

KEYWORD: Guideline D; Guideline J

DIGEST: Department Counsel argues that the Judge failed to consider the fact that Applicant was HIV positive when he committed his sexual offense in 2003. The language employed by the Judge suggests otherwise. Favorable decision affirmed.

CASENO: 04-09618.a1

DATE: 06/26/2007

DATE: June 26, 2007

In Re:)	
)	
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SSN: -----)	ISCR Case No. 04-09618
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Julie R. Edmunds, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 1, 2004, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guideline D (Sexual Behavior) and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended)

(Directive). Applicant requested a hearing. On October 25, 2006, after the hearing, Administrative Judge Marc E. Curry granted Applicant's request for a security clearance. Department Counsel filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raises the following issue on appeal: whether the Judge's decision is arbitrary, capricious, and contrary to law in that he did not consider significant record evidence. Finding no error, we affirm.

The Judge found the following: Applicant, a Naval veteran, is facility security officer for a staffing firm that serves clients with security clearances. Applicant submitted his application for a clearance on September 11, 2003. In October 2003, a police officer observed Applicant engaging in a sexual act with another person in front of a urinal in a department store restroom. The officer arrested Applicant. Applicant was charged with indecent exposure and with an additional offense arising from the sexual act. He served six months of unsupervised probation, after which the indecent exposure charge was *nulle proessed* and the other dismissed.

This was the only time Applicant engaged in such conduct. He underwent counseling, both by himself and with his domestic partner. He has informed both his partner and his employer of the offense.

Department Counsel did not challenge the Judge's findings, adopting them as part of her brief. However, she argued that the Judge erred in not taking into consideration the fact that, at the time of the offense, Applicant was HIV positive. She argued that the risks inherent in Applicant's conduct raise serious doubts as to his judgement, reliability, and trustworthiness.

We have examined the Judge's decision in light of the record as a whole. We do not find Department Counsel's argument persuasive. We note first of all that a Judge is presumed to have considered all evidence in the record. *See, e. g.*, ISCR Case No. 01-03357 at 4 (App. Bd. Dec. 13, 2005). Additionally, we note the following statement from the Conclusions section of the Judge's decision. "In engaging in a sexual act in a public restroom with a stranger, Applicant brazenly disregarded the health risks of such activity, and its potential legal consequences." Decision at 5. Although he did not mention the term "HIV," the Judge did, obviously, give serious consideration to the riskiness of Applicant's conduct and weighed it as part of his whole person analysis. Though Department Counsel may disagree with the Judge's weighing of the evidence, the Board finds no reason to conclude that the Judge's decision is arbitrary, capricious, or contrary to law.

Order

The Judge's decision granting Applicant a clearance is AFFIRMED.

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

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

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