

KEYWORD: Guideline E; Guideline D; Guideline J

DIGEST: The fact that criminal charges were dropped or dismissed does not preclude a judge from finding that an applicant engaged in the conduct underlying the criminal charges. The Board is required to give deference to a judge's credibility determinations.

CASENO: 05-14114.a1

DATE: 08/09/2007

DATE: August 9, 2007

In Re:)	
)	
-----)	ISCR Case No. 05-14114
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Chuck R. Pardue, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 30, 2006, DOHA 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 January 30, 2007, after the hearing, Administrative Judge LeRoy F. Foreman denied Applicant’s request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.¹

Applicant raised the following issues on appeal: (a) whether the Administrative Judge erred in finding that Applicant had repeatedly exposed himself and committed certain indecent acts in front of children in November 2000; (b) whether the Administrative Judge’s unfavorable security clearance determination is arbitrary, capricious, or contrary to law when the only evidence against Applicant is untried allegations that he had engaged in the sexual misconduct described above, coupled with Applicant’s 2001 decision to accept discharge from the Air Force under other than honorable conditions rather than face court-martial on those allegations; and (c) whether the Administrative Judge’s unfavorable security clearance determination is arbitrary, capricious or contrary to law, considering Applicant’s exemplary work history.

The Board’s review of a Judge’s findings is limited to determining if they are supported by substantial evidence—such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all contrary evidence in the record. Directive ¶ E3.1.31.1. “This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 620 (1966). In evaluating the Judge’s findings, we are required to give deference to the Judge’s credibility determinations. Directive ¶ E3.1.32.1. The Board does not review a case *de novo*.

The record evidence available to the Judge included the Air Force Office of Special Investigations’ police report implicating Applicant (Government Exhibit 3)² and Applicant’s own testimony that he accepted the Air Force’s offer of discharge knowing the nature of the charges against him, his right to contest his guilt at trial, and knowing what discharge under other than honorable conditions meant.³ The Judge also had the opportunity to observe Applicant’s demeanor during the hearing. Considering the record as a whole, the Judge’s findings that Applicant had engaged in the sexual misconduct and that his claims of innocence were not credible, are sustainable.

A Judge is required to “examine the relevant data and articulate a satisfactory explanation for” the decision “including a ‘rational connection between the facts found and the choices 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 general standard is that a clearance may be granted only when ‘clearly consistent with the interests of national security.’” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The Appeal

¹The Administrative Judge’s formal findings in favor of Applicant involving other alleged conduct under SOR paragraphs 1.c, 1.d, 3.b, and 3.c are not in issue in this appeal.

²Applicant did not object to the admission of this document into evidence. Rather, he only argued that it should be given little weight. Tr. at 16.

³Tr. at 31-33.

Board may reverse a Judge's decision to grant, deny or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶¶ E3.1.32.3 and E3.1.33.3.

There is a presumption against granting a clearance. *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish any appropriate mitigating conditions. Directive ¶ E3.1.15. "The application of disqualifying and mitigating conditions and whole person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole." *See* ISCR Case No. 05-03635 at 3 (App. Bd. Dec. 20, 2006).

On appeal, Applicant contends that the absence of any other prior or repeat incidents of sexual misconduct supports the finding that the sexual misconduct alleged in the SOR never happened. At his hearing, Applicant had argued that the Air Force's offer not to take his case to trial if he agreed to accept a discharge in lieu of court-martial, was an admission by the Air Force that it could not make its case against Applicant.⁴ Applicant also draws the Board's attention to his exemplary work record and the six years that have passed since the incident.

An applicant's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. The fact that criminal charges were dropped or dismissed does not preclude a Judge from finding that an applicant engaged in the conduct underlying the criminal charges. *See* ISCR Case No. 03-11906 at 3 (App. Bd. Jul. 19, 2005); ISCR Case No. 02-10168 at 3 (App. Bd. Aug. 1, 2003).

Security clearance decisions are not limited to considering an applicant's job performance or conduct during duty hours, but rather can be based on consideration of an applicant's conduct separate from the work place. An applicant with good or exemplary job performance may engage in conduct that has negative security implications. *See* ISCR Case No. 01-25466 at 3-4 (App. Bd. Jul. 22, 2004). The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snepp v. United States*, 444 U.S. 507, 511 n. 6 (1980). In assessing an applicant's security eligibility, the federal government can take into account whether an applicant's conduct or circumstances raise questions about the applicant's judgment, reliability, or trustworthiness. *See* ISCR Case No. 01-25466 at 4 (App. Bd. Jul. 22, 2004). Considering the security concern surrounding Applicant's sexual misconduct, the Directive's whole-person factors,⁵ and the "clearly consistent with the interests of national security" standard,⁶ it was not arbitrary, capricious or contrary to law for the Judge to deny Applicant a security clearance.

⁴Tr. at 81.

⁵Directive ¶ E2.2.

⁶Directive ¶¶ E2.2.2 and E2.2.3.

Order

The decision of the Judge denying Applicant a clearance is AFFIRMED.

Signed: Michael D. Hipple
Michael D. Hipple
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