KEYWORD: Guideline D; Guideline E; Guideline J

DIGEST: If the Judge takes official notice of a statute, he or she should identify it with sufficient specificity so that the Board can examine its contents and determine its relevance. A police booking report was an official record for purposes of the Directive and, therefore, admissible. Adverse decision affirmed.

CASENO: 08-09480.a1

DATE: 03/17/2010

DATE: March 17, 2010

In Re:	)	
	)	
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	)	
	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Richard A. Stevens, Esq., Department Counsel

FOR APPLICANT
J. Alexander Atwood, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On April 9, 2009, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under Guideline D (Sexual Behavior), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On November 9, 2009, after the hearing, Administrative Judge Paul J. Mason 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 Applicant was denied due process;

whether the Judge erred in admitting a document describing Applicant's conduct; whether the Judge mis-weighed the record evidence; whether the Judge failed to consider all the record evidence; and whether the Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. Finding no harmful error, we affirm.

The Judge made the following pertinent findings of fact: Applicant is a fleet mechanic for a Government contractor. He has held a security clearance since 2004. He is married, with three children, ages 19, 15, and 13.

In the mid-2000s, Applicant's nephew (N) moved into Applicant's home. N's father was imprisoned for murdering his wife, N's mother. Applicant's wife believed that their home would be a good place for N to live.

In April 2007, N, then 16 years of age, was watching a sexually explicit video in Applicant's living room. The video depicted young women. Applicant sat down beside N and asked him more than once if Applicant could sodomize or have oral sex with N. Applicant locked the doors to the home and repeated his request to sodomize N while N watched the video. N did not consent to this proposed sexual behavior. Applicant and N did not engage in sexual contact.

Applicant was arrested and charged with enticing a child for indecent purposes. However, the charge was subsequently dismissed, because Applicant's conduct did not meet all the elements of the charged offense. Specifically, the law required that a child be under the age of 16, and, as stated above, N was past his 16th birthday at the time of the misconduct.

Although not convicted of an offense, Applicant received individual treatment from a licensed clinical social worker from May 2007 to the following December. He also participated in group sessions for nine months. The therapist advised that Applicant did not successfully complete the treatment due to his difficulties with authority.[1] Testing conducted during Applicant's treatment indicated that he does not have a "persistent sexual attraction" to children or adolescents. Decision at 4. As a child, Applicant was sexually molested by his older brother. At age 15 one or two women in their thirties had sexual relations with him. His therapist "intimated that these earlier incidents of molestation were misinterpreted by Applicant to be conventional, sexual encounters during his teenage years." *Id*.

Applicant enjoys a good reputation at his place of employment for the quality of his workmanship.

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[1]Government Exhibit (GE) 4, Response to Interrogatories, dated December 3, 2008, includes a letter to DOHA by the therapist. This letter states, "[Applicant] discontinued his participation with group therapy . . . We disagreed with [Applicant's] decision, as he broke the initial agreement of participating in treatment until we felt he had completed treatment. [Applicant's] ability to participate in power struggles and be oppositional to authority is definitely an issue he will have to work on. We see this as a significant deficiency. Due to [his] decision to discontinue group therapy, he is not considered to have successfully completed the treatment initially outlined for him through his psychosexual assessment and individual treatment with [therapy provider]."

Due Process Violation

Applicant contends that he was denied due process. Specifically, he argues that the Judge erred in taking administrative notice of a state statute other than the one with which he was charged and which was referenced in the SOR. We find this argument persuasive.

The SOR contained one Guideline J allegation, a repeat of the first allegation under Guideline D. This allegation is as follows: "You were arrested in about May 2007 in [City, State] and charged with Enticing a Child for Indecent Purposes. The charges were dropped in about December 2007." As stated above, this charge was dropped because of the age of the victim. However, the Judge took official notice of another state statute which, he concluded, could have been charged and which justified an adverse finding under Guideline J. He stated, "I have taken administrative notice of the existence of another state statute that applies to victims under the age of 18. This statute, which was enacted in 1992, was in effect in April 2007, when Applicant enticed his nephew for indecent purposes. For unknown reasons, the state did not indict Applicant under the correct statute." *Id*. at 2. The Judge relied upon this statute in concluding that Applicant's conduct with N constituted a Guideline J security concern.

The Judge's treatment of this statute does not quote it verbatim or otherwise identify it with sufficient specificity that we can determine its content. It is well settled that a DOHA Judge may take official notice of facts pertinent to a case. *See, e.g.*, ISCR Case No. 02-06478 at 3-5 (App. Bd. Dec. 15, 2003); ISCR Case No. 05-11292 at 4 (App. Bd. Apr. 12, 2007). *See also* Federal Rule of Evidence 201 and Directive ¶ E3.1.19 ("The Federal Rules of Evidence . . . shall serve as a guide" in DOHA proceedings). This includes any pertinent provision of state law. ISCR Case No. 01-08565 at 3 (App. Bd. Mar. 7, 2003). However, the Board must be able to examine such provisions in order to determine their relevance. *Id*. at n. 2. In the case under consideration here, we are unable to verify the Judge's statement that there is an alternative provision of state law that would have applied to Applicant and that would support a conclusion that his case set forth a Guideline J security concern. Accordingly, we conclude that the Judge's lack of specificity is an error.

Remaining Errors

Applicant contends that the Judge erred in admitting an affidavit by an official of the local Sheriff's Department. This affidavit summarizes an interview with N, in which N describes the events which led to Applicant's arrest. Applicant contends that this document constitutes inadmissible hearsay. However, we have examined this document, which is part of a Booking Report prepared by the Sheriff's Department. It is an official record compiled or created in the regular course of business and otherwise complies with the requirements of Directive ¶ E3.1.20. Accordingly, we conclude that the Judge's ruling was not arbitrary, capricious, or contrary to law. *See* ISCR Case No. 03-08813 at 5 (App. Bd. Nov. 15, 2005) (The Board will examine a Judge's evidentiary rulings to determine if they are consistent with Executive Order 10865 and with the Directive and to determine if they are arbitrary, capricious, or contrary to law).

A Judge is presumed to have considered all the evidence in the record. *See, e.g.*, ISCR Case No. 07-00196 at 3 (App. Bd. Feb. 20, 2009); ISCR Case No. 07-00553 at 2 (App. Bd. May 23,

2008). Applicant's presentation on appeal is not sufficient to rebut that presumption. Furthermore, the record provides no basis to conclude that Applicant has weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-21819 at 2 (App. Bd. Aug. 13, 2009); ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

Although we have found error in the Judge's analysis of the Guideline J security concern, we conclude that his decision is sustainable under the remaining two guidelines. Therefore, the error described above is harmless. *See* ISCR Case No. 08-07528 at 2 (App. Bd. Dec. 29, 2009); ISCR Case No. 01-23362 (App. Bd. Jun. 5, 2006); ISCR Case No. 03-09915 (App. Bd. Dec. 16, 2004); ISCR Case No. 01-11192 (App. Bd. Aug. 26, 2002). After reviewing the record, the Board concludes that, other than the error described above, the Judge examined the relevant data and articulated a satisfactory explanation for the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Judge's adverse 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 Judge's adverse security clearance decision is AFFIRMED.

Signed; Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board