

KEYWORD: Guideline J; Guideline D

DIGEST: The Judge granted a Government motion to preclude re-litigating Applicant’s general court-martial conviction under the doctrine of collateral estoppel. We find no error in the Judge’s treatment of this motion. Adverse decision affirmed.

CASE NO: 16-02884.a1

DATE: 01/26/2018

DATE: January 26, 2018

In Re: ----- Applicant for Security Clearance)))))))	ISCR Case No. 16-02884
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 3, 2016, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct) and Guideline D (Sexual Behavior) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On October 19, 2017, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert E. Coacher 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 erred in his mitigation

analysis and whether the Judge's whole-person analysis was erroneous. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant served on active duty with the U.S. military from 1996 until 2014. He has worked for a Defense contractor since 2015. While in the military, Applicant, an O-5 at the time, was charged with rape of an enlisted subordinate based upon events that occurred in 2005. Applicant was tried by a general court-martial in 2014 and, despite his plea of not guilty, was convicted of rape. The sentence consisted of a dismissal from the service, five months confinement, and a reprimand. Applicant's conviction and sentence were upheld by military appellate authorities.

At his DOHA hearing, Applicant admitted that he had had sexual intercourse with the victim, thereby committing adultery (Applicant was married at the time of the offense) and fraternization. A clinical psychologist submitted a report stating that Applicant had an "excellent prognosis for avoiding further sexual offenses." Decision at 3.

Applicant enjoys an excellent reputation for his leadership and for his professional skill while in the military. His character references recommend that he receive a clearance. Two of the references aver that Applicant's offense was a one-time mistake.

The Judge's Analysis

In his mitigation analysis, the Judge relied on Applicant's continued denial of having committed rape, insofar as he contended that the sexual act between himself and his subordinate was with her consent. The Judge noted Applicant's claims to have been rehabilitated, but he concluded that Applicant had not accepted responsibility for his offense. He stated that Applicant had made some strides toward rehabilitating himself but that the criminal conduct at issue casts doubt upon his current reliability, trustworthiness, and good judgment. He also noted that there is no evidence that Applicant had completed a treatment plan during or after his confinement or that he is currently enrolled in such a program.

In the whole-person analysis, the Judge cited to Applicant's character references, his psychological evaluation, and his personal circumstances. Given Applicant's conviction for rape, however, the Judge concluded that Applicant had failed to provide sufficient evidence of rehabilitation.

Discussion

Some of Applicant's assertions constitute new evidence, which we cannot consider. Directive ¶ E3.1.29. Applicant challenges the Judge's mitigation analysis. Specifically, he denies that he committed rape, contending that the sexual intercourse in question was with his subordinate's consent. He states that there is nothing further that he can do to show that he has been rehabilitated and, among other things, cites to the report by his psychologist. He also contends that there were no opportunities for counseling while he was in confinement for someone such as himself whose

sentence did not include a requirement for counseling.

We have considered Applicant's arguments in light of the record as a whole. The Judge granted a Government motion to preclude re-litigating Applicant's general court-martial conviction under the doctrine of collateral estoppel. Decision at 2; Tr. at 22-23. We find no error in the Judge's treatment of this motion.¹ Even without reference to collateral estoppel, the record contains substantial evidence of Applicant's guilt of the charged offense. That evidence includes the factual sufficiency analysis contained in the decision by the military court of criminal appeals, which includes a detailed transcription of a pretext phone call between Applicant and the victim,² and Applicant's various statements in his clearance interview and SOR Response that admit many of the significant facts and circumstances underlying the offense. We see no reason to disturb the Judge's conclusion that Applicant's denials of judicially established guilt impair his effort to show rehabilitation.

Applicant's challenge to the Judge's whole-person analysis cites to his favorable evidence, including his military record, his letters of recommendation, the psychological report, etc. He argues that the acts underlying the conviction were based upon the events of a single evening and that his conduct since the incident shows him to be a person who can safeguard classified information. Applicant's argument constitutes a challenge to the Judge's weighing the evidence. However, an ability to argue for a different interpretation of the evidence is not enough to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, 15-07062 at 2 (App. Bd. Nov. 21, 2017). Applicant has not rebutted the presumption that the Judge considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 16-03219 at 2 (App. Bd. Nov. 15, 2017). We conclude that the Judge's whole person analysis complies with the requirements of Directive ¶ 6.3, in that the Judge considered the totality of the evidence in reaching his decision. *See, e.g.*, ISCR Case No. 14-06653 at 3 (App. Bd. Nov. 18, 2016).

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."

¹To the extent that Applicant's argument presupposes a challenge to this ruling, we conclude that the Judge satisfied the requirements for collateral estoppel. *See, e.g.*, ISCR Case No. 11-09245 at 3 (App. Bd. Jul. 8, 2014) (Applicant had an opportunity to litigate the earlier case and, in fact, did litigate the question of his guilt; the issues in the DOHA hearing are the same as those in the court-martial; and the application of the doctrine does not result in unfairness). On the question of unfairness, the Judge permitted Applicant to introduce evidence of his good character while in the military and afterward. Tr. at 22. He did not permit Applicant to attack the veracity of the victim, as that was already fully litigated at the court-martial. Tr. at 23.

²Applicant acknowledged the crime and the context in which it occurred. He expressed remorse for committing the crime. Pretext Phone Call, cited in Appellate Decision and included in HE I. (emphasis added)

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