

KEYWORD: Guideline J; Guideline E; Guideline D

DIGEST: In this case, the distinction between a felony and a misdemeanor was not of security concern. The underlying facts were the key to the Judge’s decision. Judge’s error in computing the time which had elapsed since the offense was harmless. Adverse decision affirmed.

CASENO: 08-11136.a1

DATE: 03/17/2010

DATE: March 17, 2010

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In Re:)	
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-----)	ISCR Case No. 08-11136
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES
FOR GOVERNMENT

Ray T. Blank, Jr., Esq., Department Counsel

FOR APPLICANT

Kenneth R. Young, Jr., Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On May 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 E (Personal Conduct), and Guideline D (Sexual Behavior) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On November 27, 2009, after the hearing, Administrative Judge Thomas M. Crean denied Applicant’s request for a security

clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge's adverse decision is arbitrary, capricious, or contrary to law. Specifically, Applicant contends that the Judge committed harmful error in characterizing Applicant's criminal behavior as a felony and in mis-stating the date of Applicant's criminal behavior and the time elapsed since Applicant's offenses and pretrial intervention program. Applicant also argues that the Judge did not give adequate weight to his evidence of mitigation. Finding no harmful error, we affirm the Judge's decision.

The Judge made the following relevant factual findings: Applicant is 44 years old and retired from the Air Force after a career of over 20 years as a fighter pilot. Applicant received numerous medals and awards during his service career. Applicant's wife was severely injured in an accident and died in 2001, leaving Applicant to raise three small children. Applicant remarried in 2002 and has one child from that marriage. While Applicant was still on active duty, he entered a store to pick up photographs while wearing his flight uniform, and he used his new cell phone to take a picture under the skirt of a female shopper. The woman challenged Applicant, and he denied doing anything inappropriate. The woman followed Applicant through the store and saw him do the same thing to another woman. The first woman loudly challenged Applicant and alerted the second woman. Applicant left the store while working with his cell phone. The police were notified, and Applicant was identified through store security cameras and the receipt for the pictures. A few weeks later, Applicant was arrested, and his camera and computer were seized pursuant to a search warrant. The police discovered that Applicant had deleted the pictures of the two women from his cell phone, but had taken pictures of his wife in the shower without her knowledge or permission. Applicant admitted to the deletion. At the request of the police, Applicant called the two women and apologized. Applicant stated that at the time of the above behavior, he was under stress about his job, because his wife had refused to accompany him to a new duty station, and he knew his refusal of the proposed transfer would negatively impact his military career. Applicant's wife, her family, his three oldest children, and his supervisors are aware of the incident. Applicant was indicted for sexual voyeurism. He was allowed to enter a pre-trial intervention program. After Applicant received counseling and completed the program, his criminal record was expunged. Applicant submitted character references from high-ranking Air Force Officers and from his father-in-law.

The Judge characterized Applicant's criminal conduct as a felony. Decision at 6. Applicant argues that his conduct was a misdemeanor. The record supports the Judge's characterization.¹ However, even if the Judge's characterization were found to be erroneous, the error would not be harmful, since the existence of a felony is not necessary for the Judge to make an adverse decision regarding criminal conduct. The Judge can consider evidence that an applicant engaged in criminal conduct even in the absence of a conviction. Here, Applicant admitted the criminal conduct in issue. Rather than emphasizing the severity of the crime, the Judge focused on the fact that any criminal

¹Applicant was indicted for two separate violations of the South Carolina statute against Sexual Voyeurism. The statute provides that a second or subsequent violation of the statute is a felony. While Applicant argues that the second violation is not a felony unless there has first been a conviction on the first violation, there is no evidence in the record to support his argument.

activity “creates doubt about a person’s judgment, reliability, and trustworthiness.” Decision at 5. It also “calls into question a person’s ability or willingness to comply with laws, rules and regulation [sic].” *Id.* Applicant has failed to demonstrate harmful error in this regard.

Applicant is correct that the Judge erred in stating that the criminal conduct described above occurred in July 2006 rather than June 2006. However, this error is harmless. The conduct actually occurred on June 23, 2006. It is very unlikely that a difference of a few days, or even a month, would lead to a different outcome in these circumstances.

Applicant is also correct that the Judge erred in stating that only two years had elapsed since the criminal conduct occurred and only 11 months had passed since Applicant completed his pre-trial intervention. In fact, it had been three years since the conduct and 21 months since Applicant completed the program. However, Applicant has not demonstrated harmful error. The Directive does not define “recent,” and there is no “bright-line” definition of what constitutes “recent” with regard to rehabilitation. *See, e.g.,* ISCR Case No. 06-07674 at 3 (App. Bd. Jun. 18, 2007). The Judge is required to evaluate the record evidence as a whole and reach a reasonable conclusion as to the recency of Applicant’s conduct. A finding that the conduct occurred one year earlier and that the program was completed ten months earlier would not necessarily have led the Judge to reach a different decision.

Applicant contends that the Judge did not give adequate weight to Applicant’s evidence of mitigation. Even if the Judge had found some evidence of mitigation in this case, that alone would not have compelled the Judge to make a favorable security clearance decision. As the trier of fact, the Judge had to weigh the evidence as a whole and decide whether the favorable evidence outweighed the unfavorable, or *vice versa*. A party’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 that the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.,* ISCR Case No. 06-17691 at 3 (App. Bd. Jul. 19, 2007).

After reviewing the record as a whole, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for his 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, 158 (1962)). Accordingly, the Judge’s ultimate unfavorable security clearance decision is sustainable. *See* Directive ¶ E3.1.32.1.

Order

The Judge's decision denying Applicant a security clearance is AFFIRMED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, Appeal Board