OpJAGAF 2018-23, 7 August 2018, ACCEPTANCE OF HEARSAY EVIDENCE IN BOARD OF INQUIRIES

TOPIC

Whether hearsay evidence may be accepted and heard during a Board of Inquiry.

TEXT OF THE DECISION

This opinion is in response to an inquiry regarding whether a Board of Inquiry (BOI) may accept hearsay evidence from victims who refuse to participate in the BOI. For the reasons set forth below, it is legally permissible for the BOI to accept hearsay evidence, provided there is adequate indicia of reliability.

BACKGROUND

On or about 24 June 2015, Respondent attended a party hosted by Victim and her roommates. Respondent and Victim were friends and classmates. For two weeks prior to the party, Respondent had been sleeping at Victim's apartment while he was waiting to get an apartment. However, they had not been in a romantic or sexual relationship with each other. While at the party, both Respondent and Victim consumed alcohol. Respondent, Victim, and a mutual friend slept in the living room. Victim and the mutual friend slept on the couch in a head-to-toe arrangement while Respondent slept on the floor immediately in front of the couch. That night, according to Victim, she awoke with her shirt above her chest, exposing her breasts. Respondent was next to her, upright on his knees in front of the couch. His hand was down her pants and one or more of his fingers was penetrating her vagina. Victim stood up, whereupon Respondent removed his hands from her pants, lay down, and appeared to go back to sleep. Victim left the room but later returned to the couch and went to sleep. When she awoke the next morning, Respondent was gone. Following this incident, Victim texted Respondent to confront him about what had occurred. She stated she had been asleep and had not consented to being touched. Respondent apologized and said his actions were out of character for him.

When AFOSI interviewed Respondent, he alleged Victim both initiated and consented to the sexual act. Respondent said he was lying next to the couch when Victim walked over, grabbed his hand, lay on the couch, and placed his hand on her thigh. Respondent said he rubbed her thigh until she spread her legs. He then rubbed her clitoris and inserted a finger into her vagina. He said after no more than 90 seconds, he began to feel nauseated, turned over, and went to sleep.

On 8 February 2016, the Squadron Commander recommended the Numbered Air Force (NAF) Commander consider initiating discharge action against Respondent for sexual assault pursuant to AFI 36-3206. The Group Commander concurred with the recommendation.

On 9 August 2016, NAF/CC notified Respondent that he was subject to discharge in accordance with AFI 36-3206, paragraph 3.3.1.[1] Specifically, NAF/CC required him to show cause for retention for sexually assaulting a fellow airman by placing his hand down Victim's pants and digitally penetrating her vagina. Respondent was notified the least favorable service characterization he could receive is an under other than honorable conditions (UOTHC) discharge.

On 7 October 2016, NAF/CC ordered a BOI to convene. The BOI was held on 7-8 November 2016. The BOI heard from three government witnesses and one witness who testified on behalf of the Respondent.

A witness for the Government testified about text conversations she had with Victim the day after the incident, and that these text messages corroborated Victim's version of events. A second witness for the Government testified about his recollection of the events on the night of the incident and statements that Victim and Respondent made to him in the days following the event. Significantly, the witness testified that when he asked Respondent if Victim's version of events was true, Respondent agreed.[2] The Government's third witness was Respondent's commander at the time of the incident. Witness three testified that, in his opinion, having reviewed the evidence, Respondent committed sexual assault.

A witness for the Respondent testified that, given his estimation of Victim's alcohol consumption that evening, it is possible Victim's memory was impaired, and Victim's recollection of the events was incomplete. Respondent provided an unsworn statement in which he asserted he did not commit sexual assault. He testified that his recollection was that the conduct was consensual.

In addition, the Board requested to hear from the Group Commander regarding her rationale for rescinding the Letter of Reprimand (LOR) Respondent received for the sexual assault. The Group Commander testified she rescinded the LOR after she was advised by her servicing SJA that the NAF did not want LORs being issued in a "pro forma" matter, without a thorough examination into the facts, simply to build a record for a BOI. The Group Commander determined the LOR given to Respondent was such an LOR, and therefore rescinded it. The Board President also asked the Group Commander whether she thought a board was appropriate in this case. The Group Commander observed it is very difficult in a case such as this with only the Victim and Respondent disputing consent. She did not provide an opinion as to whether the BOI was appropriate.

The Government presented the BOI with sixteen exhibits, including the Victim non-participation letter, the Report of Investigation, and a DVD containing interviews with the Respondent and Victim.

The Board accepted six exhibits into evidence introduced by Respondent. These included an Expert Witness' Curriculum Vitae, a chart describing the stages of acute alcoholic influence and

[1] The appropriate basis for discharge is paragraph 3.6.8. Paragraph 3.3.1 defines sexual assault. Notwithstanding this error, since paragraph 3.6.8 merely cites to paragraph 3.3.1, Respondent was fully on notice of the nature of the allegation against him, and this error did not prejudice his due process rights.

[2] Tr. Vol I, Pg. 162, Ln. 21-23 ("Listen, man, if she's saying I did it, I did it. If that's what she saying happened, then, you know, I guess that it happened.")

intoxication, an article entitled “What Happened? Alcohol, Memory Blackouts, and the Brain,” personal photos and the Respondent's unsworn statement.

The BOI found Respondent committed a sexual act upon the victim by inserting his finger in her vagina when Respondent knew or reasonably should have known Victim was asleep. The BOI recommended Respondent be separated with an under honorable conditions (general) discharge.

GUIDANCE

“The Air Force judges the suitability of officers for continued service on the basis of their conduct and their ability to meet required standards of duty performance and discipline.” AFI 36-3206, Preface. It is Department of Defense policy to administratively separate commissioned officers who do not “[m]eet rigorous and necessary standards of duty, performance, and discipline.” DoDI 1332.30, *Separation of Regular and Reserve Commissioned Officers*, 25 November 2013 (incorporating through Change 1, 31 March 2017), paragraph 3(c)(l).

AFI 36-3206, paragraph 3.6.8, authorizes involuntary separation for officers for the commission of sexual assault, as defined in paragraph 3.3.1. Under this paragraph, sexual assault “includes a broad category of sexual offenses consisting of the following specific UCMJ offenses: rape, sexual assault, aggravated sexual contact, abusive sexual contact, forcible sodomy (forced oral or anal sex), or attempts to commit these offenses.” Under the UCMJ, Article 120(b), sexual assault includes committing a sexual act upon another by causing bodily harm to that other person, where bodily harm is defined as a lack of consent, or by committing a sexual act upon another when the person knows or reasonably should know the person is asleep. Here, the BOI found Respondent knew or reasonably should have known Victim was asleep when he committed the sexual act upon her. Therefore, the Board found Respondent committed sexual assault as that term is defined at AFI 36-3206, paragraph 3.3.1.

When directing an officer's discharge pursuant to this provision, the Office of the Secretary of the Air Force may characterize a discharge as honorable, under honorable conditions (general) or UOTHC. AFI 36-3206, paragraph 7.31.2.2.4. AFI 36-3207, *Separating Commissioned Officers*, 9 July 2004 (incorporating through Change 6, 18 October 2011), paragraph 1.7 describes the different service characterizations. An honorable discharge is the highest type of discharge characterization. An under honorable conditions (general) discharge characterization is warranted “if the military record is not sufficiently meritorious to warrant an honorable discharge but doesn't warrant a discharge under other than honorable conditions.” A UOTHC discharge is appropriate where the military record does not warrant an under honorable conditions (general) discharge.

Probationary officers are entitled to have their case heard by a BOI composed of officers where, as here, the Show Cause Authority recommends a UOTHC discharge. AFI 36-3206, paragraph 4.28.3. The BOI gives respondents who face discharge proceedings a fair and impartial hearing, makes findings, and recommends whether the Air Force should retain or discharge officers. AFI 36-3206, paragraph 7.1. The BOI makes its determination based on a preponderance of the evidence. AFI 51-602, *Boards of Officers*, 13 April 2017, paragraph 1.4.2.2.

DISCUSSION

The facts of this case are straightforward. Respondent does not dispute that sexual contact occurred. Respondent contends, however, that Victim consented to the contact. Specifically, Respondent stated Victim grabbed Respondent's hand and spread her legs, thereby inviting Respondent to engage in the sexual contact. Although Victim chose not to testify at the BOI, Victim participated in an interview that was videotaped and presented to the Board. In this interview, Victim stated she woke up to find her shirt pulled up over her breasts and Respondent's finger in her vagina. She stated she was shocked, stood up, and walked away.

Text messages between Respondent and Victim the day following the assault further corroborated Victim's assertions. In these messages, Respondent apologized for his behavior, stated it was out of character, and would not happen again. Finally, one of the Government's witnesses' testified that Respondent told him he did not remember the incident, but admitted that if Victim was saying it was nonconsensual, then it was nonconsensual as Victim described it.[3]

Right to Confrontation

Post BOI, Respondent contended that Victim's refusal to testify violated his Sixth Amendment rights to confront his accuser. After hearing lengthy argument on this issue from both the Government's and Respondent's counsels, the Legal Advisor determined he could not compel victim to testify, and, given Victim's refusal, she was unavailable. The Legal Advisor admitted Victim's videotaped AFOSI interview.

We agree with the Legal Advisor's treatment of these issues. First, Respondent's reliance on the Sixth Amendment is misplaced. The Sixth Amendment's confrontation clause, by its terms, applies "In all criminal prosecutions ..." U.S. Const. Amend. 6. This Constitutional right does not apply to civil administrative matters generally. *See, e.g., Hannah v. Larche*, 363 U.S. 420 (1960).

In *Louisville & Nashville R.R. Co*, 227 U.S. 88 (1913), the Supreme Court addressed the applicable standard of review of administrative determinations. The Supreme Court noted the permissiveness in admission of evidence, but noted that such proceedings must still meet basic evidentiary requirements and that it would review an agency's conclusions to determine if they were supported by "substantial evidence." Judicial standards, consistent with the Administrative Procedures Act favor the admission of hearsay in administrative proceedings. See *United States Steel Mining Co., v Director Office of Workers' Compensation Programs*, 187 F.3d. 384 (4th Cir. 1999) (observing that agencies are empowered to admit all relevant evidence, erring on the side of inclusion). Consequently, the overriding issue is typically not whether hearsay evidence is admissible, but whether its receipt in an administrative proceeding *is sufficient to support the decision* on judicial review. For example, in *Hoska v. U.S. Dept. of the Army*, 677 F.2d 131 (D.C. Cir. 1982), the Army revoked a civilian employee's clearance, based on security violations and other misconduct, resulting in his dismissal. The government's case relied largely on hearsay evidence. The D.C. Circuit Court set aside the dismissal, reasoning that uncorroborated hearsay lacked sufficient assurance of truthfulness and was not overcome by the employee's testimony. The opinion also suggested the hearsay evidence was inconsistent, the declarants not disinterested and the employee

[3] See Respondent's quote at fn. 3, above.

was not given access to the statements before the hearing. Similarly, in *Cooper v. United States*, 639 F.2d 727 (Ct. Cl. 1980), a Navy employee was discharged for "disgraceful conduct." The Court of Claims reversed for lack of substantial evidence, as the police reports relied upon amounted to multiple hearsay, admitted without some assurance of its reliability and credibility.

Respondent relies on *Davis v. Stahr*, 293 F. 2d 860 (D.C. App. 1961) to argue the Confrontation Clause applies to administrative hearings. In *Davis*, the court held the military could not discharge an inactive reservist, under other than honorable conditions, for alleged subversive speech or associations without, at the least, allowing him to confront the witnesses against him and to know the adverse information. *Davis*, at 863. He similarly relies on *Greene v. McElroy*, 360 U.S. 474 (1959), which applied the Confrontation Clause to administrative and regulatory actions. *Greene*, at 496-497. However, *Greene* did not involve members of the armed forces; rather, it concerned a civilian employee of a government contractor. Moreover, the effect of *Greene* was considerably narrowed by *Cafeteria and Restaurant Workers, etc. v. McElroy*, 367 U.S. 886, 899 (1961) in which the Court held an employee of a concessionaire on a military or naval installation could be summarily deprived of right of access to the area.

Likewise, *Davis* did not deal with regular active duty personnel, but instead concerned reservists. However, *Beard v. Stahr*, 200 F. Supp. 766 (D.C. Dist. Ct. 1961), involved an army officer who sought an injunction and challenged the Army's practice of requiring the respondent to prove why he should remain on the active list and that the practice failed to require that he be confronted with witnesses against him. The D.C. District Court discussed how the Civil Service Act, 5 U.S.C. § 652, provides a civil service employee may be dismissed merely with notice of the charges and an opportunity to file a written reply. *Beard*, at 775. The *Beard* court also differentiated *Davis*, because *Davis* was based on the proposition that Congress had not authorized the Secretary of the Navy to issue a discharge to inactive reservists under conditions less than honorable; no constitutional question was determined. *Id*. Congress is empowered to establish procedure for the elimination of officers who either are surplus or not regarded as meeting high standards that should be exacted from officers; such procedure is not subject to the limitations of the Due Process Clause or any other constitutional provision. *Id*., at 773. Although the U.S. Supreme Court vacated *Beard* because the action was premature, as the Secretary of the Army had not yet acted on the board's recommendation to separate him, it held if appellant were removed, the Court was satisfied adequate procedures for seeking redress would be open to him. *Beard v. Stahr*, 370 U.S. 41 (1962).

"It has long been settled that the factfinder in an administrative adjudication may consider relevant and material hearsay." *Johnson v. United States*, 628 F.2d 187, 190 (D.C. App. 1980). Ultimately, a "discharge proceeding is not a criminal proceeding, and the rights of criminal defendants are not per se applicable." *McTaggart v. Secretary of the Air force*, 458 F.2d 1320 (7th Cir. 1972); *see also Brown v. Gamage*, 377 F.2d 154 (D.C. App. 1967), *cert. denied*, 389 U.S. 858 (1967); *Crowe v. Clifford*, 455 F.2d 945 (6th Cir. 1972). For instance, in *Brown*, an Air Force officer challenged his discharge because the evidence consisted of five ex parte written statements which did not afford him the ability to confront the witnesses against him. *Brown*, at 155. The court pointed out the discharge was not a criminal trial. *Id*. There is no constitutional right to serve on active duty as an officer, and the court would not review the discharge under the Sixth Amendment standard. *Id.* In a discharge, the respondent is entitled to a "fair and impartial hearing." *Id*. In

dicta, the court stated, "If we declare that a 'fair' hearing in the context of [10 U.S.C. § 8792][4] requires physical presence and cross-examination at the hearing, then either Congress must amend the statute to supply the Air Force with missing subpoena power, or the Air Force may be completely deprived of testimony from [personnel who cannot be ordered to appear to testify]."

Indicia of Reliability

We also agree with the Legal Advisor's decision to admit the videotaped testimony of Victim in this case. (See AFI 51-602, paragraph 2.2.2.2: hearsay is admissible provided the legal advisor determines it is probative and bears indicia of reliability). The Legal Advisor here did not make specific findings on the record as to the indicia of reliability of the videotaped testimony; however, we find this evidence is sufficiently reliable to be admitted and considered by the BOI.

The Ninth Circuit Court of Appeals identified eight factors bearing on the reliability, probative value, and fair use of hearsay evidence in *Calhoun v. Bailar*, 626 F.2d 145 (9th Cir. 1980), *cert. denied* 452 U.S. 906 (1981). These eight factors are: (1) the independence or possible bias of the declarant; (2) the type of hearsay material submitted, e.g., independent reports, routine reports; (3) whether written statements are signed and sworn, as opposed to unsigned, unsworn, oral or anonymous statements; (4) whether or not the statements are contradicted by direct testimony; (5)whether or not the declarant is available to testify and, if so, whether or not the party objecting to the hearsay statements subpoenas the declarant; (6) whether the declarant is unavailable and no other evidence is available; (7) the credibility of the declarant if she is a witness, or of the witness testifying to the hearsay; and (8) whether or not the hearsay is corroborated. *Id*., at 149.

Applying these factors to the current proceedings, the declarant (Victim) is biased against Respondent, in the sense she is the complaining party. That said, Victim originally made a restricted report, and the report only became unrestricted when she told an NCO in her unit of the incident. The NCO informed the Unit Commander of the incident, and the Commander contacted AFOSI. When interviewed, it was clear Victim was not just trying to get Respondent into trouble. Rather, she was friends with Respondent; she seemed to blame herself somewhat for the assault; and she was trying to put the situation behind her. She did not appear to embellish the facts to make the case worse for Respondent. There was no evidence that she had anything to gain personally by lying about the event.

Addressing factors (2) and (3), the type of hearsay submitted was an unsworn oral statement. This arguably might be less reliable in nature than a sworn statement or routine or independent reports, but this is not fatal to the ultimate decision. While unsworn, the complaint was not anonymous, and Victim, as a military member, is still subject to discipline if she provides a false official statement in violation of Article 107, UCMJ.

Regarding Factor (4), Victim's version of the events are contradicted in part by Respondent's unsworn statement. Their respective version of events leading up to the incident are generally

[4] 10 U.S.C. § 8792 set forth the requirement for board of inquiry. This authority is now contained in 10 U.S.C. § 1182. The statute still requires a board of inquiry to provide a fair and impartial hearing to each officer required to show cause for retention on active duty.

congruent. However, Respondent contends Victim grabbed his hand and placed it on her leg, and that she appeared to consent to him rubbing her clitoris and placing his fingers into her vagina. Although Respondent has contradicted Victim's version of the event since AFOSI started investigating, he previously corroborated her version. In his text message to her the day after the incident he apologized when she said she did not give her permission to touch her. He did not vehemently deny it. After Victim told a friend about it and he asked Respondent what happened, again, Respondent did not deny the accusation; rather, he said if she said he did it, then he did it. Victim's recounting of the event remained consistent with each person she told, whereas Respondent agreed with her version until the investigation began, at which time he began stating the event was consensual.

Factors (5) and (6) address the availability of the declarant. The Legal Advisor found Victim to be unavailable. There is no subpoena power at a Board of Inquiry, and Victim, through counsel, expressed her desire not to participate. Granted, since the Victim is an active duty member, the Show Cause Authority could have ordered her to testify. Although current Department of Defense guidance only explicitly permits a sexual assault victim to decline to participate in an "investigation or prosecution," we conclude this recognized right of a sexual assault victim to decline to participate should be no less before an administrative discharge board. *See* DoDI 6495.02, *Sexual Assault Prevention and Response (SAPR) Program Procedures*, 28 March 2013 (incorporating Change 3, 24 May 2017), Encl. 4, paragraph l(c) ("The victim's decision to decline to participate in an investigation or prosecution should be honored by all personnel charged with the investigation and prosecution of sexual assault cases, including, but not limited to, commanders, DoD law enforcement officials, and personnel in the victim's chain of command.")

Furthermore, although Air Force instructions do not enumerate the victim's unwillingness to testify as a consideration when determining the reasonable availability of witnesses, this is a necessary consideration in light of the victim's right to refuse to testify before the board. (*See* AFI 51-602, paragraph 3.2.3, describing factors the legal advisor to consider in determining whether a witness is available to testify; specifically including the lack of subpoena power).

Factor (7) discusses the credibility of the declarant. Although the Victim was not sworn when AFOSI interviewed her, she appeared credible in the video in both her demeanor and the consistency of her version of the events. She appeared calm and provided detailed accounts of the evening and events leading to the assault. She also told several friends about the incident, and her version of events remained consistent with each conversation. Similarly, the text messages between her and Respondent support her allegation. The Legal Advisor had the opportunity to view all interviews prior to admitting the video and was in a good position to assess the credibility of each person prior to ruling. The panel had the same opportunity.

Finally, regarding the corroboration criteria from Factor (8), Respondent himself corroborated Victim's version of events through his admissions to her and a mutual friend. The afternoon after the incident, Victim sent a text message to Respondent which read, "Hey I'm sorry to be doing this over text. But I kind of wanted to bring something to your attention. We can talk about this in person too. I know in person is the best option but I just want to get it off my chest. So last night I woke up and you were touching me in several intimate places. And I get it we were drinking but l was asleep and I didn't give an okay for that to take place, you know? I woke up really shocked

and that's when I got up to get water. If it's cool with you we can like talk about it later? To clear the air and I can get your side of things as well." Respondent replied, "Yea this has been on my mind all day. I wanted to talk to you later once I saw you. I apologize for that. **That was really out of my character. The whole day I just been wondering what was going thru my mind at that time. Trust me that will never happen again**." More importantly, the mutual friend testified that when he asked Respondent if Victim's version of the events were true, Respondent replied, "Listen, man, **if she's saying I did it, I did it**. If that's what she saying happened, then, you know, I guess that it happened." (*emphasis added*)

Considering these factors, we believe adequate safeguards for the truth existed; the testimony was reliable, it had probative value, and its admission was proper.

CONCLUSION

Based on the foregoing, we conclude it is legally permissible for the Board of Inquiry to accept hearsay evidence provided there is adequate indicia of reliability.

OpJAGAF 2018/23 7 August 2018