KEYWORD: Guideline M; Guideline E

DIGEST: Under the circumstances of this case, and in light of the Directive's provision the the Federal Rules of Evidence serve only as a guide, it was not unfair for the Judge to admit a government exhibit in redacted form and to consider it as substantive evidence. The record provides no reason to believe that the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. Adverse decision affirmed.

CASENO: 10-08390.a1

DATE: 03/30/2012

DATE: March 30, 2012

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| In Re: | ) | |
| ---------- | ) | ISCR Case No. 10-08390 |
| Applicant for Security Clearance | ) | |

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**
David F. Hayes, Esq., Department Counsel

**FOR APPLICANT**
Sheldon I. Cohen, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On February 2, 2011, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under Guideline M (Use of Information

Technology Systems) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On January 4, 2012, after the hearing, Administrative Judge Noreen A. Lynch 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 admitting certain documents; whether the Judge's credibility determination was erroneous; and whether the Judge's overall decision was not supported by the weight of the evidence. Consistent with the following, we affirm the Judge's decision.

The Judge made the following pertinent findings of fact: Applicant is a 60-year-old unmarried man. He served in the Navy, on active duty from 1969 until 1979 and in the Reserves from 1988 to 1998. He did not have a security clearance while in the Navy. He has worked in assurance security since 1997. He held a top secret clearance in 2003 and was given access to sensitive compartmented information (SCI) in 2005. In 2008 his security clearance was suspended because he used a Government laptop to view pornographic web sites. He did not appeal this decision because he did not understand the process. Applicant had been assigned to various Government agencies from 2003 to 2009. His job involved trouble shooting systems. He described his role as monitoring all activity on a computer system. He also ensured that systems adhered to a client's security policy. He would use an "intrusion detection system" to detect threats. Applicant claimed that his having viewed pornography on Government computer systems was part of his duties.[1] He would use tools to block intrusions, including those involving pornography, and report on them to his client.

At one point, Applicant underwent a series of polygraph examinations administered by another Government agency (AGA).[2] A subsequent letter, dated September 12, 2008, from a Senior Adjudication Officer advised Applicant that his access to classified information was denied. The stated reason for the denial was Applicant's having admitted, during the course of the polygraph interviews, that he had viewed adult pornography on Government computer systems. The letter also stated that Applicant had admitted regularly viewing images of nude females between the ages of 11 and 16 on his home computer. He would view pornography about two times a week at work, because the security rules were lax. He was later deterred from such activity because of improvements in security monitoring. Applicant knew that this activity was wrong.

Applicant advised that he had about 50 images of underage pornography on his home computer. He also stated to polygraph interviewers that he had visited teen chat rooms and had interacted sexually with other members. At the hearing he stated that he had a number of computers in his home, some of which he would use to view chat rooms on dating web sites. He stated that he

[1]Applicant admitted the SOR allegation under Guideline M alleging that he looked at pornographic web sites on Government computers while at work. His reply to the SOR explained this admission in a manner similar to the Judge's findings.

[2]Applicant was not employed by AGA. It administered the polygraphs on behalf of yet another agency (AGA2) by which Applicant was, at the time, employed.

did so in order to view people his age. During his hearing testimony, he denied having looked at child pornography, having looked at pornography at work except as part of his official duties, and having entered teen chat rooms. He denied having made these statements to the polygraph interviewers. He testified that a Government exhibit containing these admissions was false.

Applicant has received numerous awards and accolades from his job. One witness, his girlfriend, testified that she did not believe the allegations in the SOR. Another witness, a friend, opined that Applicant is trustworthy.

In the Analysis, the Judge stated that Applicant's testimony denying culpability was not credible. She stated that he had not accepted responsibility for his conduct and, accordingly, had not demonstrated rehabilitation. She characterized his behavior as serious, spanning a ten-year period. Accordingly, she stated that she had doubts about his suitability for a security clearance.

Applicant has challenged the Judge's decision to admit two pieces of Government evidence. Government Exhibit (GE) 2 is a set of answers to DOHA interrogatories, containing, *inter alia*, two documents. One is a letter stating that the AGA2 had denied Applicant access to classified information, based on his admissions of misconduct as described above. The other is a letter from the Defense Industrial Security Clearance Office, advising him that his clearance had been suspended due to the prior action of AGA2. Applicant had provided these documents to DOHA in response to the interrogatories. The other challenged exhibit is GE 5, which is a letter from AGA, attached to which is a summary of Applicant's answers to the polygraph interviewer's questions. This exhibit is a basis for the Judge's findings about Applicant's admissions concerning his having looked at pornography at work, having looked at child pornography at home, having maintained images of child pornography on his computer, and having entered a teen chat room. We examine a Judge's ruling on the admission of evidence to determine if the ruling is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 03-08813 at 5 (App. Bd. Nov. 15, 2005).

Applicant contends that GE 2 was not relevant. The reason for this contention is that the Government had withdrawn a SOR allegation under Guideline E to the effect that Applicant had been disapproved for a clearance based on his having viewed pornography at work. Applicant argues that, because this allegation was withdrawn, the documents contained in GE 2 were not relevant to matters before the Judge. However, despite the withdrawal of the allegation, these documents are relevant insofar as they show administrative consequences flowing directly form Applicant's security significant misconduct under Guideline M. They also are relevant to a whole-person analysis. The Judge did not err in admitting GE 2.

Applicant contends that GE 5 was not admissible under any provision of the Directive and, by admitting it and considering it as substantive evidence, the Judge denied Applicant his right to confront witnesses adverse to him. GE 5 is a six-page summary of Applicant's statements to the polygraphers from the official file maintained by AGA on Applicant, along with a cover letter from an Associate General Counsel of AGA. The cover letter states that (1) the document was redacted "to delete classified information, extraneous and administrative data and other information excludable pursuant to applicable law or regulation;" (2) the exhibit is a true copy of the original

maintained during the regular course of AGA business; (3) it was the regular course of business for AGA personnel with knowledge of the matters at hand to record or transmit to be recorded information to be included in the record; and (4) the record was made at or near the time of the matters at hand. The letter goes on to say that AGA would permit the Judge to examine unredacted copies to allow admission into the record of the redacted ones.

Applicant contends that the admission of this exhibit was not consistent with Directive ¶ E3.1.22, which entitles an applicant to cross-examine a person who had made a statement adverse to him on a controverted issue. He also contends that this exhibit did not satisfy the requirements of ¶ E3.1.20, insofar as there was no authenticating witness and, in Applicant's view, GE 5 did not qualify as a either a business record or a public record under Fed. Rules of Evid. 803 (6) and (8).

¶ 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)

In this case, there is nothing in the evidence or in other matters attached to the file to contradict the representations in the cover letter about the nature of GE 5. This exhibit, therefore, is an official record within the meaning of the Directive. Moreover, it is not a DoD ROI. Rather, it is a record maintained by an agency other than the DoD. Accordingly, there was no requirement either for an authenticating witness or for strict compliance with the Federal Rules of Evidence. Generally, the Federal Rules of Evidence serve as a guide in DOHA proceedings, and they may be relaxed to permit the development of the record. Directive ¶ E3.1.19. We conclude that GE 5 satisfied the requirements of ¶ E3.1.20. Accordingly, Applicant was not denied a right of confrontation. *See, e.g.*, ISCR Case No. 08-06997 at 3 (App. Bd. Mar. 1, 2011). ¶ E3.1.22 does not require exclusion of statements that are admissible under ¶ E3.1.20. ISCR Case No. 06-06496 at 4 (App. Bd. Jun. 25, 2009). Furthermore, under Fed. Rule Evid. 803(8), records of a government agency setting forth, in civil actions or proceedings, "factual findings resulting from an investigation made pursuant to authority granted by law" are admissible unless there is a basis to "indicate lack of trustworthiness." There is no basis in the record to conclude that GE 5 lacks trustworthiness for purposes of Fed. Rule Evid. 803.

Applicant argues that, in light of Fed. Rule Evid. 106, it was improper for the Judge to have admitted only the redacted portions of GE 5. Rule 106 provides that when "a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be

considered contemporaneously with it." According to the AGA Associate General Counsel, the redactions were for the purpose of protecting classified information or other information with national security implications, as well as extraneous matters, in accordance with the law. The record provides no reason to dispute this assertion, and Federal agencies and employees are entitled to a presumption of good faith in the performance of their responsibilities. *See, e.g., Sierra Club v. Costle,* 657 F.2d 298, 334 (D.C. Cir. 1981).

In criminal cases, the Government might be forced to choose between its interests in prosecuting a crime and in protecting classified information. *See, e.g., United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004). In a DOHA proceeding, however, in which protection of national security is paramount, an applicant's interest in discovery must be balanced by another agency's lawful interest in safeguarding national security information. We note that, in an appropriate case and with prior approval by DoD GC, a Judge may examine classified information that an applicant cannot inspect. Directive ¶ E3.1.21. The AGA Associate General Counsel cover letter included in GE 5 offered the Judge an opportunity to examine the unredacted document. Neither party requested any such a procedure, however. Under the circumstances, and in light of the Directive's provision that the Federal Rules of Evidence serve only as a guide, we conclude that it was not unfair for the Judge to admit GE 5 in its redacted form and to consider it as substantive evidence.[3] Accordingly, the Judge's admission of the challenged evidence was not arbitrary, capricious, or contrary to law.[4]

Applicant contends that the Judge erred in her credibility determination, in that she found the Government's exhibits to be more worthy of belief than the testimony, witnesses, and other evidence provided by Applicant. We have considered this argument in light of the record. While, as stated above, GE 5 was admitted in redacted form, the summary of Applicant's actual responses was detailed and specific. A reasonable person could conclude either that the summary was a depiction of Applicant's answers or that it was a willful fabrication by officials of AGA. A reasonable person would not likely conclude that it represented simply a misunderstanding of purportedly exculpatory answers. Applicant offered no plausible reason for AGA personnel going about their assigned duties to have made up such answers as are reflected in GE 5, nor does the record contain any such reason.

To a certain extent, GE 5 is corroborated by other evidence. For example, Applicant acknowledged that he had stated to the polygraphers a belief that his having looked at pornography at work was wrong. Tr. at 120, 152. According to GE 5, Applicant told the polygraphers that he had numerous computers in his house. One of his character witnesses corroborated this information. Tr. at 38. Applicant acknowledged that certain statements in GE 5 concerning Applicant's work

[3]Of course, a Judge can consider the state of a piece of evidence in assigning it weight.

[4]Applicant made a request to AGA under the Freedom of Information Act (FOIA) for release of the documents pertaining to his clearance investigation. He was not satisfied with the result, and he argues that it is unfair for DOHA to proceed against him. The extent to which AGA complied with FOIA is not a matter within our jurisdiction.

history and his employer's security policies were correct.[5] On the other hand, Applicant's testimony that has job had required him to look at pornography while at work was not corroborated. Considering the entirety of the record evidence. We find no reason to disturb 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").

To an extent, Applicant's argument on appeal amounts to a disagreement with the Judge's weighing of the evidence. However, the record provides no reason to believe that the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 08-00826 at 2 (App. Bd. Mar. 19, 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.'" *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 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

[5] "[Q]: Did you tell them that you worked at [agency] from October 1996 to October 2000? [A]: Yes, I did . . . [Q]: It says next that you advised that the rules were very lax and there [were] no security policies. [A]: Yes. That's true. Yes. [Q]: So you made that statement? [A]: Yes . . . [Q]: Then it says that you advised – that at [another agency] there were too many people around, as well as cameras monitoring people's activities. [A]: Yes." Tr. at 159, 161.

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