

KEYWORD: Guideline J; Guideline D

DIGEST: Applicant failed to demonstrate that the Judge mis-weighed the evidence. A party's disagreement with the Judge's weighing of the evidence is not sufficient to show that the Judge erred. Adverse decision affirmed.

CASE NO: 12-03036.a1

DATE: 01/09/2014

DATE: January 9, 2014

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In Re:)	
)	
-----)	ISCR Case No. 12-03036
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On June 28, 2013, DoD 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 that the case be decided on the written record. On October 31, 2013, after the close of the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Mark Harvey 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 decision is arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge's unfavorable security clearance decision.

The Judge found: Applicant is 27 years old. In 2010, when he was 24 years old, Applicant engaged in sexual intercourse with a 15 year-old girl after a party. Applicant stated that he was not aware that she was 15 years old, and she presented herself as older than her actual age. In 2011, Applicant pleaded guilty to the first-class misdemeanor offense of contributing to the delinquency of a minor. He was sentenced to 12 months in jail with 8 months suspended, a \$250 fine or 25 hours of community service, 2 years of probation, and was required to attend classes for sex offenders. He complied with the terms of his sentence. He has learned from therapy. He avoids situations where he might be arrested.

The Judge concluded: The record contains evidence of some important mitigating factors. Applicant's offense occurred 42 months ago, and the offense is an isolated incident. He received some sexual offense counseling. He has been continuously employed for six years. However, significant factors weighing against mitigating criminal conduct remain. Applicant was 24 years old when he had sex with a 15 year-old girl. He provided no documentation or recommendation from his therapist or his employer. More time must elapse before there is enough assurance that criminal conduct raising security concerns is unlikely to recur. Criminal conduct concerns are not mitigated. The sex offense continues to cast doubt on Applicant's current reliability, trustworthiness, and good judgment. Sexual behavior concerns are not mitigated. Under the Whole-Person concept, there are unresolved questions about Applicant's ability to protect classified information because of his criminal conduct and sexual behavior.

Applicant argues that the only factor considered in the Judge's decision was the one criminal incident on his record. He notes that he has no other incidents on his record, and that he completed the requirements of his sentence without complications. He asserts that the incident was a one-time lack of his usual good judgment. He states that no other factors were considered, such as his loyalty to his country and his job. He argues that if his entire character were considered, there would be evidence of many good traits that outweigh the one negative incident.

Applicant's arguments do not establish error on the part of the Judge. Contrary to Applicant's assertion that the Judge considered only the criminal conviction, a review of the Judge's decision reveals that the Judge cited mitigating evidence, including the successful completion of the sentence, Applicant's receipt of sexual offense counseling, a good employment record, and his expressions of remorse. Regarding Applicant's comments about his overall good character, the record is devoid of any third party statements or other matters that speak to the issue. The Board finds no reason to believe that the Judge did not properly weigh the evidence or that he failed to consider all the evidence of record. *See, e.g.,* ISCR Case No. 11-06622 at 4 (App. Bd. Jul. 2, 2012). We have considered the totality of Applicant's arguments on appeal and find no error in the Judge's ultimate conclusions regarding mitigation. The only record evidence submitted by Applicant was his answer to the SOR, notwithstanding the fact that he was given the opportunity to submit favorable documentary evidence. In his decision, the Judge made specific mention of the lack of documentation that would provide details and insight into Applicant's sexual offense counseling and his employment record.

The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. 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).

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 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). Therefore, the Judge's ultimate unfavorable security clearance decision is sustainable.

Order

The decision of the Judge 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: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board