

KEYWORD: Guideline F

DIGEST: If an appealing party demonstrates factual or legal error, then the Board must consider whether the error was harmful or harmless. As noted above, Department Counsel has not challenged any of the Judge’s findings of fact or conclusions. Department Counsel has not identified any derogatory information in the background interview possibly excluded from consideration that would have likely affected the outcome of the case. Nor is it apparent to us that had the Judge considered all of the potentially derogatory information in the background interview she would have reached a different result. Department Counsel has failed to establish that the Judge’s erroneous evidentiary ruling constituted harmful error. The Judge’s decision is sustainable. Favorable decision is affirmed.

CASE NO: 19-01174.a1

DATE: 02/06/2020

DATE: February 6, 2020

In Re:	)	
	)	
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	)	
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 April 26, 2019, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On September 23, 2019, after considering the record, Administrative Judge Gina L. Marine granted Applicant’s request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30. In the appeal brief, Department Counsel challenges an evidentiary ruling. For the reasons stated below, we affirm the Judge’s decision.

The SOR alleged that Applicant had 12 delinquent accounts that were either charged off or placed for collection. Excluding a duplicate debt, the delinquent debts totaled about \$39,600. In the appeal brief, Department Counsel indicated that the Government agrees with, and adopts, the Judge’s finding of fact. In her analysis, the Judge stated:

In 2017, Applicant made monthly payments of \$300 directly to the creditor to reduce the balance of the debt alleged in SOR ¶ 1.c from \$6,870 to \$3,172. In April 2018, she engaged the services of the DRP [debt relief program] to assist in resolving her delinquent debts, including those alleged in SOR ¶¶ 1.a - 1.f. In January 2019, she hired a company to help monitor her credit for fraudulent activity. From April 2018 through August 2019, Applicant and her husband made bi-weekly deposits of \$347 into the DRP savings account, totaling approximately \$12,716. Between May 2019 and August 2019, Applicant resolved, directly with the creditors, the debts alleged in SOR ¶¶ 1.g - 1.k, which totaled \$1,743. The DRP negotiated settlement agreements in August 2019 for the debts alleged in SOR ¶¶ 1.c and 1.e to be paid from DRP funds.

Applicant has established a reasonable plan to resolve her remaining delinquent debts by continuing to work with the DRP, and by using a portion of the equity from the September 2019 sale of her home. While Applicant is not currently debt-free, her actions, both before and after the SOR was issued, demonstrate that she will follow through her plan. [Decision at 6]

The Judge concluded that Applicant’s financial problems are unlikely to recur and she is managing her current finances responsibly. Department Counsel does not challenge any of the Judge’s conclusions.

In the appeal brief, Department Counsel contends that the Judge erred in an evidentiary ruling. In the decision, the Judge stated:

The Government included a summary of Applicant’s security clearance interview (Item 4) among the evidentiary items in the FORM [File of Relevant Material]. The Government included in the FORM a prominent notice advising

Applicant of her right to object to the admissibility of Item 4 on the ground that it was not authenticated as required by Directive ¶ E3.1.20. The Government did not, however, advise Applicant of the consequences of her failure to raise an objection to Item 4 in her responses to the FORM: specifically, that she could be considered to have waived any such objection; and that Item 4 could be considered as evidence in her case. Applicant did not raise an objection to Item 4 in either FORM response. However, because she was not advised that Item 4 could be considered as evidence absent her objection, Item 4 is admitted only for the limited purpose of considering any mitigating or exculpatory information therein. I will not consider any disqualifying or derogatory information contained in Item 4 that is not corroborated by admissible evidence. [Decision at 2.]

Department Counsel contends the Judge’s *sua sponte* ruling regarding Applicant’s background interview deprived the Government of an impartial decision-maker. However, there is a rebuttable presumption that a Judge is impartial and unbiased, and a party seeking to overcome that presumption has a heavy burden of persuasion. *See, e.g.*, ISCR Case No. 15-03162 at 3 (App. Bd. Jul. 25, 2017). This assignment of error is resolved against the Government because Department Counsel’s arguments fail to meet the heavy burden of establishing the Judge was biased. Adverse rulings alone do not demonstrate judicial bias. *See, e.g.*, ISCR Case No. 15-05047 at 3 (App. Bd. Nov. 8, 2017).

Department Counsel also contends that the Judge’s consideration of Applicant’s unauthenticated background interview for the limited purpose of mitigation, while excluding any uncorroborated derogatory facts, was arbitrary, capricious, and contrary to law. We agree, although not for all of the reasons set forth by Department Counsel.

We review a Judge’s evidentiary rulings to determine whether they are arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 15-05047 at 4 (App. Bd. Nov. 8, 2017). In this case, the Judge failed to articulate a satisfactory legal basis for her challenged ruling. She needed to conclude whether or not the background interview was admissible.<sup>1</sup> She cites no authority for her conclusion that information in a background interview admitted into evidence could be considered for mitigating purposes but excluded from consideration for disqualifying purposes.<sup>2</sup> She did not

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<sup>1</sup> Department Counsel asserts, “While the statement in the present case was not specifically adopted, Applicant raised no objection to it becoming part of the record, and thus, not only was it admissible based on the waived objection, but the waiver was tantamount to an adoption.” Appeal Brief at 11. The Board has never reached such a conclusion, and we decline to do so now. Each case is different. Whether a forfeiture of a right has occurred or whether a knowing and intelligent waiver has been made are determinations to be made by the Judge. Department Counsel has tools available to facilitate resolution and clarity in these situations. It is worth observing that there is a spectrum of educational backgrounds among applicants and few are represented by counsel in FORM cases.

<sup>2</sup> The Federal Rule of Evidence (FRE) authorize the admission of evidence for limited purposes in certain circumstances. *See, e.g.*, FRE 105 (Limited Admissibility); FRE 404 (Character Evidence Not Admissible to Prove Conduct; Exception Other Crimes); FRE 610 (Religious Beliefs and Opinions); etc. However, there is no basis for concluding any of the recognized circumstances for admitting evidence for limited purposes apply in this case. *Compare*

specifically identify what information in the background interview she was excluding from consideration.<sup>3</sup> Directive, Encl 2, App. A ¶ 2(a) provides that “All available, reliable information about the person, past or present, favorable and unfavorable, should be considered in reaching a national security eligibility determination.” *See also* Directive ¶ 6.3 (“Each clearance must be a fair and impartial common sense determination of all the relevant and material information . . .”); ISCR Case No. 14-06653 at 3 (App. Bd. Nov. 18, 2016)(a Judge must consider the evidence as a totality); and ISCR Case No. 94-0964 at 4 (App. Bd. Jul. 3, 1996)(“Security clearance decisions must be based on consideration of the evidence as a whole, not just those pieces of evidence that support a Judge’s final decision.”). Once the background interview was admitted into the record, it should have been considered for all pertinent purposes. It was arbitrary and capricious to exclude derogatory information in the background interview from being considered for disqualifying purposes. The Judge’s challenged evidentiary ruling is a clear error in judgment<sup>4</sup> and contrary to law.<sup>5</sup>

If an appealing party demonstrates factual or legal error, then the Board must consider whether the error was harmful or harmless. *See, e.g.*, ISCR Case No. 02-12199 at 3 (App. Bd. Aug. 8, 2005). As noted above, Department Counsel has not challenged any of the Judge’s findings of fact or conclusions. Department Counsel has not identified any derogatory information in the background interview possibly excluded from consideration that would have likely affected the outcome of the case. Nor is it apparent to us that had the Judge considered all of the potentially derogatory information in the background interview she would have reached a different result. *See, e.g.*, ISCR Case No. 95-0495 at 4 (App. Bd. Mar. 22, 1996) (remand or reversal required only where there is a significant chance that, but for the error, a different result might have been reached, citing *NLRB v. American Geri-Care, Inc.*, 697 F.2d 56, 64 (2d Cir. 1982), *cert. denied*, 461 U.S. 906 (1983)). Department Counsel has failed to establish that the Judge’s erroneous evidentiary ruling constituted harmful error. The Judge’s decision is sustainable.

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ISCR Case No. 15-07369 at 3 (App. Bd. Aug. 16, 2017)(non-alleged conduct and circumstances may be considered for certain limited purposes, such as in assessing an applicant’s credibility; evaluating an applicant’s evidence of extenuation, mitigation, or changed circumstances; determining whether an applicant has demonstrated successful rehabilitation; and conducting a whole-person assessment).

<sup>3</sup> *See* ISCR Case No. 16-02536 at 5 (App. Bd. Aug. 23, 2018)(remand because the Judge failed to identify whether statements in a personal subject interview were admitted or excluded from evidence based on whether applicant adopted them).

<sup>4</sup> “In deciding whether the Judge’s rulings or conclusions are erroneous, we review the Judge’s decision to determine whether: . . . it reflects a clear error of judgment . . .” ISCR Case No. 14-02563 at 3-4 (App. Bd. Aug. 28, 2015).

<sup>5</sup> “In deciding whether the Judge’s rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law.” ISCR Case No. 02-12199 at 2 (App. Bd. Aug. 8, 2005).

**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