

KEYWORD: Guideline D; Guideline J; Guideline E

DIGEST: Applicant, a married man, engaged in sexual relations with a minor whose parents were his friends. Favorable decision reversed.

CASENO: 12-01698.a1

DATE: 06/13/2014

DATE: June 13, 2014

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In Re:)	
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-----)	ISCR Case No. 12-01698
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Jeff Nagel, Esq., Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On September 19, 2013, 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 February 28, 2014, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Wilford H. Ross granted Applicant's request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Judge erred in his application of the mitigating conditions and whether the Judge's favorable decision is unsupported by the weight of the record evidence. Consistent with the following, we reverse.

The Judge's Findings of Fact

In 2010, Applicant engaged in a single act of consensual intercourse with a young woman (YW) not his wife, believing her to be over 18 years of age. In fact, she was about 17 1/2 years old. His conduct violated a state law prohibiting sexual intercourse with someone under 18 years of age and more than three years younger than the adult involved.

YW notified her parents, who, in turn, called the police. After a pretext phone call, in which Applicant admitted to consensual sex with YW, the police arrested him. Applicant informed his wife of the offense. She notified Applicant's place of employment. Applicant's family friends, and fellow church members are aware of his misconduct with YW. Applicant ultimately pled guilty to simple assault, his sentence consisting of a 90 day suspended term of confinement, 36 months of probation, a fine, and no contact with YW. Applicant remained on probation as of the close of the record.

Applicant is a former military police officer, who is contrite and apologetic about the incident. He testified as to his shame and concern upon being arrested and his fear of losing his family. Applicant and his wife attended counseling, which has helped them get through this crisis.

Applicant was promoted at work, despite his employer's knowledge of the offense. He enjoys an excellent reputation for his duty performance, honesty, and trustworthiness.

The Judge's Analysis

The Judge concluded that Applicant's conduct was mitigated under all three Guidelines. He cited to evidence that the offense in question occurred over three years ago, that Applicant was convicted only of simple assault, and that he has expressed remorse and a credible promise to refrain from such conduct in the future. The Judge stated that Applicant is not subject to coercion because his family, friends, and employer are all aware of the offense. The Judge noted evidence that this incident is isolated. He also stated that Applicant's remaining on probation was not sufficient to outweigh the positive evidence in the record. Regarding Guideline E, the Judge stated that Applicant's conduct reflected poor judgment, but that he had accepted the consequences of his misconduct. The Judge cited to evidence of Applicant's good duty performance.

Discussion

The standard applicable in security clearance decisions “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). “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.” Directive, Enclosure 2 ¶ 2(b). In deciding whether the Judge’s rulings or conclusions are erroneous, the Board will review the Judge’s decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Department Counsel argues that the Judge’s favorable analysis contravened the weight of the record evidence. We find this persuasive, noting the Judge’s findings and record evidence that show the following:

- a. Applicant engaged in sexual relations with the minor daughter of his friends, having invited the daughter to his trailer at a campsite.
- b. Applicant had a history of engaging in playful and/or flirtatious behavior with YW, despite his wife’s warnings about the propriety of such conduct.
- c. At the time of the security-significant conduct, Applicant was a man approaching middle-age, married with several children, which is not totally consistent with his claims of naivete in his interactions with YW.
- d. Throughout his presentation Applicant depicted YW as the aggressor and himself as unaware of her intentions, despite his wife’s warnings, until the day in question, which a reasonable person could find to be self-serving and inconsistent with his claim to have taken responsibility for his actions.¹
- e. Based upon this incident, Applicant was convicted of assault and at the close of the record he remained on probation. As Department Counsel notes, the Judge’s treatment of Applicant’s probationary status is conclusory, unsupported by analysis or by record evidence.

This evidence undercuts the Judge’s favorable decision, in that it highlights aspects of the case that put Applicant’s conduct in a less favorable light than the Judge found. It also emphasizes aspects of the case that could prompt a reasonable person to question the credibility of Applicant’s claims to have demonstrated rehabilitation. Viewed as a whole, the record does not support a conclusion that Applicant has mitigated the Guideline J concerns consistent with the standard set forth in *Egan*.

¹We also note Applicant’s testimony that he had known the family for eight years (Tr. at 55), that YW was a problem child (Tr. at 56), and that YW was a high school dropout (Tr. at 56).

The Judge's favorable findings under this Guideline are not sustainable. *See, e.g.*, ISCR Case No. 07-17559 (App. Bd. Dec. 19, 2008).

Department Counsel argues that the Judge erred in concluding that Directive, Enclosure 2 ¶ 16(e)² was the only disqualifying condition raised by Applicant's conduct. Again, we find this argument persuasive. While an applicant's sexual relations with a friend's minor child may indeed subject an applicant to the possibility of manipulation or duress, that does not exhaust the concerns that might arise under Guideline E. As with the other Guidelines, the disqualifying conditions listed for Guideline E are illustrative only, not exhaustive and exclusive. *See, e.g.*, ISCR Case No. 07-00852 at 4 (App. Bd. May 27, 2008). The Guideline addresses conduct that shows, among other things, a lack of judgment, raising questions about an applicant's reliability, trustworthiness, and ability to protect classified information. Directive, Enclosure 2 ¶ 15. Under the facts of this case, Applicant's having engaged in sexual relations with a minor whose parents were his friends and while he himself was a married man raises a significant question about his judgment, a concern that is not mitigated simply by showing that Applicant is not likely to be blackmailed on account of his misconduct. The Judge's treatment of Guideline E did not fully address the concerns raised by this Guideline and is not sustainable.

The Judge's decision runs contrary to the weight of the record evidence and fails to consider important aspects of the case. The Judge's decision is not sustainable under the *Egan* standard. Given this holding, we need not discuss the Judge's favorable findings under Guideline D.

Order

The Decision is **REVERSED**.

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

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

² “[P]ersonal conduct . . . that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing[.]”

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