KEYWORD: Guideline E

DIGEST: Directive ¶ E3.1.20 permits the admission at a DOHA proceeding of official records or evidence compiled in the regular course of business, without an authenticating witness. Directive ¶ E3.1.19 provides that the Federal Rules of Evidence (FRE) serve as a guide in DOHA proceedings. FRE 803(6) permits the admission of records of regularly conducted business activity. A report that an employer is legally required to make is part of the employer's regular course of business. Accordingly, under the facts of this case, a document that Applicant's former employer was required to submit by the provisions of the NISPOM relevant to Applicant's eligibility for access to national security information is an official record under ¶ E3.1.20. It is also a business record under FRE 803(6). Such evidence is admissible despite a hearsay objection because it is considered inherently trustworthy. Adverse decision affirmed.

CASENO: 17-03446.a1

DATE: 03/05/2019

DATE: March 5, 2019

In Re:	)	
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Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Erin P. Thompson, Esq., Department Counsel
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Michael J. Harris, Esq.

Department of Defense (DoD) declined to grant Applicant a security clearance. On October 17, 2017, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On November 1, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert E. Coacher 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 by admitting hearsay; whether the Judge's credibility determination was in error; and whether the Judge's overall adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant has worked for a Government contractor since 2016. Before that, he worked for another contractor, resigning from that employment in April 2016. While in the previous contractor's employ, Applicant was advised that he would be laid off. He found other work within the same company, which he performed until his resignation.

In late March 2016, Applicant was called to a meeting with the company's Human Resources (HR) officer and with a representative of the corporate office. He was questioned by the corporate representative about nearly 500 hours that Applicant allegedly worked at night. Applicant claimed that he was given authority to work outside core hours, but he did not provide corroboration. Believing that he had no future with the company, Applicant resigned.

A letter from the company's security manager stated that Applicant resigned in lieu of termination as result of an internal investigation. This investigation concluded that he had mischarged his time during 2015 and 2016 for a total of nearly 500 hours. This conclusion was based upon a review of Applicant's badge access records, witness interviews, and Applicant's 2015 performance review.

Applicant's former supervisor stated that Applicant never attempted to manipulate the system for personal gain. His current supervisor described him as reliable, and performance appraisals from his prior job show that he met expectations.

The Judge's Analysis

Applicant did not corroborate his claim that he had authority to work outside core hours. "His action of resigning from a position he held for 16 years immediately after being confronted by HR about his time mischarging creates a reasonable inference that he did so to avoid termination for cause." Decision at 5. The Judge found Applicant's denial of wrongdoing to be lacking credibility.

Discussion

Applicant contends that the Judge erred by admitting Government Exhibit (GE) 2, the letter referenced above that summarized the findings and conclusions of the company inquiry into his alleged mischarging of hours. He argues that admission of this document denied him the right to confront witnesses against him, as set forth in Directive ¶ E3.1.22, which forbids admission of oral or written statements adverse to an applicant unless there is an opportunity for cross examination. He also argues that the admission of this document was contrary to the Supreme Court's holding in *Greene v. McElroy*, 360 U.S. 474 (1959). We evaluate a Judge's rulings on the admissibility of evidence to see if they are arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 15-05047 at 4 (App. Bd. Nov. 8, 2017).

As the Judge found, GE 2 is a letter from the facility security officer (FSO) of Applicant's previous employer. It states that, in compliance with paragraph 1-302a of the National Industrial Security Program Operating Manual (NISPOM),[1] it constitutes notice to the Defense Security Service of Applicant's resignation in lieu of termination for the reasons described by the Judge in his findings. This letter is unquestionably hearsay, and Applicant did not have an opportunity to cross examination the FSO. However, despite the broad language of ¶ E3.1.22 when read by itself, hearsay is generally admissible in DOHA hearings. The Directive does not grant a right of confrontation greater than, or even coextensive with, that enjoyed by criminal defendants, in whose cases out of court statements are often admitted under exceptions to the hearsay rule. *See, e.g.*, ISCR Case No. 11-12461 at 4 (App. Bd. Mar. 14, 2013). Paragraph E3.1.22 must be read in light of the Directive as a whole and not in such a way that it would render other provisions therein a nullity. *Id*. Therefore, ¶ E3.1.22 does not forbid the admission of hearsay evidence that is admissible under other paragraphs of the Directive. *See, e g*., ISCR Case No. 06-06496 at 4 (App. Bd. Jun. 25, 2009).

As Department Counsel argues in her Reply Brief, Directive ¶ E3.1.20 permits the admission at a DOHA proceeding of official records or evidence compiled in the regular course of business, without an authenticating witness. Additionally, Directive ¶ E3.1.19 provides that the Federal Rules of Evidence (FRE) serve as a guide in DOHA proceedings. FRE 803(6) permits the admission of records of regularly conducted business activity. A report that an employer is legally required to make is part of the employer's regular course of business. *See, e.g.*, *Lewis v. Baker*, 526 F.2d 470, 473-4 (2d Cir. 1975).

Accordingly, under the facts of this case, a document that Applicant's former employer was required to submit by the provisions of the NISPOM relevant to Applicant's eligibility for access

[1]DoD 5220.22-M, dated February 2006, ¶ 1-302a: "**Adverse Information**. Contractors shall report adverse information coming to their attention concerning any of their cleared employees." *See also* ¶ 1-300: "Contractors are required to report certain events that . . . impact the status of an employees personnel security clearance[.]"

to national security information is an official record under ¶ E3.1.20.[2] It is also a business record under FRE 803(6). Such evidence is admissible despite a hearsay objection because it is considered inherently trustworthy. The trustworthiness of GE 2 is enhanced by the extent to which it is corroborated by Applicant's admissions in GE 1, security clearance application (SCA), at 12. In this exhibit, Applicant stated that his employer questioned the time that he charged for work done and that he decided it was in his best interest to resign.

Concerning *Greene v. McElroy*, we concur with Department Counsel's argument that in this case the Supreme Court did not establish an absolute right to confrontation in a security clearance adjudication. Rather, it held that the procedures employed by the DoD in denying a clearance without granting the applicant a right of confrontation had not been properly authorized either by the President or by Congress. Executive Order 10865, *Safeguarding Classified Information Within Industry*, upon which the Directive is founded, corrects this legal infirmity. All in all, we conclude that the Judge's decision to admit GE 2 was not arbitrary, capricious, or contrary to law.

Applicant challenges the Judge's conclusion that his denials of wrongdoing were not credible. We are required to give deference to a Judge's credibility determinations unless they are contradicted by other evidence. Directive ¶ E3.1.32.1; ISCR Case No. 14-01894 at 6 (App. Bd. Aug. 18, 2015). In this case, the challenged conclusion is a reasonable interpretation of the record. GE 2 states that an inquiry conducted by his employer established that Applicant had overcharged his hours. An employer's description or characterization of events underlying an adverse action are entitled to at least some degree of deference. *See, e.g.*, ISCR Case No. 14-00114 at 3 (App. Bd. Sep. 30, 2014). As stated above, this document is corroborated by other evidence. In addition to GE 1, Applicant's testimony at the hearing supports its credibility. *See* Tr. at 31-34, in which he acknowledged that company representatives accused him of overstating his hours, after which he resigned from the company because he decided that he "didn't see any future there afterwards." We also note the Judge's finding that Applicant did not corroborate his claim to have been authorized to work outside his normal duty hours. We find no reason to disturb the Judge's credibility determination.

We are persuaded by Department Counsel's argument that Applicant's brief constitutes, in large measure, a disagreement with the Judge's weighing of the evidence. Such a disagreement, or an ability to argue for an alternative interpretation of the evidence, is not sufficient to show that the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 17-02463 at 2 (App. Bd. Sep. 10, 2018).

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[2]The term "official records" in E3.1.20 is not defined. Official records are not listed as an exception to the hearsay rule in the FRE; however, public records are listed. The term "public records" is defined, in part, as "[a] record or statement of a public office if . . . it sets out . . . a matter observed while under a legal duty to report . . . ." FRE 803(8). We interpret "official records" to include writings authorized by law or regulation to be recorded or filed in a public office, such as adverse information reports. *Compare*, FRE 901(b)(7) and 902(4). We also note the FRE shall serve as a guide and the technical rules of evidence may be relaxed in security clearance proceedings. Directive E3.1.19. Furthermore, the criminal penalty under 18 U.S.C. § 1001 for knowingly and willfully providing false documents to the U.S. Government provides an indicia of reliability and trustworthiness to documents recorded or filed as required by law or regulation. *See also*, FRE 807.

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). *See also* Directive, Encl. 2, App. A ¶ 2(b): "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

Order

The Decision is **AFFIRMED**.

Signed: Michael Y. Ra'anan
Michael Y. 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