

KEYWORD: Guideline E

DIGEST: Applicant molested his stepdaughter in 2004. In 2006 his wife revealed the crime to a clergyman, who gave Applicant an opportunity to report the crime himself. Ultimately the clergyman reported. The crime. Applicant is still on probation and his therapist testified that it is premature to terminate Applicant's counseling. A prosecutor's decision to accept a plea agreement does not necessarily suggest that the offense is minor. Favorable decision reversed.

CASENO: 07-17559.a1

DATE: 12/19/2008

DATE: December 19, 2008

In Re:)
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 -----) ISCR Case No. 07-17559
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 Applicant for Security Clearance)
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

John Bayard Glendon, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 9, 2008, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct), 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 September 25, 2008, after the hearing, Administrative Judge John Grattan Metz, Jr., granted Applicant’s request for a security clearance. Department Counsel filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30. Applicant filed a Cross-Appeal pursuant to Directive ¶ E3.1.28.

Department Counsel raised the following issues on appeal: whether the Judge’s favorable decision under the Guidelines E, J, and D mitigating conditions is arbitrary, capricious, and contrary to law. Finding error, we reverse.

Whether the Record Supports the Judge’s Factual Findings

A. Facts

The Judge made the following pertinent findings of fact: Applicant is a fifty-year-old logistics manager for a defense contractor. He has held a security clearance since 1982. He served twenty years in the U.S. military, retiring in 1998.

In 2007, he pled guilty to second degree assault in connection with molesting his then fourteen-year-old stepdaughter. The assault occurred in January 2004. The victim immediately revealed Applicant’s misconduct to her mother, Applicant’s wife. The wife urged Applicant not to turn himself in, due to the financial consequences to the family. However, in 2006, they separated, though they have not divorced. During a counseling session with a clergyman, Applicant’s wife revealed the molestation. Required by law to report the abuse, the clergyman gave Applicant and his wife a brief opportunity to make the report themselves. However, the clergyman ultimately reported the molestation. During the pre-trial investigation, Applicant was examined by a medical expert qualified to perform psychological testing. This person concluded that Applicant did not meet the profile of a pedophile, that the offense was a one-time incident, and that he had an “extremely low risk” for recidivism. Decision at 3. At the close of the record, Applicant was on probation and was continuing in counseling.

Department Counsel has not challenged the Judge’s findings. However, Department Counsel’s brief argues that the Judge did not consider or extend appropriate weight to contrary record evidence. The Board will consider this argument below.

B. Discussion

The Appeal Board’s review of the Judge’s findings of facts is limited to determining if they are supported by substantial evidence—“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. “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.

Whether the Record Supports the Judge’s Ultimate Conclusions

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 choice 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 the national security.’” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The Appeal Board may reverse the 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.

Once a concern arises regarding an Applicant’s security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. *See* 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, e.g.*, ISCR Case No. 05-03635 at 3 (App. Bd. Dec. 20, 2006).

In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, 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. In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Concerning Guideline J, the Judge concluded that Applicant's behavior raised a security concern under Criminal Conduct Disqualifying Condition (CCDC) 31(a): "a single serious crime or multiple lesser offenses[.]"¹ This conclusion is sustainable. However, Department Counsel argues that the Judge erred in not applying CCDC 31(d): "the individual is currently on parole or probation[.]"² Department Counsel's argument is persuasive. Under the facts of this case, Applicant's probation, imposed as a consequence of his plea of guilty, is sufficient to raise this disqualifying condition, and the Judge erred in failing to address it.

The principle issue is whether the record will sustain the Judge's conclusion that Applicant had met his burden of persuasion as to mitigation. Department Counsel argues that it will not. The Board notes the nature and circumstances of the offense, plus the following evidentiary matters, drawn from the record and from the Judge's decision: (1) that nearly two years elapsed between the offense and its discovery; (2) that Applicant did not report the offense himself, despite having been given an opportunity to do so; (3) that at the close of the record Applicant had been on probation for less than two years; (4) that Applicant's therapist testified that it was premature to terminate Applicant's counseling;³ and (5) that Applicant's various official statements concerning the incident are not consistent with one another. The Board further notes the Judge's statement that the judicial system treated Applicant's offense "as a relatively minor incident." Decision at 4. The facts underlying the conviction, of course, speak for themselves. However, a prosecutor's decision to accept a plea agreement does not necessarily suggest that an offense is minor, particularly in cases such as this one, where a child victim would have to testify against her stepfather.

Viewed in light of the *Egan* standard, the record will not support a conclusion that Applicant has demonstrated rehabilitation or that the offense and his subsequent behavior do not "cast doubt upon" his "reliability, trustworthiness, or good judgement," especially regarding security concerns arising from Applicant's probationary status. The Judge's favorable security clearance decision under Guideline J is not sustainable. In light of this holding, the Board need not address the issues raised by Department Counsel under Guidelines E and D. Applicant's cross-appeal contains no assertion of harmful error by the Judge. The Board's authority is limited to cases in which an appealing party has alleged that the Judge committed harmful error. The Board does not review a case *de novo*. See, e.g., ISCR Case No. 08-05372 at 2 (App. Bd. Nov. 26, 2008).

¹Directive ¶ E2.31(a).

²Directive ¶ E2.31(d).

³Tr. at 47. "Q: It's your understanding that a condition of his probation . . . is that he receive therapy? A: Yes. Q: Upon the completion of his probationary period . . . do you expect to terminate the therapy? A: That would be something I couldn't say for now . . . Q: Have you considered terminating the therapy at this time? A: No, I have not considered terminating therapy as of yet." This witness testified that, under pressure, Applicant occasionally becomes "inappropriately emotional." The witness stated that Applicant "frequently places himself in situations and conditions where ["anxiety and depression"] become center stage." Tr. at 49-50.

Order

The Judge's favorable security clearance decision is REVERSED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan
Administrative Judge
Chairman, 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