

KEYWORD: Guideline D; Guideline E; Guideline J

DIGEST: In administrative proceedings, hearsay is admissible and can constitute substantial evidence. DOHA proceedings are administrative in nature, and they are not conducted with a strict application of evidentiary rules required in criminal cases, although DOHA relies upon the Federal Rules of Evidence (FRE) as a guide in its hearings. Directive ¶ E3.1.19. Public records admissible under FRE 803(8), such as court records and police reports, are presumed to be reliable by virtue of the government agency's duty for accuracy and the high probability that it has satisfied that duty. Adverse decision affirmed.

CASENO: 16-03603.a1

DATE: 05/29/2019

DATE: May 29, 2019

In Re: _____)
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Applicant for Security Clearance)

ISCR Case No. 16-03603

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Mark A. Myers, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On June 8, 2018, DoD 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 March 12, 2019, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Elizabeth M. Matchinski 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 her findings of fact and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant is 40 years old. He has been working for his current employer since 2004 and was granted a security clearance in 2005. His security clearance was suspended in 2013 following his arrest on sexual assault charges involving his stepdaughter. He married in 2006, separated from his wife following the arrest, and divorced in 2017.

Under Guideline J, the SOR alleged that Applicant was arrested in early 2013 on three counts of rape of a child and one count of witness intimidation (SOR ¶ 1.a) and that he was indicted later in 2013 on four counts of aggravated rape of a child, six counts of indecent assault and battery on a child under age 14, one count of assault and battery with intent to rape, and one count of assault and battery by means of a dangerous weapon (SOR ¶ 1.b). The allegations in SOR ¶¶ 1.a and 1.b are duplicative. Both of those allegations were cross-alleged under Guidelines D and E. Under Guideline E, the SOR also alleged that Applicant failed to report his arrest to his facility security officer (FSO) in a timely manner and that he lied on his security clearance application (SCA) and during his background interview in 2015 by stating he was falsely accused of the criminal allegations.¹

In 2013, Applicant's then 12-year-old stepdaughter told her mother that Applicant had sexually assaulted her on multiple occasions. She described the incidents and indicated that Applicant threatened to beat her with a belt if she told anyone of the assaults. The police were notified and arrested Applicant, who remained in custody for a week. The police record reveals that the stepdaughter had also told a 13-year-old friend of the assaults.

Applicant notified his security office of the arrest and charges about four months following the arrest and about three weeks after the indictment. The security office submitted an adverse

¹ In responding to the SOR, Applicant admitted that he was arrested and indicted on the alleged charges but claimed those charges were based on false accusations. He admitted that he did not report his arrest to his FSO in a timely manner and denied the two falsification allegations.

information report that indicated Applicant did not report the exact charges and also stated that he did not report the matter sooner because he was scared. At the security clearance hearing, he indicated that he understood he was required to report the arrest when it happened but attributed the delay to being stressed and being focused on taking care of his family.

Applicant pled not guilty to the charges. The State filed with the court a Statement of the Case that summarized the facts, which indicated the alleged conduct progressed from initially fondling the stepdaughter when she was nine years old to eventually rape. The attorney who represented Applicant in the criminal proceeding indicated that Applicant rejected plea bargain offers, and there was no scientific evidence linking Applicant to the crimes. In early 2015, the State moved to *nolle prosequi* the charges because it did not believe that it could meet its burden of proof beyond a reasonable doubt at trial. “In addition, the state did not believe it was in the victim’s best interest to proceed at that time.” Decision at 4, *citing* Government Exhibit (GE) 5.

In his 2015 security clearance application (SCA), Applicant reported that he was falsely accused of the sexual assault charges. In a 2016 background interview, he denied ever touching children inappropriately and indicated that the charges against him were false. When asked about the delay in reporting his arrest during the interview, he indicated he was trying to get his personal life in order.

In responding to interrogatories, Applicant indicated that he has a healthy co-parenting plan with his ex-wife. At the hearing, he stated that he has unsupervised weekly contact with his two children. He has no visitation rights with the stepdaughter. He provided no reason for why his stepdaughter would falsely accuse him. He provided annual performance evaluations that praise his work performance.

The Judge’s Analysis

“The indictment indicates the grand jury believed Applicant committed felonious sexual assaults on his stepdaughter between 2009 and . . . [2013] and that he threatened to assault her if she told anyone about the assaults. . . . The evidentiary standard for a grand jury indictment is probable cause to believe the defendant committed the offense. . . . In the state at issue, probable cause requires more than mere suspicion but something less than evidence sufficient to warrant a conviction.” Decision at 8. “The Government’s evidence includes police reports containing contemporaneous summaries of interviews of Applicant’s ex-wife and close friend of Applicant’s stepdaughter about the sexual assaults as detailed to them by Applicant’s stepdaughter. . . . There is no apparent motive for either of them to have made false statements to the police about what they were told.” *Id.* “There is no statement in evidence from Applicant’s stepdaughter, but the grand jury indictment and the statements to the police from her mother and friend constitute probative, reliable

evidence that may be considered in these proceedings, and together raise security concerns under [Adjudicative Guideline] ¶ 31(b).”² *Id.* at 9.

The decision of the prosecutor to dismiss the charges was based on the best interests of the stepdaughter and because the State did not think it could prove the charges beyond a reasonable doubt. That decision is not a finding of no culpability.

Applicant demonstrated a lack of candor about the criminal charges during his security clearance adjudication, which diminishes the credibility of his denials of committing the alleged sex crimes. He under-reported the extent of the criminal charges against him to his security office, on his 2015 SCA, and during his background interview. “His denials of any inappropriate behavior with his stepdaughter lack credibility.” Decision at 10.

Applicant did not comply with his obligation to report his arrest to security officials in a timely manner. Sufficient evidence exists to conclude that Applicant lied when he claimed he was falsely accused of the criminal sex offenses in his SCA and background interview. His minimization of his charges on those occasions, which was not specifically alleged and cannot be considered as a disqualifying factor, shows a lack of reform and reliability. Although more than five years have passed since the sex crimes, he has not yet shown he can be counted on to comply with reporting requirements. The Judge found in favor of Applicant on one Guideline J allegation (SOR ¶ 1.a) and against him on the remaining allegations.

Discussion

Regarding the criminal conduct allegations, Applicant’s Counsel contends that the entire case against his client is based on hearsay. Applicant’s Counsel notes the record neither contains a statement from the stepdaughter about the alleged sexual assaults nor a report of a physical examination performed on her. He argues that the record lacks credible and substantive evidence and the burden of production was improperly shifted to him during the proceeding. He further asserts that the Judge’s findings based solely on hearsay do not comport with the Directive. These arguments are not persuasive. In administrative proceedings, hearsay is admissible and can constitute substantial evidence. *See, e.g., Crawford v. Dept. of Agriculture*, 50 F. 3d 46, 49 (D.C. Cir. 1995); *Bustos-Torres v. INS*, 898 F.2d 1053, 1056 (5th Cir. 1990); *Willingham v. Gonzales*, 391 F. Supp. 2d 52, 64 (Dist. Ct. D.C., 2005), quoting *Hoska v. Army*, 677 F.2d 131, 138 (D.C. Cir. 1982). DOHA proceedings are administrative in nature, and they are not conducted with a strict application of evidentiary rules required in criminal cases, although DOHA relies upon the Federal Rules of Evidence (FRE) as a guide in its hearings. Directive ¶ E3.1.19. *See, e.g., ISCR Case No. 11-12461 at 4 (App. Bd. Mar. 14, 2013).* Public records admissible under FRE 803(8), such as court records and police reports, are presumed to be reliable by virtue of the government agency’s duty for

² Directive, Encl. 2, App. A ¶ 31(b) states, “evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted[.]”

accuracy and the high probability that it has satisfied that duty.³ *See, e.g.*, ISCR Case No. 11-07509 5, n.3 (App. Bd. Jun. 25, 2013), *citing United States v. Carter*, 591 F.3d 656, 659 (D.C. Cir. 2010). In this case, we find no error in the Judge’s reliance on hearsay documents in making her findings of fact or in reaching her conclusions.

Applicant Counsel also contends that Judge erred in her consideration of the State’s decision to *nolle prosequi* the charges. In this regard, we note that the dropping or dismissal of criminal charges does not preclude the Judge from finding an applicant engaged in the conduct underlying those charges or from evaluating the applicant’s security eligibility. *See, e.g.*, ISCR Case No. 17-00506 at 3 (App. Bd. Aug. 7, 2018) and ISCR Case No. 14-01763 at 3-4 (App. Bd. Nov. 3, 2015). In his argument, Applicant Counsel states, “There is simply no evidence in this record to support the determination that the State’s decision not to prosecute was due to considerations of ‘best interests’ of the alleged victim.” Appeal Brief at 10. On the other hand, he also notes that the State’s *nolle prosequi* court filing, which was signed by the Assistant District Attorney, states, “we do not believe it is in the victim’s best interest to proceed at this time.” GE 5 at 3. He argues, “While seemingly splitting hairs, it is submitted that the wording is critical in that the inference is that the testimony of the alleged victim would not hold up against zealous cross examination; [p]erhaps due to multiple version[s] of events.” In support of his claimed reasons for the dismissal of the charges, Applicant’s Counsel cites to GE 2 and 5. However, neither of those documents nor any other record evidence supports the contention of Applicant’s Counsel that the charges were dropped “due to [the victim’s] multiple versions of events” or because the “victim would not hold up against zealous cross-examination.”⁴ From our review of the record, the Judge’s findings regarding the State’s decision to dismiss the charges are based on substantial evidence or constitute reasonable inferences that could be drawn from the evidence. *See, e.g.*, ISCR Case No. 12-03420 at 3 (App. Bd. Jul. 25, 2014).

Applicant Counsel further challenges the Judge’s reliance on the indictments as proof that he engaged in criminal conduct and argues that “Pattern Jury Instructions warn jurors that an ‘indictment is proof of nothing’ and ‘it does not even raise suspicion of guilt.’”⁵ Appeal Brief at 9. In making his arguments, he also highlights a number of the unique aspects of grand jury proceedings.⁶ However, as noted above, DOHA proceedings are not required to comply with rules

³ In DOHA proceedings, police reports are admissible both as official records under Directive ¶ E3.1.20 and as public records under FRE 803(8). *See, e.g.*, ISCR Case No. 15-02859 at 3 (App. Bd. Jun. 23, 2017).

⁴ In referring to the *nolle prosequi* decision during his closing argument, Applicant’s Counsel at the hearing stated, “I don’t know what the prosecutor used to reach that decision.” Tr. at 64. The record of the proceeding was left open for Applicant’s Counsel to present an affidavit from the attorney who represented Applicant in the criminal proceeding. That affidavit does not state a reason for the prosecutor’s decision to dismiss the charges. Applicant’s Exhibit F.

⁵ The sample jury instructions are not contained in the record. Applicant’s Counsel neither requested that we take administrative notice of the jury instructions nor provided a citation to those instructions.

⁶ The thrust of Applicant’s Counsel arguments is that a prosecutor controls grand jury proceedings and little weight should be given to an indictment.

or procedures that pertain to criminal prosecutions. Jury instructions have no application in DOHA proceedings. In this regard, we also note that Applicant has not specifically challenged the Judge’s finding that, in the state at issue, an indictment is a grand jury determination that probable cause exists to believe the defendant committed the offense. Based on our review of the record, Applicant’s Counsel has failed to show that the Judge erred in her consideration of the indictments.

The balance of the arguments of Applicant’s Counsel amount to a challenge to the Judge’s analysis of the evidence. He argues that the Judge failed to consider all of the record evidence and mis-weighed the evidence. His arguments, however, are neither enough to rebut the presumption that the Judge considered all of the record evidence nor sufficient to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.,* ISCR Case No. 17-02488 at 3 (App. Bd. Aug. 30, 2018).

The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The 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 Decision is **AFFIRMED**.

Signed: Michael Ra'anan

Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy

James F. Duffy
Administrative Judge
Member, Appeal Board