KEYWORD: Guideline J; Guideline D; Guideline E

DIGEST: Applicant demonstrates some harmless errors by the Judge but her material findings of security concern are sustainable. The effect of an unfavorable decision on applicant is not relevant to security clearance determination. Adverse decision affirmed.

CASENO: 10-01021.a1

DATE: 11/18 2011

DATE: November 18, 2011

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## APPEAL BOARD DECISION

## APPEARANCES

**FOR GOVERNMENT**
James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**
***Pro se***

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On November 4, 2010, DOHA 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 E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 22, 2011, after the hearing, Administrative Judge Elizabeth M. Matchinski 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's findings of fact were based upon substantial record evidence; whether the Judge erred in her credibility determination; and whether the Judge's adverse security clearance decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm the decision of the Judge.

The Judge made the following pertinent findings of fact: Applicant is director of engineering for a Defense contractor. He has worked for the same employer since the late 1980s. He has prior military experience as an officer.

In April 2009, Applicant met a woman online through a "members only website for those seeking alternative sexual behaviors." Decision at 2. The two agreed to a date at a local restaurant. After dinner, Applicant accompanied the woman to her car, where he assaulted her.

The victim subsequently stated to the police that, in her car, Applicant kissed her forcibly, grabbing her breast and vaginal areas, and grabbing her around the neck to the extent that she had difficulty breathing. She stated that Applicant kept asking if he could go to her home and that he appeared drunk. The victim honked her car horn, whereupon Applicant left.

Applicant was arrested. He admitted to the police that he had kissed the victim "aggressively and had grabbed her breast." *Id*. He denied that he had placed his hands around her neck. Applicant was jailed overnight and released upon $100,000 bail. He was charged with assault with intent to commit rape, indecent assault and battery, on a person age 14 or over, and assault and battery. He pled guilty to assault and battery and the other two charges were subsequently dismissed.

As a consequence of his conviction for assault and battery, Applicant was sentenced to two years probation; required to undergo an alcohol evaluation and any recommended counseling; ordered to stay away from the victim; required to complete an anger management program; and ordered to pay certain fees and assessments.

During his interview with an OPM investigator, Applicant stated that the victim had invited him to her car, where they kissed. She asked him if "he liked it rough," whereupon Applicant told the victim he was going home. He denied that he had grabbed the victim's breast. He stated that he had pled guilty to a misdemeanor to avoid a trial and keep his family and employer out of the news.

In April 2010, Applicant completed a domestic abuse and generalized violence program, pursuant to court order. The counselor reported that Applicant had admitted during counseling that he had grabbed the victim and kissed her roughly. In order to meet the discharge criteria, Applicant was required, *inter alia*, "to report an acceptance of responsibility for the abusive and violent behaviors" and to cease blaming the victim for his own actions. Applicant denied ever admitting to the counselor that he had committed the misconduct for which he was convicted.

The Judge cited Applicant's description of the event in his Answer to the SOR:

> After dinner she invited me to her car where she proceeded to "insist" that I play rough with her at which point I sensed something was not right and left the car and drove home. Both the Assistant District Attorney and the Judge sensed that there was something "missing/wrong" with the plaintiff's claim as no bail was set and both felony charges were dismissed. *Id*. at 4.

The Judge found that Applicant's hearing testimony was similar, in that he denied having done anything wrong and blamed the victim for the situation. "He accepts responsibility only for putting himself in a situation where he should not have been." *Id.* As of the close of the record, Applicant was still on probation.

In the Analysis, the Judge described why she concluded that Applicant's contention that the victim was the aggressor was not credible. She noted that his hearing testimony was not consistent with his statement to the police, nor with the police officer's own observations concerning the demeanor of the victim. The Judge stated that the police description of the victim's hysterical conduct after Applicant left her car buttressed her version of the events and undermined Applicant's.[1] The Judge noted the isolated nature of the misconduct and Applicant's having completed anger management counseling. However, she concluded that his present probationary status and his lack of credibility undercut his efforts to demonstrate reform.

Applicant contends that the Judge erred in some of her findings of fact. He states, correctly, that his bail was set at $10,000 rather than the $100,000 which the Judge found.[2] However, viewed in light of the record as a whole, this error is harmless, in that it did not likely affect the outcome of the case. *See, e.g.*, ISCR Case No. 10-01846 at 3 (App. Bd. Sep. 13, 2011). Applicant contends that the Judge erred in finding that he had been ordered to undergo an alcohol evaluation. However, GE 4, Record of Criminal Case, includes a copy of the probation order signed by the Judge. This order includes "substance abuse evaluation," limited to "alcohol only," as a condition of Applicant's probation. Therefore, the challenged finding is supported by substantial record evidence. Viewed in light of the entirety of the evidence, the Judge's material findings of security concern are sustainable. *See, e.g.*, ISCR Case No. 09-05399 at 3 (App. Bd. Jan. 11, 2011).

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[1]Government Exhibit (GE) 3, Arrest Report, contains a description of the first contact of the police with the victim. "On arrival found [victim] who I observed hysterical, upset, shaking and crying."

[2]GE 3 states that Applicant's bail was set at $10,000.

Applicant contends that the Judge erred in her conclusion that his version of the events in question was not credible. He states that he has been candid and forthright in his discussion of this matter. However, the Judge's analysis of Applicant's credibility, described above, is based upon a reasonable interpretation of the record evidence. *See, e.g.*, ISCR Case No. 09-08023 at 3 (App. Bd. Sep. 6, 2011).

Applicant states that if he loses his security clearance he will lose his job. However, the effect that an unfavorable decision may have on an applicant is not relevant or material to a security clearance determination. *See, e.g.*, ISCR Case No. 10-06672 at 3 (App. Bd. Jul. 8, 2011).

The record supports a conclusion that the Judge examined the relevant data and articulated a satisfactory explanation for the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Judge's adverse 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."

## Order

The Judge's adverse security clearance decision is AFFIRMED.

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

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board