

KEYWORD: Guideline D; Guideline E; Guideline J

DIGEST: Applicant took his girlfriend's 15 year old daughter out shopping. He put his hand on her breast asked if she wanted to drive. He later denied the incident to police. Adverse decision affirmed.

CASENO: 08-08761.a1

DATE: 08/19/2010

DATE: August 19, 2010

In Re:	)	
	)	
-----	)	ISCR Case No. 08-08761
	)	
Applicant for Security Clearance	)	
	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

Stephen M. Weiss, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 19, 2009, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct), Guideline D

(Sexual Behavior), and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On May 24, 2010, after the hearing, Administrative Judge Marc E. Curry 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 application of the Guideline E mitigating conditions and whether the Judge's whole-person analysis was erroneous.<sup>1</sup> Consistent with the following discussion, we affirm the Judge's decision.

The Judge made the following pertinent findings of fact: Applicant is a 66-year-old engineer for a Defense contractor. He served in the U.S. Navy from 1961 to 1964 and has held a security clearance since 1983.

From 2003 to 2007, Applicant dated a woman (W) who had a teenage daughter (D). From 2005 to 2006, W and D lived with Applicant. One evening Applicant and D drove to a nearby store. After shopping, D told Applicant that she wanted to drive the car. She was 15 years old at the time. Applicant told her no, but they continued to argue as Applicant drove them home. Eventually Applicant pulled the car over to the side of the street and stopped it. He put his hand on D's breast and asked her if she wanted to drive. D backed away from Applicant, who then apologized.

Two days later, D reported the incident to the school counselor, who then reported it to a local social services agency. A representative of the agency interviewed D, with a police officer present. Afterward, the police took D to the police station, where they recorded a phone call between D and Applicant. During this conversation Applicant acknowledged touching D's breast, apologized, and told her not to tell W.

The police asked Applicant to come to the station for an interview. Though he acknowledged to the police that he spanked D on her bare bottom approximately twice weekly, he denied having touched her breast. However, once the police played a tape of his telephone conversation with D, Applicant admitted touching her breast. Applicant's initial denial of having touched D's breast formed the basis of the Guideline E allegation at issue in this appeal. Applicant was charged with felony sexual abuse, pleading guilty to disorderly conduct, a misdemeanor. He voluntarily underwent psychological counseling. His counselor stated that Applicant's prognosis was good. During the hearing, Applicant characterized the breast-touching incident as accidental.

The Judge concluded that Applicant had attempted to minimize his misconduct with D, which precluded a favorable application of any Guideline E mitigating conditions. Applicant contends on appeal that this was error. He asserts that there is no basis in the record to support the Judge's view that Applicant minimized his misconduct. We have considered this argument in light of the entire record. The Judge concluded that Applicant had touched D's breast intentionally and

---

<sup>1</sup>The Judge's favorable findings under Guidelines J and D are not at issue in this appeal.

that the incident constituted sexual contact.<sup>2</sup> This conclusion is sustainable.<sup>3</sup> In light of that, Applicant's contention during his security clearance interview and at the hearing that the touching was merely accidental could reasonably be construed as an attempt to minimize the misconduct. The Judge properly considered this minimization in the context of Applicant's burden of persuasion as to mitigation of the security concern arising from his false statement to the police. The Judge's conclusion that Applicant had failed to meet his burden of persuasion is sustainable.

Applicant contends that the Judge did not perform a proper whole-person analysis. He noted such matters as Applicant's lack of prior criminal history; his ultimate conviction of a misdemeanor rather than a felony; his willingness to discuss the incident when so requested; his good work performance; the absence of reoffense; and his long having held a security clearance. He argues that these factors strongly outweigh evidence of Applicant's false statement to the police in November 2006.

A Judge is presumed to have considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 07-00196 at 3 (App. Bd. Feb. 20, 2009). Although he need not cite or discuss every piece of record evidence, in this case the Judge gave explicit consideration to most of the things to which Applicant refers. Moreover, he also provided a reasonable explanation for his conclusion that Applicant had failed to mitigate the Government's security concerns, notably his having minimized the incident in question. In addition, we note record evidence of apparent inconsistent statements by Applicant concerning the circumstances of his sexual contact with D.<sup>4</sup> These statements are

---

<sup>2</sup>Although the Judge found that Applicant's misconduct established security concerns under Guidelines J and D, he concluded that Applicant had mitigated these concerns by evidence of his voluntary counseling, the lack of recurrence of such misconduct, and his good employment record.

<sup>3</sup>In addition to the Judge's findings concerning the circumstances underlying the incident, we note record evidence that Applicant had fondled D's breasts "on several occasions" and that once he had watched her as she took a shower. Government Exhibit (GE) 1, Sheriff's Department Detail Incident Report, at 9, 13. This document also contains a description at p. 16 of Applicant's statement to the Sheriff concerning the event. "[H]e said [D] had wanted to drive home . . . and he told her no. He said she became upset and . . . as he was driving home, he pulled over to the side of the road . . . on a side street. He said he lifted his right hand and placed it on her breast and then asked her if she wanted to drive." Applicant objected to GE 1 at the hearing. Although Applicant did not explicitly raise the Judge's admission of GE 1 as an issue on appeal, he described his objection in a footnote to his appeal brief. His contention at the hearing was that the document contained multiple levels of hearsay and was not sufficiently credible as to incidents of misconduct not alleged in the SOR. Because he did not actually raise the admissibility of GE 1 as an appeal issue, we simply note that Directive ¶ E3.1.20 permits the admission in DOHA hearings of official records or evidence compiled in the regular course of business, other than DoD personnel background reports of investigation. *See* ISCR Case No. 08-90480 at 3 (App. Bd. Mar. 17, 2010) (Sheriff's booking report admissible under this provision of the Directive). The evidence contained in GE 1 and described above supports the Judge's finding of intentional sexual contact.

<sup>4</sup>At the hearing, Applicant testified that the incident occurred on the road while he and D were returning from shopping. Tr. at 87-92. His statement to the Sheriff was similar. Applicant said to the Sheriff that, during the drive home, he and D began arguing about her driving, and he pulled onto a side road. GE 1 at 16. Subject's psychologist, however, described the incident somewhat differently. The psychologist stated that D had jumped into the driver's seat

pertinent to an evaluation of Applicant's credibility. See ISCR Case No. 08-08579 at 3 (App. Bd. Jul. 16, 2009). Applicant has not rebutted the presumption that the Judge considered all of the record evidence. Neither has he demonstrated that the Judge weighed in the record evidence in a manner that is arbitrary, capricious, or contrary to law. See, e.g., ISCR Case No. 08-10204 at 3 (App. Bd. Jun. 21, 2010).

After reviewing the record, the Board concludes 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).

### Order

The Judge's adverse security clearance decision is AFFIRMED.

Signed: Jeffrey D. Billett

Jeffrey D. Billett  
Administrative Judge  
Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin  
Administrative Judge  
Member, Appeal Board

Signed: James E. Moody

James E. Moody  
Administrative Judge  
Member, Appeal Board

---

of the car and Applicant touched her breast in trying to move her over to the passenger side of the front seat. Applicant Exhibit H at 4. As this description of the event presumably came from Applicant, it is different from his statement to the police and at the hearing in significant ways. See, e.g., Applicant's description of the event, quoted in n. 3 *supra*.