KEYWORD: Guideline E; Guideline B; Guideline K

DIGEST: An SOR is an administrative pleading that is not held to the strict requirements of a criminal indictment. It is sufficient if the SOR puts an applicant on notice of the security concerns alleged against him. We will not interpret the Directive in such a way as to render any provision meaningless. Paragraph E3.1.22 does not provide a right of cross-examination regarding out-of-hearing statements that are admissible under other provisions of the Directive. Adverse decision affirmed.

CASE NO: 11-12461.a1

DATE: 03/14/2013

DATE: March 14, 2013

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| Applicant for Security Clearance | ) | |

## APPEAL BOARD DECISION

## APPEARANCES

**FOR GOVERNMENT**
Tovah A. Minster, Esq., Department Counsel

**FOR APPLICANT**
***Pro se***

The Department of Defense (DoD) declined to grant Applicant a security clearance. On September 25, 2012, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under Guideline E (Personal Conduct), Guideline B (Foreign Influence), and Guideline K (Handling Protected Information) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On November 27, 2012, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge

Edward W. Loughran 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 one of his evidentiary rulings; whether the Judge erred in his findings of fact; and whether the Decision was arbitrary, capricious, or contrary to law. The Judge's favorable findings under Guidelines B and K, and under three of the four Guideline E allegations, are not at issue in this appeal. Consistent with the following, we affirm.

**The Judge's Findings of Fact**

The Judge made the following findings pertinent to the issues on appeal: Applicant worked for a contractor in Country A. During that time, he was friendly with a member of the military reserves of the U.S. She held a security clearance, both because of her military status and her civilian job with the U.S. Government. In 2009, the friend was on temporary duty in Country A. Applicant and she went to dinner one evening. Applicant advised her that two persons from Syria would meet them. One of these persons worked for the Syrian government. In response to a question from Applicant, the friend told him she would probably report the meeting with the Syrians to appropriate security authorities. After the Syrians arrived, the group engaged in talk of a social nature, and the friend was not asked sensitive questions. After the evening concluded, Applicant again asked if she was going to report the foreign contact, and she stated that she probably would. Applicant asked her if she could at least not mention his name when she made her report.

Subsequently, the friend reported the contact to pertinent security authorities. She advised that Applicant had introduced the Syrians to her. She identified the two Syrian nationals from pictures on Applicant's social networking site. U.S. officials identified one of the persons as a low-level official of the Syrian government. They could not identify the other person.

Applicant admitted to facts supporting most of the findings above, though he denied having asked the friend not to mention his name. The Judge stated that he did not find Applicant's testimony credible. He found that the conversation took place as the friend had described it.

**The Judge's Analysis**

The Judge stated that Applicant's request to be left out of the friend's report was something he had no right to do. He concluded that, at a minimum, it was an attempt to convince the friend to decline completely to fulfill what she believed to be her duty in reporting a possible security incident. He concluded that Applicant showed questionable judgment, creating thereby a possibility that he could be subject to exploitation, manipulation, and duress. In considering Applicant's case for mitigation, the Judge stated that he found Applicant to be evasive and less than forthcoming. He stated that Applicant's lack of complete candor rendered the Judge unable to conclude that Applicant had met his burden of persuasion as to mitigation. In the whole-person analysis, the Judge stated that Applicant had not accepted responsibility for his security-significant conduct, leaving the Judge with unresolved doubt about his fitness for a clearance.

**Discussion**

Denial of Due Process Issue

Applicant contends that he was denied due process. Specifically, he contends that the allegation in the SOR was vague, thereby impairing his ability to prepare for the hearing. An SOR is an administrative pleading that is not held to the strict requirements of a criminal indictment. Neither does it have to allege every relevant fact that might arise at the hearing. *See, e.g.*, ISCR Case No. 08-06859 at 3-4 (App. Bd. Oct. 29, 2010). In this case, the sole allegation that the Judge found against Applicant read as follows:

> In approximately June 2009, you introduced a United States military member to two Syrian nationals associated with the [Syrian government in Country A] and subsequently asked the military member not to disclose your association with said Syrian nationals to anyone inside the United States [G]overnment. SOR ¶ 1(a).

The SOR identified both the nature of the Syrians' government employment and the name of Country A. This allegation was sufficient to place Applicant on notice of the security concern alleged against him and the factual basis thereof. Given the extensive nature of Applicant's documentary evidence, including documents addressing the substance of the allegation at issue here, there is no reason to believe that he was impaired in his ability to prepare for the hearing. Furthermore, Applicant's Answer to the SOR made no claim of vagueness. His response to the allegation was simply "I deny." Applicant has failed to demonstrate that he was denied the due process afforded by the Directive.

Evidentiary Ruling

Applicant contends that the Judge erred in admitting a Government exhibit consisting of a signed statement in the form of a letter, thereby denying him his right to cross-examination secured by Directive ¶ E3.1.22.[1] We evaluate a Judge's evidentiary rulings to see if they are arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 10-01400 at 4 (App. Bd. Jan. 3, 2013).

[1]"A written or oral statement adverse to the applicant on a controverted issue may be received and considered by the Administrative Judge without affording an opportunity to cross-examine the person making the statement orally, or in writing when justified by circumstances, only in either of the following circumstances . . ." The excepted circumstances are not germane to the case under consideration.

The challenged statement is a letter from the Naval Criminal Investigative Service to the Defense Security Service, apprising the recipient of an ongoing criminal investigation of Applicant. The investigation was in response to the report by Applicant's friend of their contact with the Syrian nationals. The document states in pertinent part "[Applicant] subsequently asked the . . . reservist not to report his association with the Syrian nationals to anyone inside of the U.S. [G]overnment." Government Exhibit (GE) 4, Status of NCIS Investigation of [Applicant], July 20, 2011. Citing ¶ E3.1.22, Applicant argues that the Judge should not have admitted this document without affording him a right to cross examine the person who made it.

We have previously addressed the significance of ¶ E3.1.22, concluding that its right of cross examination is not greater than the confrontation right enjoyed by a criminal defendant, or even co-extensive with it. *See, e.g.*, ISCR Case No. 02-12199 at 7 (App. Bd. Oct. 7, 2004). Even in a criminal case, out-of-court statements are often admitted under the exceptions to the hearsay prohibition set forth in the Federal Rules of Evidence. In administrative proceedings, hearsay is admissible and can constitute substantial evidence. *See, e.g., Crawford v. Dept. of Agriculture,* 50 F. 3d 46, 49 (D.C. Cir. 1995); *Bustos-Torres v. INS*, 898 F.2d 1053, 1056 (5th Cir. 1990); *Willingham v. Gonzales*, 391 F. Supp. 2d 52, 64 (Dist. Ct. D.C., 2005), quoting *Hoska v. Army*, 677 F.2d 131, 138 (D.C. Cir. 1982). DOHA proceedings are administrative and civil in nature, and they are not conducted with a strict application of evidentiary rules required in criminal cases, although DOHA relies upon the Federal Rules of Evidence (FRE) as a guide in its hearings. Directive ¶ E3.1.19. *See, e.g.*, ISCR Case No. 03-06770 at 4 (App. Bd. Sep. 9, 2004).

To interpret ¶ E3.1.22 as Applicant argues would impose a right of cross-examination as a condition of admitting otherwise admissible hearsay evidence on controverted matters. That would render other paragraphs of the Directive meaningless. *See, e.g.*, ISCR Case No. 03-01009 at 7 (App. Bd. Mar. 29, 2005) ("The Board will not interpret or construe the Directive or the Adjudicative Guidelines in a manner that results in rendering any provision superfluous or meaningless"). (Moreover, this would pose an unreasonably severe impediment to the accomplishment of DOHA's mission, especially in view of the fact that the agency does not have authority to subpoena witnesses to appear before its hearings.) Accordingly, we have consistently held that ¶ E3.1.22 does not provide a right of cross examination concerning out-of-hearing statements that are admissible under other provisions of the Directive.[2] *See, e.g.*, ISCR Case No. 06-06496 at 4 (App. Bd. Jun. 25, 2009). One such provision is Directive ¶ E3.1.19, *supra*, with the FRE's panoply of hearsay exceptions. Another is Directive ¶ E3.1.20, which states:

> [o]fficial records or evidence compiled or created in the regular course of business, other than DoD personnel background reports of investigation (ROI), may be

[2]*See Udall, Secretary of the Interior, v. Tallman*, 380 U.S. 1 (1965): "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration . . . When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order."

> received and considered by the Administrative Judge without authenticating witnesses, provided that such information has been furnished by an investigative agency pursuant to its responsibilities in connection with assisting the Secretary of Defense, or the Department or Agency head concerned, to safeguard classified information . . .

We have cited this paragraph in admitting a variety of documents, including police reports, criminal investigation reports by the military services, Defense Investigative Service facility inspection reports, and Clearance Decision Statements. *See, e.g.*, ISCR Case No. 08-06997 at 3 (App. Bd. Mar 1, 2011). In the case under consideration here, the document in question possesses all the indica of having been compiled in the regular course of official NCIS operations. Prepared on NCIS letterhead stationary, it relates matters that fall within the purview of a DoD criminal investigating agency and which are appropriate for reporting to the DoD agency charged with overseeing contractor security matters. It does not appear to have been generated merely in anticipation of a DOHA hearing. There is nothing in the record to suggest that this document exceeded the scope of NCIS authority, and Federal officials are entitled to a presumption of good faith in the conduct of their duties. *See, e.g.*, ISCR Case no. 11-05079 at 5 (App. Bd. Jun. 6, 2012). Accordingly, this document is an official record within the meaning of the Directive.

Moreover, it is not a report of a background investigation but, rather, of a criminal investigation into possible counter-intelligence activity by Applicant. Accordingly, it was legitimate for the Judge to admit it without an authenticating witness. In light of the record as a whole, the Judge's decision to admit this document was not arbitrary, capricious, or contrary to law. To the extent that Applicant has raised a due process concern in making his argument on this issue, we resolve it adversely to him.[3]

Error in Factual Finding Issue

Applicant challenges the Judge's finding that he requested the friend not to mention his name in her report. We examine a Judge's findings to determine if they are supported by substantial record evidence. *See, e.g.*, ISCR Case No. 11-02311 at 3 (App. Bd. Nov. 26, 2012). In this case we have considered GE 4, discussed above. We have also considered Applicant Exhibit (AE) 11, which is a detailed summary by the NCIS of the friend's statement to them of the circumstances underlying Applicant's request to her. This document describes in detail the friend's association with Applicant and the events of the evening in question. Specifically, it describes the friend as advising that, at the close of the evening, Applicant asked whether she was going to report the contact. When told that she probably would, Applicant "asked that she at least not mention his name." GE 4 and AE 11, taken together, constitute substantial evidence of the challenged finding, especially in light of

[3]We also note that, at the end of the hearing, the Judge gave Applicant an opportunity to call the friend as a witness, either in person or over the telephone, in order to address the circumstances at issue in this case. He provided Applicant extra time after the hearing to decide if he wished to take advantage of this opportunity. Applicant did not desire to do so. Decision at 2; Tr. at 139.

the Judge's credibility determination (*See* Directive ¶ E3.1.32.1: "[T]he Appeal Board shall give deference to the credibility determinations of the Administrative Judge").

In regard to the unfavorable Formal Finding regarding SOR ¶ 1(a), we find no error in the Judge's treatment of the mitigating conditions or the whole-person factors. The record supports a conclusion that 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). *See also* Directive, Enclosure 2 ¶ 2(b): "Any doubt concerning personnel being considered for access to classified information 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: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

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