

KEYWORD: Guideline E; Guideline D; Guideline J

DIGEST: The Judge’s overall conclusions were based principally on the facts underlying the charge of statutory rape and on Applicant’s continued registration as a sex offender. Applicant’s arguments are not enough to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. Adverse decision affirmed.

CASENO: 16-01829.a1

DATE: 10/4/2017

DATE: October 4, 2017

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In Re:)	
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-----)	ISCR Case No. 16-01829
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On July 27, 2016, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct), 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 July 26, 2017, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Edward W. Loughran 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

contained errors and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant enlisted in the military at age 18. He married his first wife in 1992, shortly before his 20th birthday. On two occasions in 1992, Applicant and a fifteen-year-old female friend of his wife¹ engaged in sexual acts, including intercourse. Applicant knew the girl's age. Applicant was charged in state court with third-degree rape, *i.e.*, statutory rape. He pled guilty and was sentenced to a fine of \$1,000, costs, restitution of the victim's counseling expenses, 180 days in jail, and four years of probation. The court checked the following block on the order: "Deferred Imposition of Sentence." Applicant was order to be "remanded to the Sheriff to be incarcerated in jail July 12, 1993." Decision at 2.

Applicant served about five months. Due to the misconduct that resulted in the conviction, Applicant was discharged from the military under other than honorable conditions (UOTHC). He moved to his current state of residence after his release from jail and was permitted to serve his probation there. He is required to register as a sex offender.

In 2009, Applicant was arrested and charged with criminal damage and disorderly conduct. He stated that he and his wife were arguing, and he pulled a television set out by the cord, breaking it. He attended anger management classes, and the charges were dismissed as part of a deferred adjudication. The Judge stated that he was considering this incident, which was not alleged in the SOR, on the issues on mitigation and the whole-person analysis.

Applicant contended that his rape conviction was dismissed after his probation as part of a deferred imposition of sentence. The Judge stated that the evidence was not clear as to whether Applicant received a suspended imposition of sentence or whether the sentence was simply deferred until he was remanded to jail. Applicant submitted the court judgment and sentence order but provided no further evidence. He testified that he had a letter from the court stating that his rights were restored because of the deferred imposition, but the letter was lost in a fire.

Applicant believes that he would not have to register as a sex offender if he had remained in his previous domicile. He is working with state agencies to show cause as to why he should not have to register. He has expressed remorse for his crime, and he revealed his sex offender status when volunteering to coach a youth league. His employer and his girlfriend are aware of his status, although his two immediate supervisors are not.

The Judge's Analysis

The Judge noted that Applicant's sex offense occurred 25 years ago. He cited to Applicant's contention that his statutory rape charge was dismissed and that he would not have to register as a

¹ "[Judge]: So your wife was young when you married her? [Applicant]: Yeah . . . she was 17 and I was 19." Tr. at 17.

sex offender in the state where the crime occurred. He noted some evidence that is consistent with this, the FBI record that makes no reference to the charge or conviction. Government Exhibit 3, FBI Identification Record. However, the Judge observed that there are no actual court records to establish Applicant's claims on this matter. Given that Applicant is still required to register as a sex offender, his misconduct continues to cast doubt upon his current reliability, trustworthiness, and good judgment.

Discussion

Applicant contends that the Judge's findings of fact contain errors. He states that the television was not broken during the 2009 altercation. Rather, a short cable came out and was re-attached. He argues that the record evidence clearly establishes that his rape conviction was dismissed. He argues that the evidence shows that his record was expunged, so that it is as if he had committed no crime.

We have considered this assignment of error in light of the record as a whole. The Judge's findings about the 2009 incident are consistent with Applicant's clearance interview, in which he advised that, in anger, he had pulled a TV off a cabinet shelf during an argument with his wife and damaged the cable connector. The Judge's findings that it was unclear whether his conviction had been dismissed and whether his sentence had been deferred or suspended are reasonable inferences from the record. Even if the Judge erred, especially regarding Applicant's claim that his conviction was expunged, it did not likely affect the overall outcome of the case. The Judge's overall conclusions were based principally on the facts underlying the charge of statutory rape and on Applicant's continued registration as a sex offender. *See, e.g.*, ISCR Case No. 10-05039 at 3 (App. Bd. Oct. 17, 2011) (The fact that criminal charges were dropped, dismissed, or resulted in an acquittal does not preclude a Judge from finding that an applicant engaged in the conduct underlying those criminal charges.) The Judge's material findings are based upon "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. Applicant has cited to no harmful error in the Judge's findings.

Applicant cites to the age of his sex offense, arguing that he has changed over the course of his life and that anyone who could exert some kind of influence on his life is aware of his misconduct, thereby diminishing the chance that he could be blackmailed or coerced. He notes that he has worked at his job for over two years without compromising any protected information.

In his findings and analysis, the Judge noted the age of Applicant's misconduct. However, he also cited to Applicant's continued registration as a sex offender in concluding that Applicant had not completely mitigated the concerns raised in the SOR. When these matters are read in conjunction with the sustainable findings about the 2009 offense and about Applicant's UOTHC discharge from the military, they support his adverse decision. Applicant's arguments are not enough to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 15-08711 at 3 (App. Bd. Aug. 24, 2017).

The Judge examined the relevant evidence 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, Encl. 2, App. A ¶ 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: Michael Ra’anan

Michael Ra’anan
Administrative Judge
Chairperson, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy

James F. Duffy
Administrative Judge
Member, Appeal Board