

KEYWORD: Guideline J; Guideline D

DIGEST: Applicant failed to rebut the presumption that the Judge based her decision on the record evidence rather than her own predilections. Judge not prejudiced by Department Counsel's having elicited details of Applicant's criminal conduct. Adverse decision affirmed.

CASE NO: 09-06406.a1

DATE: 04/13/2011

DATE: April 13, 2011

In Re:)	
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-----)	ISCR Case No. 09-06406
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Francis J. Flanagan, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. In March 2010, 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 D (Sexual Behavior) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On January 12, 2010, after the hearing, Administrative Judge Erin C. Hogan denied Applicant's request for a security clearance. Applicant appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issue on appeal: whether the Judge's adverse security clearance decision was arbitrary, capricious, or contrary to law. For the following reasons, the

Board affirms the Judge's unfavorable decision.

The Judge made the following findings of fact: Applicant is married and has two children, a daughter, age 35 and a son, age 31. In December 1988, Applicant was arrested and charged with multiple felony counts of first degree sexual assault and first degree child molestation. On January 22, 1990, Applicant pleaded *nolo contendere* to seven counts of first degree child molestation. He was sentenced to 25 years in jail, with all 25 years suspended on condition of completion of probation. The probationary period expires on January 21, 2015.

Applicant molested his daughter on numerous occasions between the ages of four and thirteen. Applicant would do this after drinking a lot of alcohol and smoking marijuana. He knew his actions were inappropriate and illegal. Applicant had sexual intercourse with his daughter on one occasion when she was thirteen. After his arrest, Applicant underwent psychiatric counseling. Applicant was ordered out of the family residence by the court system for four years. The no-contact order was eventually lifted by the court. Applicant takes full responsibility for his actions. His daughter is now married and Applicant and his wife see her and her family on a regular basis. Applicant's coworkers, supervisor, and friend are aware of his arrest, and are aware of the general nature of the charges, but do not know the specifics of the case. Applicant's wife was angry at Applicant for a long time, but she has put the past behind her. The family is doing well. Applicant has a good relationship with his children and grandson. Applicant's wife would trust Applicant to be alone with their grandson because she believes he has learned his boundaries. She trusts her husband and is proud of him. She feels he learned from his mistake and is trustworthy.

The Judge concluded as follows: The government established a case for disqualification under Guidelines J and D. Under Guideline J, while Applicant has a good employment record and has not been arrested since 1988, he did not self-report his 1988 conduct until after being confronted by his wife. He committed serious felonies. He remains on probation until 2015. While he and his wife appear to have moved on since the incident, the serious nature of the criminal conduct outweighs any progress Applicant has made after the authorities became aware of his offenses. Questions about Applicant's reliability, trustworthiness, or good judgment remain because of the serious nature of his criminal conduct. Regarding Guideline D, it is unclear whether the jurisdiction that prosecuted Applicant's case was aware that Applicant had sexual intercourse with his daughter. However, his admitted conduct was criminal and considered to be serious felony offenses. Even though Applicant's conduct became known in 1988, he is still vulnerable to coercion, exploitation, and duress because of the sensitive nature of his past sexual behavior. While it has been 22 years since it was discovered that Applicant had been molesting his daughter, he molested his daughter approximately two to four times a week over a nine-year period. The sensitive nature of Applicant's past sexual behavior still makes him vulnerable to coercion, exploitation, or duress regardless of the passage of time. Under the whole-person concept, whatever favorable progress Applicant has made since 1988 does not outweigh the serious nature of the offenses committed on his daughter from age 4 to 13.

Applicant attached two affidavits to his appeal brief and asks that they be considered by the Board, given the relaxed rules of evidence in administrative hearings. One is a statement from Applicant's wife indicating that through inadvertence, she misstated facts during her hearing testimony regarding the length of time that Applicant had been abusing their daughter. The other

is a statement from a family counselor corroborating Applicant's wife's statements regarding her testimony and offering details about the family's progress in counseling. The Board declines to consider these matters on appeal. The Directive states that the Board may not consider new evidence on appeal. *See* Directive ¶ E3.1.29. The fact that DOHA administrative hearings are conducted without strict adherence to formal rules of evidence does nothing to countermand the explicit prohibition set forth in the Directive.

Applicant argues that the Judge impermissibly substituted her own moral judgments in deciding the case, instead of applying the applicable mitigating conditions. He claims that, although he committed a heinous crime, it occurred in 1988 and the Adjudicative Guidelines do not disqualify individuals convicted of child molestation from obtaining a security clearance. Applicant states that, in applying her own moral code, the Judge ignored rather than weighed evidence. Applicant's assertions do not establish error on the part of the Judge.

There is a presumption in favor of regularity and good faith on the part of DOHA judges as they engage in the process of deciding cases. *See, e.g.*, ISCR Case No. 99-0019 at 5 (App. Bd. Nov. 22, 1999). In the context of Applicant's appeal argument this means there is a presumption that the Judge decided the case with reference to the applicable Adjudicative Guidelines and not her personal predilections. Applicant has failed to overcome this presumption, largely because he has failed to articulate in any detail precisely how the Judge allowed any personal biases to affect her resolution of the case. A review of the Judge's decision reveals that it is based on a detailed discussion of applicable disqualifying conditions and potentially applicable mitigating conditions. Because of the passage of time since his 1988 convictions, Applicant contends that the Judge has imposed a rule of absolute disqualification for child molesters. However, the mere passage of time cannot be viewed in isolation, and must be evaluated with reference to other facts and circumstances in the case. *See, e.g.*, ISCR Case No. 08-05351 at 8 (App. Bd. Mar. 12, 2010). In this case, the Judge noted such factors as the serious nature of the offenses, their duration, and the fact that Applicant was still vulnerable to coercion owing to the sensitive nature of the offenses. Given the totality of the record evidence in this case, the Judge has articulated a rational basis for concluding that Applicant's conduct was not mitigated.

Applicant argues that the Judge ignored evidence. A Judge is presumed to have considered all the evidence in the record unless she specifically states otherwise. *See, e.g.*, ISCR Case No. 07-00196 at 3 (App. Bd. Feb. 20, 2009). Applicant has not overcome the presumption in this case. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. *See, e.g.*, ISCR Case No. 06-10320 at 2 (App. Bd. Nov. 7, 2007). 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 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. 06-17409 at 3 (App. Bd. Oct. 12, 2007). In this case, the decision makes clear that the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct and considered the possible application of relevant conditions and factors. The Judge properly considered the whole pattern of Applicant's child sexual abuse, which included an instance of sexual intercourse with his thirteen-year-old daughter and the fact that those people outside his family who are close to him do not know the details of his abuse of his daughter.

Applicant also argues that the Judge was unduly prejudiced by Department Counsel's eliciting of details at the hearing about the sexual abuse of the daughter. Applicant objected to this line of questioning at the hearing. The Judge ruled that she felt it important to know something about the facts supporting the offenses. Applicant argues that since he pleaded guilty to the offenses, the charges spoke for themselves and that the addition of details about the offenses was more prejudicial than probative. A Judge's rulings on matters of the admissibility evidence of this type are reviewed for an abuse of discretion. The Board concludes that the Judge did not err in this instance, and, as an administrative judge, she would not be unduly prejudiced by the details underlying the offenses committed by Applicant.

The Board does not review a case *de novo*. The favorable evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-11172 at 3 (App. Bd. Sep. 4, 2007). After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for her 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). Therefore, the Judge's ultimate unfavorable security clearance decision is sustainable.

Order

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

Signed: Michael Y. Ra'anan

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

Signed: Jeffrey D. Billett

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board