dream-like state. He pled guilty to misdemeanor charges of contributing to the delinquency of a minor and domestic assault and battery. Sentenced to twelve months on each charge, he is currently on probation.

The court stated that Applicant was to have only supervised contact with his children. He claims that a family court granted him unsupervised visits with them and, moreover, that he now has physical custody of them, including the victim. Applicant did not corroborate these assertions.

Applicant denies that he committed any criminal acts and that his wife concocted the charges in order to get custody of the children. He states that he pled guilty only to spare his children the trauma of testifying. Applicant provided a letter from the state's child protective service (CPS) concluding that the charges of child abuse were unfounded. This letter was issued before Applicant's plea of guilty and it is not clear if the CPS had access to all of the evidence. Applicant has received no counseling, due to his claims of factual innocence.

The Judge's Analysis

The Judge concluded that the evidence raised concerns under all Guidelines alleged in the SOR. Regarding Guideline J, the Judge found Applicant's claims of innocence to be lacking credibility. He also found Applicant's testimony that he could have touched his daughter in an inappropriate manner while he was asleep to be incredible. He stated that, considering all of the evidence—the testimony of the lead detective, the victim's immediate reporting of the crime, and the consistency of the details provided by Applicant's family to the police—Applicant did indeed assault his daughter, a serious offense. The Judge also stated that Applicant's conduct raised concerns under Guideline D. Moreover, Applicant's financial problems showed irresponsible behavior that raised questions about his fitness for a clearance.

The Judge concluded that Applicant's lack of remorse undercut his case for mitigation of the Guidelines J and D concerns. He also stated that Applicant had failed to mitigate evidence of his habitual overspending and his failure to address his debts. In the whole-person analysis, the Judge stated that the favorable evidence in the record was not sufficient to overcome the seriousness and recency of Applicant's criminal conduct and his "complete disregard" for his financial obligations. *Id.* at 9.

Discussion

Applicant's Appeal

Applicant contends that the Judge erred in finding that he had assaulted his daughter. We examine a Judge's findings of fact to see if they are supported by "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. Evidence of Applicant's plea of guilty and the

testimony of the detective, *inter alia*, support the challenged finding. Moreover, Applicant's denial of guilt after having pleaded guilty supports the Judge's analysis that he denies responsibility for his conduct. Similarly, the Judge's adverse findings and conclusions under Guideline F are sustainable.

The Judge examined the relevant data and articulated a satisfactory explanation for the decision. The decision is sustainable on this 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* Directive, Enclosure 2 ¶ 2(b): "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security."

Cross-Appeal

Department Counsel contends that the Judge erred in denying a motion to hold the record open for the submission of rebuttal evidence, a police report. In light of our disposition of Applicant's appeal, this issue is moot. *See, e.g.*, ISCR Case No. 03-21190 at 2 (App. Bd. Mar. 12, 2007).

Department Counsel contends that the Judge erred in denying a pre-hearing amendment. Specifically, one week prior to the hearing, Department Counsel sent Applicant an amendment to the SOR, incorporating the existing allegations under Guideline E. Department Counsel argues on cross-appeal that the Judge erred in treating this as a proposal to amend the SOR at the hearing rather than as a pre-hearing amendment already accomplished. To the extent that the Judge erred in his analysis of the amendment, the error was harmless, insofar as his ruling on this issue had no effect on his overall disposition of the case. *See, e.g.*, ISCR Case No. 04-0988 at 2 (App. Bd. Nov. 29, 2006).

Order

The Decision is **AFFIRMED**.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board