KEYWORD: Guideline D; Guideline E

DIGEST: An SOR is not required to satisfy the strict requirements of a criminal indictment. The record demonstrates Applicant was provided adequate notice to prepare his case. Applicant's stated willingness to perjure himself in another context is relevant to his security eligibility. Adverse decision affirmed.

CASENO: 08-06859.a1

DATE: 10/29/2010

DATE: October 29, 2010

In Re:	)	
	)	
------	)	ISCR Case No. 08-06859
	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Tovah Minster, Esq., Department Counsel

FOR APPLICANT
William S. Aramony, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On December 23, 2009, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under Guideline D (Sexual Behavior) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On July 16, 2010, after the hearing, 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 Government had met its burden of production as to an allegation of fraud; whether the Judge failed to consider all of the record evidence; whether the Judge erred in his application of the mitigating conditions; and whether the Judge's whole-person analysis was error.[1] Consistent with the following discussion, we affirm the decision of the Judge.

The Judge made the following pertinent findings of fact: Applicant is an engineer working for a federal contractor. He has a Ph.D. in electrical engineering. He has been married since the late 1970s. He and his wife have two children.

Applicant was granted a security clearance in the early 1980s. While holding the clearance, he smoked marijuana in 1986 and 1988. He has not used illegal drugs since 1988.

Applicant engaged the services of prostitutes from 1976 until 2001, with declining frequency in the later years. In the 1980s and 1990s he visited adult bookstores that had live models, and Applicant engaged in sexual contract with them. He has also visited pornographic internet sites and, in 2001, he subscribed to a web site that permitted interaction with live models. In the 1990s and in the early 2000s, he visited strip clubs, where he received "lap dances." Decision at 2. Since 1998, Applicant has received psychological counseling for sexual addiction. He has also attended meetings of Sexaholics Anonymous (SA), a twelve step recovery program based on Alcoholics Anonymous. Applicant has not had an incident of sexual misconduct since 2003.

Between 1988 and 1996, Applicant reported personal expenses (home maintenance items, upgrades to personal computers, etc.) as business expenses on his federal income tax returns. He claimed between $500 and $1000 of personal expenses and business expenses each year. In 1997, another Government agency revoked Applicant's security clearance due to his sexual behavior, his failure to pay taxes, and software piracy.

In addition to the misconduct outlined above, Applicant did not report on his federal income tax forms the true amount of rent he received from rental property. This under-reporting occurred for tax years 1999 and 2000. The total amount of the under-reporting was $3,000. In replying to

[1]The Judge's favorable findings under Guideline D are not at issue in this appeal. However, Applicant's having (1) engaged the services of prostitutes, (2) visited pornographic web sites permitting interaction with models, (3) visited adult bookstores with live models, and (4) visited "lap dancing establishments" were also alleged under Guideline E. The Judge found against Applicant under these Guideline E allegations.

DOHA interrogatories in 2008, and later, in his response to the SOR, Applicant stated that he had submitted amended tax returns. However, during the hearing, Applicant testified that he did not submit amended returns.[2]

Subsequently, Applicant served as the executor for his father's estate. Pursuant to these duties, he sought to have a house placed on the market. Applicant hired his brother-in-law (B) to make renovations. B had subcontractors submit two bids, one an actual bid and the other a false one. The false bids, which were higher, were for accounting purposes. The total amount of the contract was $97,000. The work was performed at less cost than reflected in the false bids, and B made a profit of $47,000. When Applicant complained about the cost of the renovations, B explained to him the double bids and offered to split his profits with Applicant. Applicant agreed and offered, in return, to split half of the executor fees with B. Applicant received $23,734 from B. Although B's wife knew of this arrangement, none of Applicant's other siblings were aware of it.

Later, Applicant's other siblings brought an action in court to have Applicant removed as executor. In 2002, during an interview conducted by another Government agency, Applicant explained his actions with B and advised that he had received about $23,000. He told the investigator that, should he be directly asked about this at trial, he intended to commit perjury. He stated to the interviewer that, if the $23,000 payment was discovered, he and B would claim that it was for an unrelated business transaction. Applicant told the investigator that B had friends who would come to the deposition and testify about the false bids.[3]

After this interview, Applicant was questioned at a deposition. He stated at the DOHA hearing that he did not believe that he had committed perjury at the deposition. He stated that he testified at the deposition that B had performed the renovations and that the $97,000 was the cost of the work.

The parties settled the lawsuit, with Applicant remaining as executor but with fees limited to $35,000. Applicant returned the $23,734 to B in 2002, two years after he had received it. Except for B's wife, none of Applicant's siblings were aware of this payment as of the close of the record.

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[2]"Q: . . . . You gave me these exhibits. Exhibit E are those tax returns, your tax returns? A: Right. Those were the corrected sub forms that [Accountant] did. Q: I thought he didn't correct them? A: Oh he did correct them but there was no reason to file the corrected form or any return. Q: Because you didn't owe any money? A: Right." Tr. at 80.

[3]*See* GE 3 at 6: "[Applicant] indicated that he intends to commit perjury in the upcoming civil trial if he is asked directly about his involvement in this scheme. [Applicant] was asked to provide witnesses as to the cost of the renovation work; in turn, he asked [B] to provide witnesses. To [Applicant's] knowledge, [B] has friends who are willing to testify to the higher prices charged as described previously. He opined that these individuals are likely repaying a favor to [B] or he may be compensating them in some way."

In 2001, a U.S. military department denied Applicant a security clearance due to his sexual behavior and involvement in the lawsuit. Applicant's job performance evaluations state that he is accountable, honest, open and respectful in his conduct of company business.

Due Process Issue

Applicant contends that the Judge denied him due process, insofar as he relied upon record evidence concerning Applicant's willingness to commit perjury. Applicant argues that, because perjury was not alleged in the SOR, he was denied notice sufficient to enable him to prepare for the hearing.

An SOR is an administrative pleading that is not required to satisfy the strict requirements of a criminal indictment, and it does not have to allege every fact that may be relevant at the hearing. It does not have to identify specific evidence that Department Counsel will rely on at the hearing. *See, e.g.*, ISCR Case No. 04-08806 at 3 (App. Bd. May 8, 2007).

In this case, Applicant's SOR alleged at paragraph 2(e): "You engaged in fraudulent activity in about 2000 while serving as executor of your father's estate by overcharging the estate for expenses and keeping a share of the proceeds." Furthermore, Government Exhibit (GE) 3, Agency Investigation, contained the description of Applicant's interview with another Government agency concerning his willingness to commit perjury. This document was admitted into evidence with no objection from Applicant. Tr. at 10.

Applicant's stated willingness to perjure himself during the course of civil litigation challenging his conduct as executor of his father's estate is relevant to evaluating the security significance of that conduct, as it was alleged in the SOR.[4] A reasonable person in Applicant's position would be expected to have foreseen that, when he received an SOR alleging that he had perpetuated fraud upon his father's estate, circumstances flowing from that alleged fraud, to include legal action by aggrieved heirs, would be addressed at a hearing. Viewed as a whole, the record demonstrates that Applicant was provided notice sufficient to enable him to prepare his case for mitigation.

Moreover, conduct not alleged in the SOR may be considered for such purposes as assessing an applicant's credibility and evaluating an applicant's evidence for extenuation or mitigation. *See, e.g.*, ISCR Case No. 02-07218 at 3-4 (App. Bd. Mar. 15, 2004). In this case, the Judge discussed Applicant's deposition testimony in his evaluation of Applicant's case for mitigation. Therefore, he addressed it in its proper context. There is no error in the Judge's treatment of this matter.

Government's Burden of Production

Applicant contends that the Government failed to meet its burden of production concerning the allegation that Applicant had engaged in fraudulent activity while serving as executor of his

[4]*See* ISCR Case No. 02-06478 at 5 (App. Bd. Oct. 25, 2004), for a discussion of relevance.

father's estate. In a DOHA hearing, the Government's burden is to present substantial evidence regarding any controverted allegation. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." Directive ¶ E3.1.32.1.

We have considered Applicant's description of his agreement with B, as described in GE 3. This document sets forth in some detail B's having submitted false bids for the house renovation. Applicant stated to the interviewer that, when he complained to B about the high cost of the renovation, B offered to split the profits with him. He stated that B faxed Applicant a document showing how B used this "multiple bid" system to his advantage. GE 3 also describes Applicant's reply to a question about the extent to which his sharing the profits with B might subject him to blackmail: "No, not at the moment. It's never been tested. I'd hope I'd do the reasonable thing. I know you want me to say that I'd never, but I don't know because its never been tested."

We have also considered GE 2, Applicant's reply to DOHA interrogatories, in which Applicant stated that "this action was a poor decision on my part," that he had "acted inappropriately" in the exercise of his fiduciary responsibilities to the estate. These documents, when considered along with the other evidence in the record, are sufficient to constitute substantial evidence of fraudulent actions. While Applicant's testimony and documents denying an intent to defraud were evidence the Judge was bound to consider, they are not sufficient to undermine his conclusion that the Government had met its burden of production as to Applicant's alleged fraudulent conduct.

Applicant's argument on this issue challenges some of the Judge's findings, particularly a statement in the Analysis portion of the decision that Applicant's deposition testimony was, at a minimum, "intentionally misleading." Decision at 11. In support of this issue, Applicant has submitted new evidence not contained in the record, a transcript of his deposition testimony. We cannot consider this new evidence.[5] *See* Directive ¶ E3.1.29. ("No new evidence shall be received or considered by the Appeal Board"). *See also* ISCR Case No. 08-06875 at 2 (App. Bd. Oct. 29, 2009). We conclude that the Judge's material findings are based on substantial evidence, or constitute reasonable characterizations or inferences that could be drawn from the record.[6] *See*, *e.g.*, ISCR Case No. 08-07528 at 2 (App. Bd. Dec. 29, 2009).

Other Issues

[5]Although we have not considered this transcript, we note that it does not appear to undermine the challenged statement by the Judge.

[6]"Q: . . . .And when you testified at the deposition did you talk about the money [B] gave you? A: No, I did not. Q: So did you perjure yourself? A: No, I did not . . . Q: That was not a specific question asked? A: No, they didn't ask any questions . . . Q: All right. So nobody asked why it cost so much or anything like that? A: Yes, I told them that we fixed it up and that's what it cost. Q: Well, wouldn't the appropriate answer to that be it cost so much because he gave me a $23,000 kickback? A: No, I wasn't looking at it that way . . . Q: Were you prepared to perjure yourself if necessary at your deposition? A: No, I don't think I would have. I fortunately was not tested." Tr. at Tr. 117-118.

Applicant's presentation on appeal is not sufficient to rebut the presumption that the Judge considered all of the record evidence. *See, e.g.*, ISCR Case 09-01735 at 2 (App. Bd. Aug. 31, 2010). 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,'" both as to the mitigating conditions and the whole-person factors. *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)). In addition to the matters discussed above, we note evidence that Applicant engaged in security significant misconduct, to include tax evasion and fraud, after having had a clearance revoked in 1997. 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). Applicant requested that, in the event that we find that the Judge committed harmful error, we remand the case for a new decision. In light of our holding, however, we do not need to address this request.

Order

The Judge's adverse security clearance decision is AFFIRMED.

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

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board

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