

KEYWORD: Guideline E

DIGEST: A Security Clearance Decision Statement is an official record that is admissible under the Directive without an authenticating witness. DoD Reports of Investigation require authentication, although in this case Applicant stipulated to the documents' authenticity. Adverse decision affirmed.

CASE NO: 08-06997.a1

DATE: 03/01/2011

DATE: March 1, 2011

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In Re:)	
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-----)	ISCR Case No. 08-06997
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

John Bayard Glendon, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Charles L. Simmons, Jr., Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On April 28, 2009, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On October 20, 2010, after the hearing, Administrative Judge John Grattan Metz, Jr., 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 by admitting

hearsay evidence that denied Applicant his right of cross-examination; and whether the Judge erred in his application of the mitigating conditions. Consistent with the following discussion, we affirm the decision of the Judge.

The Judge made the following pertinent findings of fact: Applicant is the chief engineer for a company owned by his wife. He holds a Master's degree in electrical engineering and has completed the course work for a Ph.D.

In 2006, Applicant's request for special access was denied by another Government agency. The reasons for the denial of special access were several instances of misconduct which were subsequently alleged in the SOR in the case at issue here.¹

This misconduct alleged in the SOR included the following: (1) Applicant employed foreign nationals whom he suspected were illegal aliens; (2) he failed to report their income to the IRS; (3) he overcharged his employer for mileage from 1985 to 2006; (4) he purchased merchandise with his employer's funds, returned some of it for cash refunds, then used the cash to purchase personal items; (5) he was occasionally undercharged for purchases but did not advise the sellers; and (6) he unlawfully discharged a firearm on his property from 1993 to 2006, aware that such conduct was unlawful. Additionally, the SOR alleged the special access denial by the other Government agency as a security concern. The Judge concluded that his findings raised disqualifying conditions under Guideline E.

In the Analysis portion of the decision, the Judge stated that the incidents were of varying degrees of seriousness. He stated that Applicant's having employed household workers while suspecting that they were in the country illegally, and not reporting their income to the IRS, was, in and of itself, a sufficient reason to deny him a clearance. When considered in light of the other incidents, this conduct raised security concerns that Applicant's favorable evidence was not sufficient to mitigate. Accordingly, the Judge denied Applicant a clearance.

Upon appeal, Applicant contends that the Judge erred by admitting six documents, Government Exhibits (GE) 7 through 12. He argues that they were inadmissible hearsay and denied him his right of cross-examination under the Executive Order and the Directive. These documents were prepared by the other Government agency in its denial of special access to Applicant. The challenged documents consist of five summaries of interviews of Applicant (GE 7 through 11) and a Clearance Decision Statement (GE 12).

Executive Order 10865 and Directive ¶ E3.1.22, with slight differences in wording, each provide that an applicant has a right to cross-examine a person who has made a statement adverse to him or her on a controverted issue.² Applicant states that the challenged documents are statements adverse to him and, by admitting them, the Judge denied him his right of confrontation.

As stated above, this right applies only as to controverted issues. *See* ISCR Case No. 97-

¹The prior case also included allegations under Guidelines F and J, which are not at issue in this case.

²Executive Order 10865 § 4(a); Directive ¶ E3.1.22.

0765 (App. Bd. Dec. 1, 1998). In this case, Applicant admitted the allegations in the SOR. Answer to SOR, dated June 16, 2009.³ Therefore, the facts contained in these allegations were not controverted. *See* Directive ¶ E3.1.14 (“Department Counsel is responsible for presenting witnesses and other evidence to establish facts alleged in the SOR that have been controverted”); ISCR Case No. 08-10012 at 3 (App. Bd. May 7, 2010) (“Applicant admitted this SOR allegation, relieving Department Counsel of any further requirement of proof”). Under the facts of this case, a right of cross-examination under the cited provisions of the Executive Order and the Directive does not apply.

Moreover, a right of cross-examination is not violated when documents are admissible elsewhere under the Directive. Directive ¶ E3.1.20 provides that

[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 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 . . . An ROI may be received with an authenticating witness provided it is otherwise admissible under the Federal Rules of Evidence[.] (internal citations omitted)

We have cited this provision in support of admission of a variety of documents, including police reports, criminal investigation reports by the military services, and Defense Investigative Service facility inspection reports.⁴ We have also held that a Clearance Decision Statement by the same Government agency that denied Applicant’s special access is admissible as substantive evidence under this provision of the Directive. Because a Clearance Decision Statement is not an ROI, it may be admitted without authentication. *See, e.g.*, ISCR Case No. 02-12199 at 4, 7 (App. Bd. Aug. 8, 2005). Therefore, the Judge did not err in admitting GE 12.

GE 7 through 11, however, are reports of the other agency’s personnel background investigation of Applicant. *See, e.g.*, ISCR Case No. 02-12199 at 8 (App. Bd. Oct. 7, 2004). Insofar as the other agency falls within the ambit of the DoD, these exhibits are ROIs which could not be admitted without an authenticating witness, as required by the Directive. However, at the hearing, Applicant stipulated as to the authenticity of these exhibits, thereby relieving the Government of the

³Applicant admitted each of the specific allegations in the SOR, “with mitigating circumstances.” He characterized the mitigating circumstances as his full cooperation with the security clearance process and his candid and honest responses to all inquiries. He stated that, to the extent that his record raised security concerns, he had “taken appropriate steps to address all prior instances of personal conduct stated in the Statement of Reasons” and that his actions in response to the security concerns are sufficient to mitigate them. Therefore, Applicant’s answer does not question the factual accuracy of the allegations. The Judge agreed that Applicant had met his burden of persuasion as to one of the allegations, SOR ¶ 1(e), and found in Applicant’s favor on it.

⁴ISCR Case No. 03-06770 (App. Bd. Sep. 9, 2004); ISCR Case No. 06-06496 (App. Bd. Jun. 25, 2009); ISCR Case No. 93-1234 (App. Bd. May 19, 1995). Additionally, ISCR Case No. 02-30913 (App. Bd. Jul. 19, 2005) states that security clearance applications are admissible under ¶ E3.1.20.

responsibility of calling an authenticating witness.⁵ Furthermore, we conclude that these exhibits are otherwise admissible under the Federal Rules of Evidence. First, they consist solely of Applicant's responses to interview questions. Because they were offered by Department Counsel, they constitute admissions by a party-opponent and, therefore, are excluded from the definition of hearsay. Fed. Rule Evid. 801 (d)(2). Second, even if they are hearsay, they are admissible as public records and reports under Fed. Rule Evid. 803(8). We conclude that the Judge did not err in admitting GE 7 through 11.

Finally, even if the Judge did err in admitting the challenged documents, the information contained therein is repeated almost verbatim in GE 12, which was properly admitted. Therefore, even if the Judge had declined to admit these exhibits, his overall decision would most likely have been the same. Any error in the Judge's ruling on the admissibility of GE 7 through 11 is harmless. *See, e.g.*, ISCR Case No. 03-23829 at 3 (App. Bd. Apr. 27, 2007).⁶

Applicant cites to decisions by the Hearing Office in support of his appeal. We give due consideration to these cases. However, each case must be decided upon its own merits. Directive, Enclosure 2 ¶ 2(b). Moreover, Hearing Office decisions are binding neither on other Hearing Office Judges nor on the Board. *See, e.g.*, ISCR Case No. 06-24121 at 2 (App. Bd. Feb. 5, 2008). We have examined the Judge's treatment of the mitigating conditions and find no error therein. 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).

Order

The Judge's adverse security clearance decision is AFFIRMED.

⁵"Admin. Judge: [Applicant's Attorney], do you have any objection to the government's characterization of Exhibits 1 through 14 and the cover sheet that it provided? [Attorney]: The characterization, no, your Honor. And we admit and stipulate that they're authentic and genuine documents." Tr. at 20.

⁶We have considered the questions of whether GE 12, by relying so extensively on GE 7 through 11, has thereby incorporated these documents by reference, or whether these documents would be admissible under Fed. Rule Evid. 106, which codifies the doctrine of completeness. In light of our disposition of the issue on appeal, we do not need to resolve these questions.

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

Signed: Michael D. Hipple
Michael D. Hipple
Administrative Judge
Member, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
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