KEYWORD: Guideline J; Guideline D

DIGEST: Upon cross-examination Department Counsel questioned Applicant about statements he made to the FBI. The statement were in an Army Report of Investigation which was not offered into evidence. At no time did Applicant's counsel raise an objection or request to see the document. The issue was waived for purposes of appeal. Adverse decision affirmed.

CASENO: 08-08085.a1

DATE: 04/21/2010

DATE: April 21, 2010

In Re:	)	
----	)	ISCR Case No. 08-08085
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Candace L. Garcia, Esq., Department Counsel

FOR APPLICANT
Nina J. Ginsberg, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 9, 2009, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under Guideline J (Criminal Conduct) and Guideline D (Sexual Behavior) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On January 15, 2010, after the hearing, Administrative Judge Mark Harvey 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 permitting Department Counsel to question Applicant concerning a prior statement and whether the Judge's adverse security clearance decision was arbitrary, capricious, or contrary to law. Finding no error, we affirm.

The Judge found that Applicant is a 36-year-old systems engineer working for a Defense contractor. He served in the Army from 1992 to 1993. He is married and has children.

Applicant's father deserted his family when Applicant was nine. His mother remarried when Applicant was twelve. Applicant's older sister sexually abused him when he was eleven to thirteen years of age. Applicant had problems in school and, as an adolescent, was depressed and sometimes suicidal. He received therapy for his emotional problems for six years.

While in junior high school, Applicant was tutored by the wife of an Army officer. Even after graduating from high school, Applicant continued a friendly relationship with the family and was permitted to provide child care for their twelve-year-old daughter. From August to October 1992 Applicant, then nineteen, engaged in sex acts with the daughter. He did so about ten times. He also engaged in such acts with another twelve-year-old girl twice. These acts included digital penetration of one of the children.

Applicant entered the Army in 1992. While Applicant was on active duty, the FBI questioned him about his sexual activity with the two young girls. As a result of the investigation, Applicant was prosecuted. He pled guilty to one count of engaging in a sexual act with a minor and another count of engaging in sexual contact with a minor. Applicant was sentenced to fifteen months of confinement and served thirteen months.

Applicant must register as a "sexually violent offender." Decision at 7. After his release from jail, Applicant received counseling from a psychiatrist. The psychiatrist concluded that Applicant has a low risk of reoffending. He stated at the hearing that, at the time of the offenses, Applicant was emotionally immature but that he now exhibits an appropriate emotional age.

Due Process Violation

Applicant contends on appeal that the Judge denied him due process. The basis for the contention is Department Counsel's cross examination of Applicant, in which she questioned him about statements he made in the investigation of the sex offenses. Applicant contends that, through

the questioning, Department Counsel was able to present inadmissible evidence to the Judge and that the Judge considered this evidence in formulating his decision.

Near the close of the hearing, the Judge asked Applicant about the extent of his sexual contact with the victims. He asked Applicant if the victim whom he digitally penetrated had touched Applicant's genitals. Applicant replied, "Not that I recall, no. I don't believe so . . . My penis never left my pants. I don't believe that she ever fondled my penis. . . I can't say truthfully, whether it did or didn't. I don't believe it did[.]" Tr. at 141.

Upon cross examination, Department Counsel questioned Applicant about statements he made to the FBI during its investigation of the offenses. These statements were summarized in a Report of Investigation (ROI) prepared by officials of the U.S. Army.

> [Question]: Do you recall making a statement to the FBI?
>
> [Answer]: I recall making a statement. I don't recall the specifics of that statement. However, I will say that in truthfulness, if it was a statement I made to the FBI, it was more than probably accurate.
>
> [Question]: Okay. . . During that . . . interview, you said–told the interviewer that on two occasions, this one girl masturbated you with her hand. Do you recall that at all?
>
> [Answer]: I don't recall the memory, but I'm not disputing the accuracy. Tr. at 142-143.

Department Counsel never offered the ROI into evidence, and it is not attached to the file. Applicant has attached it to his brief. Although we cannot consider new evidence, we have, in the past, considered extra-record information for the purpose of resolving other issues, such as jurisdiction or due process concerns. *See* ISCR Case No. 08-07664 at 2 (App. Bd. Dec. 29, 2009). Accordingly, we have examined Applicant's submission of this ROI in order to evaluate its nature and the uses which Department Counsel made of it. However, we have not considered this document as substantive evidence of the SOR allegations.

In considering this issue, we first note that at no time during the questioning did Applicant's counsel raise an objection. Neither did counsel request an opportunity to examine the document which formed the basis of the questioning at issue here, nor did she seek additional time to prepare a response to the document's contents.[1] This objection is raised for the first time in Applicant's appeal brief. Accordingly, we conclude that Applicant has waived this issue for purposes of appeal. *See* ISCR Case No. 02-22461 at 7 (App. Bd. Oct. 27, 2005). *See also* ISCR Case No. 94-0084 at 5 (App. Bd. Dec. 13, 1994).

[1]Applicant's counsel was placed on notice as to the nature of the extrinsic evidence by Department Counsel's statement to the Judge, "It's a Department of Army report of investigation." Tr. at 144.

Secondly, we conclude that, even if the issue had not been waived, Department Counsel's questioning of Applicant was not erroneous. It appears consistent with Federal Rule of Evidence 613, which permits a party to question a witness on a prior statement, without first disclosing the contents of the statement to the witness.[2] While the Federal Rules of Evidence serve only as a guide in DOHA hearings, the extent to which a party's conduct of his or her case complies with them lessens the force of an opposing party's objection. By the same token, we find no basis to conclude that the Judge considered this document for the truth of its contents, or that he even saw it. Rather, he considered Applicant's response to Department Counsel's questions in forming his opinion of Applicant's credibility. The credibility of an applicant's hearing testimony is a proper matter for a Judge to address in evaluating, *inter alia*, the applicant's claims of reform and rehabilitation. *See* ISCR Case No. 04-09959 at 3 (App. Bd. May 19, 2006). Therefore, we conclude that Department Counsel's questions did not deprive Applicant of the due process afforded by the Directive.

Remaining Issues

Applicant contends that the Judge's analysis of the pertinent mitigating conditions and of the whole-person factors was impaired by his alleged consideration of the Army ROI. However, as stated above, there is no basis in the record to conclude that the Judge was aware of the contents of this document beyond what was intimated in Department Counsel's questioning. Neither is there a basis to conclude that he considered the document as substantive evidence. Therefore, Department Counsel's questions do not provide a reason to disturb the Judge's analysis of Applicant's case for mitigation.[3]

---

[2]Federal Rule of Evidence 613, **Prior Statements of Witnesses**

(a) **Examining Witness Concerning Prior Statement**.
In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) **Extrinsic Evidence of Prior Inconsistent Statement of Witness**.

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interest of justice otherwise require[.] *See U.S. v. Vasquez*, 225 Fed. Appx. 831 at 833 (11th Cir. 2007) (Prior inconsistent statements offered for impeachment purposes are not hearsay.) *See also Jankens v. TDC Management*, 21 F.3d 436, 442 (D.C. Cir. 1994) (An oral statement by a witness can be used for impeachment purposes, including oral statement recorded in writing by some third party.)

[3]Applicant argues that the Army ROI was not admissible evidence and that Department Counsel's questioning deprived him of his right of confrontation under the Directive. We do not need to address this argument in our resolution of Applicant's due process claim. However, we have previously held that an Army Criminal Investigation Division ROI constituted an official record within the meaning of Directive ¶ E3.1.20. ISCR Case No. 06-06496 at 2-3 (App. Bd. Jun. 25, 2009). Unlike a DoD personnel background ROI, the CID report was admissible without an authenticating witness.

Applicant also contends that the Judge misinterpreted some of his testimony. Specifically, he disagrees with the following comments in the Analysis portion of the decision:

> When asked whether he would commit the offenses if he had it to do all over again, he was evasive. He lacked sincere empathy for the victims, and instead emphasized the impact of the offenses on himself and his family. Decision at 11.

Applicant points to testimony, for example, in which he expresses remorse. He also explains his apparently equivocal answer to a question about whether he would commit the offenses again as simply an acknowledgment that good things, such as having met his wife, can follow on the heels of bad things. However, 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 has not rebutted that presumption, nor has he demonstrated that the Judge mis-weighed the record evidence. *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).

Viewed in light of the totality of the record evidence, the Judge's adverse decision is sustainable. "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; Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

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

Member, Appeal Board