KEYWORD: Guideline I; Guideline E

DIGEST: On its face, GE 1 is an official record that is admissible in DOHA proceedings. Applicant digitally signed GE 1; certified that her statements in it were true, complete, and correct to the best of her knowledge and belief; and submitted it to the Government to obtain national security eligibility. The truthfulness of her responses to questions in GE 1 are critical aspects of SOR allegations presented to Judge for adjudication. Under Directive ¶ E3.1.20, such an official record may be received into evidence without an authenticating witness. Adverse decision affirmed.

CASE NO: 19-00673.a1

DATE: 10/19/2020

DATE: October 19, 2020

In Re:	)	
----------	)	ISCR Case No. 19-00673
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Marc Napolitana, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On June 13, 2019, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline I (Psychological Conditions) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 15, 2020, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Shari Dam 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 evidentiary and procedural rulings, whether the Judge erred in her findings of fact, whether the Judge was biased, 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, who is in her early 50s, has worked for five Federal contractors since early 2015. While she has taken college courses, she has not earned any college degrees.

Under Guideline E, the SOR alleges that Applicant falsified Electronic Questionnaires for Investigations Processing (e-QIPs) in 2014 and 2017 by listing she received bachelor's degrees in 1991 and 2005 and master's degrees in 2000, 2001, 2002, and 2003; falsified the 2017 e-QIP by failing to disclose that she was involuntarily terminated from jobs in 2015 and 2016; falsified the 2017 e-QIP by listing she was a Marine Corps employee for about 2 years; falsified the 2017 e-QIP by listing she was in the Air Force Inactive Reserves for about 11 years and received an honorable discharge; and falsified a resume submitted to a contractor in 2017 by claiming she had various credentials. It also alleges that she was terminated from contractor employment in 2016 for misrepresenting that she was a Federal Bureau of Investigation (FBI) employee while at a Veterans Affairs (VA) clinic.

Applicant attributed the mistakes regarding her educational background in her e-QIP to computer connectivity problems. She indicated that she rushed through the applications and failed to review her responses before submission. She claimed she mistakenly listed educational certificates as degrees, noting she had trouble with the drop-down menus. A special agent testified there is no educational "certificate" category in the e-QIP. Applicant stated that she did not disclose one job termination on her e-QIP because she did not receive a termination notice, but she knew the termination related to a false accusation regarding a badge incident at a VA clinic. She indicated her failure to list the other job termination on the e-QIP was an unintentional oversight.

Applicant acknowledged that she should not have listed the Marine Corps as an employer in the 2017 e-QIP but noted she performed voluntary security services at sporting events for a military-related foundation composed of retired military members and their spouses. She testified that she never served in the Air Force but had participated in the Civil Air Patrol. She attributed

these discrepancies on her e-QIP to typographical errors and connectivity problems. She denied that she attempted to falsify in her resume, stating it was a working copy that was not intended for distribution. She also noted her computer was hacked and did not know which resume was on the internet. The statement on the resume that she was a helicopter pilot was a typographical error. She denied ever representing herself as an employee of the FBI but noted that agency offered her a job about 13 years ago. People may have misunderstood her comments about that offer and mistakenly thought she worked for that agency.

Under Guideline I, the SOR alleged that a licenced psychologist diagnosed Applicant with antisocial personality disorder in 2019 and gave her a poor prognosis. The psychologist determined Applicant's disorder impaired her judgment and ability to safeguard classified information. In a post-hearing submission, Applicant provided an evaluation from an clinical neuropsychologist who did not provide a diagnosis or clearance recommendation but noted Applicant's self-reporting assessment scores fell outside the normal range, which suggests she may not have been "completely forthright" in her responses. Decision at 9.

The Judge's Analysis

Applicant deliberately provided false and misleading information to contractors and in her 2014 and 2017 e-QIPs. None of the pertinent mitigating conditions under Guideline E were established. She continues to deny all of the allegations and claims she made unintentional mistakes on her e-QIPs and resumes due to being rushed, unintentional oversight, or computer problems. "None of these explanations are credible or persuasive regarding the specific false information she provided." Decision at 12.

A psychologist diagnosed Applicant with a mental health disorder that impairs her ability to safeguard classified information. "The evaluation she submitted in rebuttal to the Government's evaluation did not focus on her reported falsifications, but primarily assessed her cognitive functioning." Decision at 13. The rebuttal evaluation did not articulate a diagnosis or prognosis and is not persuasive. None of the pertinent Guideline I mitigating conditions apply.

Discussion

Evidentiary and Procedural Rulings

Applicant's Counsel contends that the Judge committed various evidentiary and procedural errors. The Board examines a Judge's challenged evidentiary and procedural rulings to determine whether they are arbitrary, capricious, or contrary to law, which includes determining whether rulings are inconsistent with provisions in the Directive. Directive ¶ E3.1.32.3. *See also*, ISCR Case No. 15-05047 at 4 (App. Bd. Nov. 8, 2017). At this stage, it merits noting that Applicant represented herself at the hearing below.

Applicant's Counsel first asserts the Judge failed to consider Applicant's objection to Government Exhibit (GE) 1, Applicant's 2017 e-QIP. In support of his argument, he cites only a

portion of the exchange between the Judge and Applicant and argues that "the objection was not accurately fleshed out by the Judge." This assignment of error lacks merit. On its face, GE 1 is an official record that is admissible in DOHA proceedings. *See, e.g.*, ISCR Case No. 02-30913 at 4 (App. Bd. Jul. 19, 2005). Applicant digitally signed GE 1; certified that her statements in it were true, complete, and correct to the best of her knowledge and belief; and submitted it to the Government to obtain national security eligibility.[1] The truthfulness of her responses to questions in GE 1 are critical aspects of SOR allegations presented to Judge for adjudication. Under Directive ¶ E3.1.20, such an official record may be received into evidence without an authenticating witness. Of note, not cited in the appeal brief is the initial portion of Applicant's objection in which she indicated that she intended to offer into evidence a "correct" e-QIP. Tr. at 16. The Judge knew that Applicant's intent to present a "correct" e-QIP—which was entered into evidence as Applicant's Exhibit (AE) A and was prepared by Applicant the night before the hearing (Tr. at 21 and 129)—had no bearing on the admissibility of GE 1. We find no error in the Judge's ruling admitting GE 1 into evidence.

Second, Applicant's Counsel notes that, when Applicant was asked if she had any objection to GE 5, she responded by stating it was not a "true resume" and indicating it was apparently distributed after her computer was hacked. Appeal Brief at 6, quoting from Tr. at 18. Applicant's Counsel argues the Judge admitted GE 5 into evidence without properly entertaining Applicant's challenge to its authenticity. While the Judge should have first asked Department Counsel to address Applicant's apparent challenge to the authenticity of GE 5 before ruling on its admissibility, any error that may have occurred was harmless. *See, e.g.*, ISCR Case No. 19-01220 at 3 (App. Bd. Jun. 1, 2020) (an error is harmless if it did not likely affect the outcome of the case). At the hearing, a special agent testified that she obtained GE 5 from one of Applicant's former employers who had pulled it from her employment file. Tr. at 64-66 and 89-90. The special agent also testified that she requested Applicant to log into the USAJobs.gov website to retrieve her resume. Applicant did so and the resume on that website was identical to GE 5. Tr. at 71-73 and 90. The special agent adequately authenticated GE 5. Additionally, Applicant authenticated GE 5 during her testimony. She testified that GE 5 was a "working resume" that "was not ready to be published" and, after advising her former employer it was not finished, she submitted it to them upon their demand. Tr. at 117-120, 123-127, and 142.

Third, Applicant's Counsel contends that the Judge erred in admitting GE 7, a Government requested psychological evaluation, over Applicant's objection that she did not have sufficient time to review it. Applicant's objection to GE 7, however, was not based on her having insufficient time to review it but rather on the content of the evaluation. Tr. at 19-20. At the hearing, Applicant acknowledged that she received GE 7 in Department Counsel's discovery package. *Id*. and 143. The discovery package was mailed to Applicant more than 40 days before the hearing. No assertion has been made that Applicant requested a continuance to either review or rebut GE 7. Moreover, there is no basis for concluding that the admission of GE 7 into evidence denied Applicant of any

[1] When offered into evidence by the Government, an applicant's signed e-QIP is admissible under Federal Rule of Evidence 801(d)(2) among other reasons.

procedural due process rights afforded her under the Directive. This assignment of error lacks merit.

Fourth, Applicant's Counsel contends that the Judge interfered with Applicant's right to make objections. Near the beginning of the hearing, the Judge advised Applicant "Anytime you have a problem, just ask the question because it's normally easily resolved. Not all the time, but well, okay." Tr. at 11. Applicant's contention involves an objection that she made during the special agent's direct examination by Department Counsel. When this objection was raised, the special agent was testifying about Applicant's explanations for her inaccurate e-QIP responses regarding her educational qualifications. Applicant asked the Judge whether she could make an objection. The Judge permitted her to object. Applicant did not assert an actual objection to the special agent's testimony but instead essentially began testifying about computer problems she encountered while working on her e-QIP. Tr. at 47-48. The Judge then asked the special agent some questions based on Applicant's comments. During that exchange, Applicant interjected information about AE A, the e-QIP she completed the night before the hearing. At the end of the exchange, the Judge advised Applicant that it would be better if she would write down her questions of the witness because she would be given an opportunity to ask them. Tr. at 47-50. Based on this exchange, Applicant's Counsel argues "the Judge effectively muzzled the Applicant" and "encouraged the Applicant to not object in the middle of damaging testimony." Appeal Brief at 7 and 13. We disagree with those assertions. Directive ¶ E3.1.10 provides the Judge "shall conduct all proceedings in a fair, timely, and orderly manner." Within the parameters set forth in the Directive, the Judge has leeway on how he or she conducts a hearing. *See, e.g.*, ISCR Case No. 18-00857 at 6, n.11 (App. Bd. May 8, 2019). The Judge's statement to Applicant was appropriate guidance to help ensure the orderly presentation of testimony. There is no basis for concluding that a reasonable person would have interpreted the Judge's guidance as somehow limiting or discouraging Applicant from making objections.

Fifth, Applicant's Counsel contends that Judge permitted the inclusion of inflammatory testimony without providing Applicant notice. This contention arises from Department Counsel asking the special agent on re-direct examination what Applicant was trying to gain when she purportedly stated she was an employee of the FBI at the VA medical clinic. The special agent responded by stating, "from the reports there was something about pain pills that she had been prescribed. She was trying to obtain a higher, a higher amount of pills because she was going to FBI training in Washington, D.C. for a month or so." Appeal Brief at 8, quoting from Tr. at 86-87. Applicant's Counsel notes no Guideline H allegations were brought against Applicant and argues this was damaging and irrelevant testimony. This argument is not persuasive. The SOR alleged that Applicant had misrepresented herself as a FBI employee at the VA clinic. What Applicant may have said or done during that incident were relevant lines of inquiry. Rules governing the exclusion of inflammatory evidence are primarily designed for jury trials, and judges have latitude to rule on whether evidence is so inflammatory that it might improperly prejudice the jury. In DOHA proceedings, there is no jury. DOHA Judges, as experienced professionals, are not presumed to be easily prejudiced by such evidence. Also, Applicant never objected to this testimony, so any potential objection was forfeited. Moreover, even if Applicant had made a request for additional medication, such a request does not reflect any illegal or improper drug involvement.

Sufficiency of the Findings of Fact

A section of the appeal brief is entitled, "Failures in Finding of Facts." In that section, Applicant's Counsel makes a general claim that the Judge's findings are not supported by substantial evidence. However, he fails to identify any specific finding of fact that is not based on substantial evidence. The Appeal Board does not review a case *de novo*. This assignment of error fails for lack of specificity. *See, e.g.*, ISCR Case No. 17-03372 at 2-3 (App. Bd. Oct. 19, 2018) (discussing the rationale for requiring an appealing party to raise specific claims of legal or factual error).

Applicant's Counsel also makes a general claim that the Judge failed to examine relevant evidence. Again, he fails to identify any specific evidence the Judge purported failed to examine. This assignment of error does not rebut the presumption that the Judge considered all of the record evidence. *See, e.g.*, ISCR Case No. 18-00110 at 5 (App. Bd. Mar. 31, 2020).

Weighing the Evidence

Applicant's Counsel's remaining assignments of error amount to a disagreement with the Judge's weighing of the evidence. For example, he highlights three Hearing Office cases as examples of applicants being granted security clearances in similar situations. He also challenges the Judge's credibility determination and whole-person assessment. In this regard, we noted the U.S. Supreme Court has stated, "Determining the weight and credibility of the evidence is the special province of the trier of fact." *Inwood Laboratories, Inc., et al. v. Ives Laboratories Inc., et al.*, 456 U.S. 844, 856 (1982).

Each security clearance adjudication is unique and must be judged on it own merits. *See* Directive, Encl. 2, App. A¶ 2(b). We gave due consideration to the Hearing Office cases that Applicant's Counsel has cited in support of his arguments, but they are neither binding precedent on the Appeal Board nor sufficient to undermine the Judge's decision. *See, e.g.,* ISCR Case No. 19-01234 at 3-4 (App. Bd. Jun. 24, 2020). The cited cases are easily distinguishable from the present case. Of note, the Judge in one of the cited cases concluded the applicant did not intentionally provide false information about his academic record to employers.

As noted above, the Judge concluded that none of Applicant's explanations for the alleged falsifications were credible. We are required to give deference to a Judge's credibility determination. Directive ¶ E3.1.32.1. A party challenging a Judge's credibility determination has a heavy burden on appeal. *See, e.g.*, ISCR Case No. 02-12199 at 3 (App. Bd. Aug. 8, 2005). Applicant's Counsel has failed to identify any basis for us to call into question the Judge's credibility determination.

From our review of the record, the arguments of Applicant's Counsel are 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. 19-01234 at 3. We further conclude the Judge considered the totality of the evidence in compliance with the whole-person analysis requirements. *See* Directive, Encl. 2, App. A ¶¶ 2(a) and 2(d).

Bias

In the appeal brief, Applicant's Counsel stated, "A review of the DOHA Hearing transcript, and the record at large, makes it abundantly clear the Judge had a negative perception of the Applicant from the moment the hearing began." Appeal Brief at 12. He further asserts:

> [T]he Judge effectively allowed the *pro se* Applicant to be bludgeoned into an extremely negative characterization by the Department Counsel. In turn, this negative characterization of the Applicant's credibility was adopted by the Judge resulting in an unfavorable decision. While there may not be sufficient evidence to satisfy the heavy burden of intentional bias by the Judge, it is clear that taken collectively, the various errors cited resulted in a biased decision. [Appeal Brief at 13.]

Our review of the record reveals nothing that would persuade a reasonable person that the Judge lacked the requisite impartiality or conducted the hearing in an unfair manner. Applicant's Counsel has not met the heavy burden of persuasion to rebut the presumption that the Judge was impartial. *See, e.g.*, ISCR Case No. 19-01513 at 3 (App. Bd. Jun. 15, 2020).

Conclusion

Applicant has failed to establish that the Judge committed any harmful error. 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 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