KEYWORD: Guideline J; Guideline E

DIGEST: The fact that charges were dropped, dismissed or resulted in acquittal does not preclude an Administrative Judge from fining an applicant engaged in the underlying criminal conduct. Adverse decision affirmed.

CASENO: 08-02299.a1

DATE: 11/12/2010

DATE: November 12, 2010

In Re:	)	
------	)	ISCR Case No. 08-02299
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James F. Duffy, Esq., Department Counsel

FOR APPLICANT
John B. Wells, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On November 20, 2008, DOHA issued a statement of reasons (SOR) advising Applicant

of the basis for that decision–security concerns raised under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On August 18, 2010, after considering the record, Administrative Judge Mark Harvey denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30. Department Counsel cross-appealed pursuant to Directive ¶ E3.1.28.

Applicant raised the following issues on appeal: whether the Judge's essential findings of fact were supported by substantial record evidence; whether the Judge failed to consider significant record evidence; whether the Government failed to meet its burden of production; whether the Judge was biased against Applicant; whether the Judge failed properly to apply the whole-person factors; and whether the Judge's adverse security clearance decision was arbitrary, capricious, or contrary to law. Department Counsel raised the following issue on cross-appeal: whether the Judge's favorable decision under Guideline E was arbitrary, capricious, or contrary to law. Consistent with the following discussion, we affirm the decision of the Judge.

Facts

The Judge found that Applicant is an employee of a Defense contractor. He has a Masters degree in public administration. He served on active duty from 1983 to 2003. He is married, with two children from a previous marriage.

This case arose from allegations of sexual misconduct against Applicant and two fellow officers in the U.S. military. The allegations resulted in a general court-martial,[1] which will be discussed below. The Judge's findings consist in large measure of summaries of trial testimony and of other evidence, including the versions of events provided by Applicant, his two co-accuseds, and the victim (V). In the Analysis portion of the decision, the Judge explained why he found V's version to be credible and why he found the versions provided by the three accuseds to be lacking credibility in significant ways.

Applicant and his two friends, B and C, were, as stated above, military officers. V was a female enlisted member of the same branch of service. She met B in 2000. Knowing him to be an officer, she nevertheless engaged in sexual activity with him during the summer months. She subsequently met Applicant and C at a party in January 2001. She and Applicant danced together, and she told Applicant she was enlisted. Applicant gave her his business card. She danced with C at the same party. Applicant told V about an upcoming party at an on-base club, in honor of Applicant's transfer to another assignment.

V attended the party. She danced with C, and at some point, observed C speaking with Applicant and B. V did not consume any alcohol at the party. C invited V to come to his residence, telling her that other partygoers were to arrive soon after. V agreed, and she and C left the party at about 10:30 p.m. The drive to C's residence took about 25 minutes.

[1]*See* 10 U.S.C. § 818 for the jurisdiction of a general court-martial.

C and V were the first to arrive at his residence. They engaged in consensual sexual activity. They went to C's bedroom, where the sexual activity continued. V heard the front door open, and she requested C to close the bedroom door. C partially closed the door. V saw Applicant and B watching through the partially closed bedroom door. She asked to leave, but Applicant and B entered the bedroom. B was totally naked, and Applicant had on nothing but a tank top. The three officers engaged in sexual activity with V. B and C held V's legs, while Applicant engaged in sexual intercourse with her. After Applicant left the room, B and C forced V to perform oral sex upon C.

V did not fight back or scream. She did not incur any physical injuries. After these events, C took V home, stopping on the way at a take-out restaurant. While C was in the restaurant, V called a male friend and left a message that "some sh-t" had happened. When she got back to her room, she did not take a shower. The next morning, V told her supervisors about the incidents of the previous night. She was subsequently examined at a rape crisis center, and she provided a statement to law enforcement personnel.

As a consequence of V's complaint, the military service conducted a criminal investigation. Pursuant to the investigation, V made a pretextual telephone call to C, which was recorded by the investigators. Telephone records demonstrate that, after this phone call, Applicant, B, and C conducted several conversations among themselves, some as long as nearly 30 minutes. Applicant and his companions later made statements to investigators describing their version of the events in question.

The three were subsequently brought to a joint trial by general court-martial. The charged offenses included rape,[2] forced sodomy,[3] conduct unbecoming an officer[4] by engaging in wrongful and dishonorable sexual activity with an enlisted person in the presence of others, false official statement,[5] conspiracy[6] to commit certain sexual offenses against V, and conspiracy to make a false official statement, all offenses under the Uniform Code of Military Justice (UCMJ). The military judge found Applicant and his co-accuseds guilty of conduct unbecoming an officer, conspiracy to make a false official statement, and false official statement. He found them not guilty of the remaining charges. He sentenced the three each to forfeit $500 pay per month for two months and to be reprimanded. In performing his review under Article 69, UCMJ, the Judge Advocate General

[2]10 U.S.C. § 920.

[3]10 U.S.C. § 925.

[4]10 U.S.C. § 933.

[5]10 U.S.C. § 907.

[6]10 U.S.C. § 881.

(TJAG) set aside the finding of guilt as to conspiracy, affirmed the remaining findings of guilt, and approved the sentences.[7]

The Government's case at trial against Applicant and his companions included DNA evidence. This evidence identified Applicant's and V's DNA on one of three condoms discovered in C's trash can, corroborating V's claim that Applicant had sex with her. This evidence was provided through the testimony of a scientist from a criminal investigation laboratory. After trial, it was discovered that this same scientist had come under investigation for permitting contamination during his testing procedures and for falsifying DNA entries. These infractions were not connected with the forensic testing done in Applicant's case. However, subsequent DNA testing by other scientists excluded the three accuseds from two of the condoms and concluded that the results from the third were inconclusive. In light of this newly discovered evidence, TJAG set aside the remaining findings of guilt, authorizing another trial.

Discussion

Factual Sufficiency: Applicant claims that the Judge's findings in support of V's version of the offenses are not based upon substantial record evidence. Applicant contends that the evidence unequivocally demonstrates that, during the criminal investigation and subsequent court-martial, V provided false evidence against Applicant and his companions. Applicant contends that it was error for the Judge to have accepted V's credibility in the course of formulating his findings.

We review the Judge's findings of facts to determine 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 defer to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

Throughout his brief, Applicant points to his acquittal as a reason to discount V's version of the events. However, "the fact that criminal charges were dropped, dismissed, or resulted in an acquittal does not preclude an Administrative Judge from finding an applicant engaged in the conduct underlying those criminal charges." ISCR Case No. 99-0119 at 2 (App. Bd. Sep. 13, 1999).

In the Analysis portion of the decision, the Judge explained why he concluded that V was credible. He stated that the record did not provide a plausible reason for her to have falsely accused Applicant and his companions, and he addressed aspects of Applicant's statement to investigators that

[7]Cases in which a sentence extends to death, dismissal of an officer, dishonorable discharge or bad conduct discharge, or confinement for one year or more are reviewed for legal and factual sufficiency by a service court of appeals. 10 U.S.C. § 866. Cases in which the sentence is less than that statutory minimum are reviewed by the service's TJAG. 10 U.S.C. § 869.

he found were not plausible. For example, Applicant had stated to investigators that he and B went to C's house on the evening in question in order to check up on C's well-being after he had left the party without their knowledge. The Judge concluded that, under the circumstances, it was not believable that they would have driven for nearly a half hour in order to see if C were alright rather than simply to have called him on the phone. It was more logical, the Judge concluded, that Applicant and B went to C's house because they expected to have sexual relations with V.

We have considered the Judge's decision in light of the record as a whole. The File of Relevant Material (FORM) consists in large measure of the voluminous record of trial generated by the court-martial. We have paid particular attention to the summaries of V's testimony[8] and to her other statements, as well as to the statements of Applicant and his co-accuseds. V made several inconsistent statements, highlighted at trial. Furthermore, the record contains evidence that V did not enjoy a good reputation for truthfulness. However, we find no reason to disturb the Judge's conclusion that V had no obvious motive falsely to implicate three men in criminal conduct. The reasons advanced by Applicant, and summarized by the Judge in Footnote 11 of the Decision, are speculative and do not undermine the Judge's conclusion about credibility.[9] Furthermore, the Judge's findings about the extensive telephone conversations following the pretextual telephone call support his conclusion that Applicant and his companions conspired among themselves to make false statements about V's claims.

We also note Department Counsel's discussion in the FORM and in his reply brief, in which he describes the extent to which V's version of the events in question is corroborated by other record evidence. For example, the statements of the three officers are generally consistent with that of V as to the circumstances leading up to Applicant's and B's appearance at C's house. Indeed, Applicant and his fellow officers, through their own words, place themselves at the scene of the offenses. C's own acknowledgment that he engaged in sexual activity with V at his house is consistent with a view that Applicant and B went there for a similar purpose.[10] Viewed in light of the record as a whole, the

[8]Verbatim transcriptions of court-martial proceedings are not required in cases in which the sentence does not include death, a dismissal of a commissioned officer, a punitive discharge, or any other punishment exceeding the jurisdictional limits of a special court-martial. 10 U.S.C. § 854(c)(1). For the jurisdictional limits of a special court-martial, see 10 U.S.C. § 819.

[9]Applicant argued that V may have falsely accused the three officers because she was upset at having been discovered by B, to whom she was attracted, in C's residence; that she wanted to take down three officers in a "trifecta;" that she may have been concerned about being charged with fraternization and sought to shift the blame to others; and that she wanted to strike back at B because "she felt spurned."

[10]We also note the Judge's finding concerning C's statement to the criminal investigator. Decision at 5. This statement is described in the trial testimony of the investigator. C stated to the investigator that, when Applicant and B knocked on his bedroom door, V "became very upset, flustered, and that he thought she felt as though she was being set up or something." Item 8, Record of Trial, at 138. Compare with V's summarized testimony concerning events arising from the arrival of Applicant and B at C's bedroom: "When [Applicant] and [B] came into the room, I told them I was ready to go home and to take me home, that I didn't want to do this . . . I was trying to get up because I didn't want to be there." *Id.* at 190. C's description of V's reaction to Applicant and B corroborates her testimony on the subject. C's statement is somewhat inconsistent with the statements Applicant and B provided during the investigation, in that neither of them refer to V or to the agitation both she and C describe.

Judge's material findings are based on substantial evidence, or constitute reasonable characterizations or inferences that could be drawn from the record, and are sustainable. *See, e.g.*, ISCR Case No. 08-11735 at 2-3 (App. Bd. Sep. 2, 2010).

Applicant requests that we defer not to the credibility determinations of the Judge but rather to that of the Investigating Officer (IO) in the Article 32 investigation,[11] who had found V not to be a credible witness, and to defer as well to certain comments during trial by the military judge.[12] However, those officials were examining the case in a criminal law context, with its different standards of proof and evidence. Furthermore, Applicant decided to have his DOHA case decided on the written record. As a result, the Judge did not have an opportunity to question Applicant and observe his demeanor. Although we have considered the IO's opinions, along with all the other evidence, we do not find in them a reason to reverse the Judge's analysis and conclusions.

Other Issues: Applicant contends that the Judge ignored record evidence of an exculpatory nature. However, a Judge is presumed to have considered all of the record evidence. *See, e.g.*, ISCR Case No. 09-01735 at 2 (App. Bd. Aug. 31, 2010). In the case under consideration here, the Judge made extensive findings, which included descriptions of the statements by the accuseds, a discussion of the problems with the DNA evidence, Applicant's evidence of good character, and other matters favorable to Applicant. As explained above, the record as a whole supports the Judge's findings of fact. It provides no reason to believe that the Judge ignored record evidence. Neither does it provide a reason to believe that the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-21819 at 2 (App. Bd. Aug. 13, 2009).

In his brief, Applicant states that the Judge's "opinion was not reasoned. It was based solely on a belief that [Applicant] was guilty, despite the overwhelming weight of evidence to the contrary." To the extent that this raises an issue that the Judge prejudged the case and, therefore, evidenced bias, we note that there is a rebuttable presumption that a Judge is impartial and unbiased. A party seeking to overcome that presumption has a heavy burden of persuasion. *See, e.g.*, ISCR Case No. 08-01306 at 4 (App. Bd. Oct. 28, 2009). Other than his disagreement with the Judge's weighing of the record

[11]Prior to referral to a general court-martial, charges against an accused must be investigated regarding the truth of the matters underlying the charges and the form of the charges. The investigating officer is required to make a recommendation as to the appropriate disposition of the case. 10 U.S.C. § 832.

[12]The IO had concluded, among other things, that V's actions during and following the alleged incident were not consistent with her claim to have been subjected to rape and forcible sodomy. He stated that she showed no resistance during the offense, did not scream or yell, or try to escape. He also noted that, when C took her to the restaurant after the events in question, she "acted wholly inconsistent with the way a reasonable person would react if she had been assaulted." Item 7, Remarks Attached to IO Report, at 6-8. On the other hand, a forensic psychiatrist, who testified at trial as a prosecution witness, stated that V's conduct during and following the incident is not unusual among victims of sexual assault. Item 8, Record of Trial, at 212. The military judge had commented on V's demeanor during testifying and that her sometimes cursory answers, such as "I don't know," were not helpful. *Id*. at 203.

evidence, Applicant points to nothing in support of his argument on this issue. Applicant's brief is not sufficient to rebut the presumption that the Judge was unbiased.

Applicant suggests that the offenses, even if they occurred, were not serious enough to constitute Guideline J disqualifying conditions. He states that, "[w]hile even a one-time instance of consensual drunken debauchery, had it occurred, needs to be discouraged and punished, it does not rise to the level of seriousness that requires the loss of clearance eligibility." Applicant Brief at 29. However, the Judge's findings and analysis established substantial evidence of conduct unbecoming an officer, indecent acts with another,[13] conspiracy to make false statements, and the making of false statements. *See* Decision at 12. The Judge concluded that the Government had met its burden of production as to two disqualifying conditions under Guideline J: 31(a)[14] (a single serious crime or multiple lesser offenses) and 31(c)[15] (allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted). This conclusion is sustainable.

Applicant contends that the Judge erred in his analysis of the mitigating conditions and the whole-person factors. He notes, for example, that the offenses, even if they occurred, were nearly ten years old at the time of the Decision and, when viewed in light of Applicant's excellent traits of character, demonstrate rehabilitation. He argues that Applicant had succeeded in demonstrating his innocence but that, if the offenses occurred, Applicant's drunken condition would have rendered him susceptible to peer pressure.[16] The Judge acknowledged the age of the offenses. However, the overall tenor of Applicant's response to the FORM and subsequent appeal brief was that he did not commit the offenses. Having reasonably found that he did, however, the Judge did not err in concluding that Applicant's continued denial of responsibility significantly undercuts his efforts to demonstrate mitigation. Moreover, the Judge's whole person analysis complies with the requirements of Directive, Enclosure 2 ¶ 2 (a), in that he considered the totality of Applicant's conduct in reaching his decision. *See* ISCR Case No. 09-01793 at 5 (App. Bd. Sep. 28, 2010).

The record supports a conclusion that the Judge examined the relevant data and articulated 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 Judge's adverse 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).

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[13]At the time of Applicant's misconduct, "indecent acts with another" was an offense punishable under 10 U.S.C. § 934. Although Applicant was not convicted of this offense, the Judge concluded that it was raised by the record evidence.

[14]Directive, Enclosure 2 ¶ 31(a).

[15]Directive, Enclosure 2 ¶ 31(c).

[16]*See* Directive, Enclosure 2 ¶¶ 32(a), (b), (c), and (d).

Department Counsel on cross-appeal requests that, should we reverse the Judge's adverse finding under Guideline J, we reverse his favorable finding under Guideline E. In light of our resolution of Applicant's appeal, we need not address this issue.

Order

The Judge's adverse security clearance decision is AFFIRMED.

Signed: Michael D. Hipple
Michael D. Hipple
Administrative Judge
Member, Appeal Board

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

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