

KEYWORD: Guideline F; Guideline E

DIGEST: In summary, Applicant has consistently maintained that he stored and transferred the gold as a favor for his friend. His explanation for the conduct in question remains uncontradicted. The evidence fails to establish any wrongdoing. The Judge’s adverse conclusions to the contrary were based wholly on speculation. From our review of the record, we conclude that the Judge’s decision failed to consider important aspects of the case and runs contrary to the weight of the record evidence. Accordingly, it was arbitrary, capricious, and contrary to law for the Judge to conclude based on the evidence in this case that Applicant was not eligible for a security clearance. Adverse decision reversed.

CASENO: 15-05565.a1

DATE: 08/02/2017

DATE: August 2, 2017

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In Re:)	
)	
-----)	ISCR Case No. 15-05565
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On March 15, 2016, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended)

(Directive). Applicant requested a hearing. On April 19, 2017, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Elizabeth M. Matchinski 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 he was denied due process because the SOR did not provide him with adequate notice and whether the decision was arbitrary, capricious and contrary to law. Consistent with the following, we reverse.

The Judge's Findings of Fact

Applicant is a 51-year-old employee of a defense contractor. While in graduate school, he shared an apartment with a foreign national who resided in the Cayman Islands for some period.¹ Applicant and the foreign national became friends, and they have stayed in close contact over the years.

In about 2001, the friend asked Applicant to store about 250 ounces of gold for him in case of instability in the Cayman Islands. Applicant kept the gold in the basement of his home. In about 2012, the friend asked Applicant to sell some of the gold. Applicant sold some of it on the internet to private buyers. He made deposits into his bank account, including about \$12,000 and \$60,000 in early 2013, from the proceeds of the sales before transferring the funds to the friend's bank account in Japan.

At his friend's request in about 2013, Applicant flew to the Cayman Islands and, using a limited power of attorney, took approximately \$500,000 worth of gold from his friend's safe deposit box and delivered it to a broker. "Applicant testified that he was 'simply the courier delivering gold bars' to the broker, who then wired the funds directly to [the friend's] bank account." Decision at 3. In a background interview in January 2015, Applicant stated that he was still holding about \$100,000 to \$150,000 of the friend's gold. He denied receiving any financial benefit from holding or selling the gold.

After issuance of the SOR, Applicant advised his friend that DOD had concerns about him holding the gold. In 2016, the friend opened an account with a reputable gold depository service in the United States, and Applicant then made four shipments of gold worth about \$190,000 into that account. Applicant indicated that, to his knowledge, he did not assist his friend in evading any tax liability, although he never asked him if he was helping him avoid taxes.

The Judge's Analysis

Money transfers that cannot be explained by one's legal sources of income raise security concerns. The burden was on Applicant to show the funds were from legal sources. "Application

¹ The foreign national is a dual citizen of two NATO countries and is a graduate student now residing in a non-NATO ally country that is much further from the Cayman Islands than Applicant's residence. No Guideline B security concerns were alleged in this case.

of the mitigating condition [that] ‘the affluence resulted from a legal source’ depends largely on the credibility of Applicant’s account.” Decision at 6. His conduct in storing the gold and traveling to the Cayman Islands, a well known tax haven, for the gold transfer raises suspicions. He provided no corroboration for his account. He discrepantly indicated to an investigator that he was the one, instead of a broker, who wired funds to his friend from the Cayman Islands. He also did not provide an adequate explanation of why funds were transferred to Japan.² The documentation he provided for shipping \$190,000 worth of gold to the depository in 2016 was inadequate to prove no criminal activity was involved in acquiring or handling the assets. The evidence falls short of establishing the affluence resulted from a legal source of income.

Applicant exercised questionable conduct in several aspects. “He denies that he knowingly assisted his friend in tax evasion or other criminal activity, but it is troubling that he sought no legal or professional advice before storing the gold, selling some on [the internet], wiring proceeds to a third country (Japan), or facilitating the sale of \$500,000 in gold in the Cayman Islands.” Decision at 8. He provided no records to support a conclusion that his conduct was legal and appropriately documented.

Discussion

In deciding whether the Judge’s rulings or conclusions are erroneous, we will review the Judge’s decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See, e.g.*, ISCR Case No. 14-02563 at 3-4 (App. Bd. Aug. 28, 2015).

In his appeal brief, Applicant argues that his conduct as alleged in the SOR does not appear to violate any of the disqualifying conditions under Guidelines F and E. We interpret this argument as Applicant claiming the findings and conclusions are not supported by the evidence.³ We find this argument persuasive.

Under Guideline F, unexplained affluence is a security concern because it may result from criminal activity, including espionage. The key aspect of this security concern is the affluence cannot be explained from known sources of income. In this case, Applicant disclosed during a background interview that he stored and transferred gold for his friend. Government Exhibit (GE) 2. At the hearing, he indicated that his friend’s parents were both prominent professionals in the Cayman Islands who became very wealthy, and his friend “inherited a great deal from his parents.” Tr. at 13-14. The Judge noted that the gold in question was only a small portion of the friend’s wealth, which included five million dollars of real estate in the Cayman Islands. Decision at 3. Applicant’s explanation that he engaged in the alleged activities for the friend as a favor is plausible and is not contradicted by any record evidence. From our review of the record, we are unable to

² Applicant’s friend is neither a citizen nor a resident of Japan.

³ In his Reply Brief, Department Counsel also identified this as an issue that Applicant raised.

discern what aspects of Applicant's conduct in storing and transferring the gold remains "unexplained" so as to continue to raise a security concern.⁴

The SOR allegations are based on statements that Applicant made during his background investigation.⁵ He disclosed his trips to the Cayman Islands in his security clearance application and disclosed the assistance he provided to his friend regarding the gold in his background interview.⁶ The Government did not present any independent evidence to establish the facts alleged in the SOR. Yet, the Judge apparently discounted Applicant's version of those events (which is the only version in the record) and, in doing so, noted issues that apparently had an impact on her assessment of his credibility. For example, the Judge pointed out a possible inconsistency in Applicant's statements. She noted that Applicant reportedly told the background investigator that he wired funds to his friend following his transfer of the gold to the broker in the Cayman Islands in 2013; while in his SOR response and in his testimony, Applicant stated that the broker wired the funds to his friend.⁷ The Judge also concluded that "Applicant was not forthcoming with Caymanian officials about his intentions during [that] trip." Decision at 8. This conclusion was apparently based on Applicant advising the Caymanian customs officials that he was in their country on business in 2013 but did not inform them that he intended to make a gold transfer because he was not bringing anything in or out of the country.⁸ These purported inconsistencies appear to be nothing more than minor quibbles over semantics insufficient to undermine Applicant's veracity.

⁴ The evidence established that Applicant lives within his means, including driving a 20-year-old vehicle.

⁵ We recognize that the Directive presumes a nexus or rational connection between proven conduct under any guideline and an applicant's security eligibility. *See, e.g.*, ISCR Case No. 09-07565 at 3 (Jul. 12, 2012). In this case, the only apparently pertinent Guideline F provision involves "unexplained affluence." It merits noting that the facts alleged in the SOR contain no language indicating that Applicant's storage or transfers of the gold was an "unexplained affluence." While Applicant admitted most of the Guideline F allegations, he did not admit that his handling of the gold constituted "unexplained affluence," which is the gravamen of the security concern at issue here. In fact, he stated "I have no 'unexplained affluence'" in his SOR response. In essence, such a response constituted a denial of the security concern raised under the Guideline F allegations. Applicant also denied the sole Guideline E allegation in the SOR response. Consequently, Applicant's admissions to most of the Guideline F allegations fall short of establishing disqualifying condition 19(h) (*see*, note 10, below) or of shifting the burden of production to Applicant to mitigate the alleged security concerns. (*see*, Directive ¶¶ E3.1.14 and E3.1.15). We also note that Department Counsel contends that "Applicant acknowledged that the financial transactions and affluence underlying the SOR are inherently suspicious." Reply Brief at 8, citing Tr. at 37, line 7-13. However, our reading of that exchange between Department Counsel and Applicant at the hearing does not support that proposition.

⁶ We note that, in his background interview, Applicant disclosed his bank deposits and withdrawals regarding the gold sales when asked if he had any large banking transactions. He categorized two of the transactions as large. When asked about the specific dates of the transactions, he could not recall the dates. His disclosure of those transactions occurred before the investigator confronted him with records showing the specifics of two of the transactions. GE 2.

⁷ As a matter of common business practice, we recognize that individuals normally do not "wire" funds; commercial entities do so. Assuming that the investigator accurately reported that Applicant stated, "I wired" the funds, such a statement could have simply implied that he directed a commercial entity to do so.

⁸ The record does not reflect that Applicant had any obligation to present such information to the custom officials.

The deference we give to a Judge’s credibility determinations has its limits. *See, e.g.*, ISCR Case No. 10-08257 at 3 (App. Bd. Dec 12, 2011). Specifically, a Judge’s credibility assessment cannot serve as a substitute for record evidence.⁹ *See, e.g.*, ISCR Case No. 09-08550 at 2 (App. Bd. Feb. 25, 2011). In this case, the Judge’s identified credibility issues cannot substitute for record evidence showing Applicant engaged in any conduct that raised security concerns. Those credibility issues involve peripheral matters that do not detract from Applicant’s testimony about the security concerns at issue. Applicant has consistently denied engaging in any wrongdoing. We can find no evidence in the record that contradicts Applicant’s explanation for his conduct in question or that establishes he engaged in any wrongdoing.

In concluding that disqualifying condition 19(h) applied,¹⁰ the Judge indicated that Applicant’s income was not enough to explain the bank deposits of \$72,000 in 2013. Decision at 6. The alleged conduct, however, involved a bailment in which the ownership of the gold or ownership of the proceeds from the gold sales never transferred to Applicant. Given his explanation that the gold was not his property and that he was merely holding it for a friend, we are unable to see why Applicant would need to explain why his possession or transfers of the gold was consistent with his known legal sources of income. Moreover, considering the specific circumstances presented in this case, there is no basis for concluding that Applicant’s handling of the gold constituted an “unexplained affluence.”

Under Guideline E, the key issue is conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations.¹¹ In her decision, the Judge raises the specter that Applicant’s conduct might be illegal. She notes that the Cayman Islands is a well known tax haven,¹² that it is troubling Applicant sought no legal or professional advice before engaging in such activities,¹³ that no information from other sources was provided to establish that Applicant’s storing and selling of the gold and making large money transfers on behalf of his friend were legitimate,¹⁴ and that the documentation presented was inadequate to prove that no criminal activity was involved in acquiring or handling the gold.¹⁵ However, a Judge’s findings of fact must be based on “such relevant evidence as a reasonable mind might accept as adequate to support a

⁹ For example, a Judge’s determination that an applicant’s denial of engaging in certain conduct was not truthful cannot be the only evidence in the record that supports a finding applicant actually engaged in that conduct. *See, e.g.*, ISCR Case No. 03-22167 at 4 (App. Bd. Dec. 6, 2006).

¹⁰ Directive, Encl. 2 ¶ 19(h), which was in effect at the time of the Judge’s decision, states: “unexplained affluence, as shown by a lifestyle or standard of living, increase in net worth, or money transfers that cannot be explained by subject’s known legal sources of income[.]” A recent revision of the adjudicative guidelines modified this disqualifying condition slightly, but did not change its substance. *See*, Directive, Encl. 2, App A. ¶ 19(g).

¹¹ *See*, Directive, Encl. 2, App. A ¶ 15.

¹² Decision at 7.

¹³ Decision at 8.

¹⁴ Decision at 8.

¹⁵ Decision at 7.

conclusion in light of all the contrary evidence in the same record. Directive ¶ E3.1.32.1. In this case, the record evidence fails to establish that Applicant engaged in any illegal or improper conduct. The references to tax evasion or other illegal conduct amount to nothing more than speculation, which is insufficient to establish improper conduct. Indeed, the transactions Applicant engaged in do not appear on their face to be illegal, improper, unethical, or the product of poor judgment, and the Government offered no evidence to the contrary. Additionally, there is no allegation in the SOR that Applicant engaged in any falsification that would otherwise undermine the credibility of his testimony regarding the transactions.

In summary, Applicant has consistently maintained that he stored and transferred the gold as a favor for his friend. His explanation for the conduct in question remains uncontradicted. The evidence fails to establish any wrongdoing. The Judge's adverse conclusions to the contrary were based wholly on speculation. From our review of the record, we conclude that the Judge's decision failed to consider important aspects of the case and runs contrary to the weight of the record evidence. Accordingly, it was arbitrary, capricious, and contrary to law for the Judge to conclude based on the evidence in this case that Applicant was not eligible for a security clearance.

Order

The Decision is **REVERSED**.

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board

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

SEPARATE OPINION OF ADMINISTRATIVE JUDGE MICHAEL Y. RA'ANAN

I construe Applicant's brief as raising a flaw in the SOR, namely that it did not reasonably advise him of the nature of the government's security concern. The SOR merely recited a limited set of facts that Applicant had previously provided to the Department of Defense. The recited facts are certainly not common in our cases. That does not mean that they are necessarily disqualifying. Nor is it necessarily obvious to a non-security professional why, without more, they may raise a

security concern for the government. (I contrast the facts of this case with any of hundreds of Guideline F decisions the Board has reviewed where an applicant had tens of thousands of dollars of delinquent debt, including unpaid Federal, state and local taxes. The government's security concerns in those case are more self-evident to the lay person.)

I believe that in this case with its unusual fact pattern, Applicant has a valid point about the SOR. Without commenting on the Judge's ultimate disposition of the case, I believe that her decision articulated the security concerns in a way that had not occurred in the earlier stages of the case. Of course, by the time Applicant read her decision he was in no position to provide evidence or arguments. I believe the case should be remanded for an additional hearing.

Signed: Michael Ra'anan

Michael Ra'anan

Administrative Judge

Chairperson, Appeal Board