

KEYWORD: Guideline D; Guideline E

DIGEST: Whether an applicant has adopted statements in an interview summary is a question of fact. Despite the prehearing, hearing, and post-hearing exchanges on the admissibility of Applicant’s interview summary, the Judge failed to make findings as to which of the key statements in the interview summary Applicant either adopted or did not adopt. In other words, we are unable to discern whether key statements were admitted into, or excluded from, evidence. Moreover, because the issue of whether or not Applicant adopted key statements is an important aspect of this case, the Judge was also responsible for explaining the basis of those critical findings. Favorable decision remanded.

CASENO: 16-02536.a1

DATE: 08/23/2018

DATE: August 23, 2018

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In Re:)	
-----)	ISCR Case No. 16-02536
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Alison O’Connell, Esq., Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 27, 2016, DoD 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 April 11, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Francisco Mendez granted Applicant’s request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

On appeal, Department Counsel contends that the Judge’s decision is arbitrary, capricious, or contrary to law. A key issue before us is whether the Judge erred in his findings and conclusions pertaining to an adopted personal subject interview (PSI). Consistent with the following, we remand the decision for corrective action.

The sole SOR allegation under Guideline D reads: “You maintain a close and continuing sexual relationship with [an adult film actress] that reflects lack of judgment or discretion and may place you in a position where you may be vulnerable to coercion, exploitation, or duress.”¹ It was cross-alleged as the sole allegation under Guideline E. In responding to the SOR, Applicant denied both allegations with comments.

Applicant, who is in his 70s, has a doctorate degree and has held a security clearance for many years. He submitted a security clearance application in 2015 and underwent a PSI in 2016. The summary of the interview reflects that Applicant met the adult film actress at a promotional event in 2014, later contacted her through a website, and joined her fan club for a fee. As a member of the fan club, he could watch live pornographic performances online. The summary further states:

Subject [*i.e.*, Applicant] also learned from [the adult film actress] that she was also willing to meet Subject to have sex with him. On approximately 5 occasions, Subject has paid [the adult film actress] to have sex with him. Subject pays her \$1,200 for each sex session. Subject indicated that he has traveled to [three different locations] to have sex with her. Subject indicated that there is no set time frame on the session and they usually go to dinner first and then go back to a hotel room and Subject pays for sex. Subject indicated that he owns a time share in [state omitted] which is where [the adult film actress] resides [city and state omitted] and that she met Subject at his villa for sex. Subject’s daughter [names omitted] and [her] boyfriend are aware that Subject engaged in prostitution. Subject’s daughter was also in [state omitted] and was staying in the time share with Subject. Subject asked his daughter and her boyfriend to leave the villa for a few hours so he could have it to himself. Subject’s daughter asked why he needed the villa to himself and Subject told her about [the adult film actress].

* * *

¹ The Judge uses the term “adult film actress” in the decision.

Subject was asked if he knew prostitution was illegal. He said “not in all states.” He was asked again if he knew prostitution was illegal and that it is a crime. He said “yes”. Subject is aware that prostitution is illegal. . . . Subject indicated that he only contacts [the adult film actress] when he has the extra money and can afford her \$1,200 fee. Ironically, Subject indicated that is the exact amount he charges for his self-employment [name of service omitted] fee.

* * *

It is not common knowledge that Subject has hired a prostitute. Subject does not feel like he can be blackmailed or coerced because of it.²

In 2016, Applicant was sent interrogatories that contained the summary of the PSI and two telephone inquiries. He responded, “No” to the question that asked whether the reports of investigation accurately reflected the information he provided the investigator. He was then asked to explain how they were incorrect. He responded by providing some general comments that included: “This report is incomplete, inaccurate, and misleading” and “I have not knowingly or consciously broken any laws.”³ He also provided specific narrative comments that referenced pages and paragraphs of the PSI, including detailed comments about his employment history, references, and financial record. Regarding the portion of the PSI relating to the adult film actress, Applicant commented:

On P.7, this entire narrative is subjective, prejudicial and largely inaccurate. In short, I volunteered that [the adult film actress] who is a friend of mine is a U.S. citizen (naturalized) who was born in [foreign country omitted]. She is a business owner and an actress and we see each other when our schedules permit. There is nothing inappropriate or illegal about this. For this report to include this brief mention of one of my dear friends under the heading of “Illegal Activity/Foreign Contacts/ Activities/Travel” is completely inaccurate, inappropriate and prejudicial. The use of the word, “prostitute” in this section is totally attributed to the bias, misjudgment, and prejudicial attitude of the investigator.⁴

Applicant completed his comments by stating, “In summary, this report is inaccurate, incomplete and due to numerous instances of the use of subjective and prejudicial comments is grossly misleading.”⁵ He also responded “Yes” to the question that asked whether, subject to his additions

² Government Exhibit (GE) 2 at 10 and 11.

³ *Id.* at 2 and 3.

⁴ *Id.* at 4.

⁵ *Id.* at 5.

and deletions, he agreed with and adopted the investigator's summaries as accurate reflections of his interviews.⁶

This case has an unusual procedural history concerning the adopted PSI. Prior to the hearing, Department Counsel responded to the Judge's case management order by forwarding to him the proposed Government exhibits. In an email sent the evening before the hearing, the Judge addressed GE 2 (*i.e.*, a copy of Applicant's response to the interrogatories that also contained the summary of the PSI) by saying:

Applicant generally objects to those matters under the heading "Illegal Activity/Foreign Contact/Activities/Travel". . . . If my reading of [Applicant's] objection is accurate, it would seem that I cannot consider this portion of the summary of interview unless the Government will be offering a witness to authenticate the summary. See generally, Executive Order 10865, § 5 (investigative reports, such as the summary of interview, are inadmissible in due process proceedings without an authenticating witness); DoD Directive 5220.6, Enclosure 3, ¶ E3.1.20 (similar prohibition).⁷

The Judge continued that Applicant, at best, adopted the portions of the interview "describing arguably constitutionally protected conduct (attendance at an adult pornographic expo; paying to become a fan of the adult entertainer through her website; and later viewing through the internet said adult entertainer engaging in sexual acts)."⁸ The Judge further stated:

The only matter that is left that would not constitute constitutionally protected conduct would be that portion of the summary claiming that Applicant paid \$1,200 to have sex with the adult entertainer on about 5 separate occasions. However, it appears from a review of Applicant's interrogatory response and Answer that he does not adopt this specific portion of the summary and objects to its accuracy.⁹

The Judge noted that he was not making a ruling or deciding the case before he received all of the evidence. He also asked if Department Counsel planned to call a witness to authentic the PSI or did the Government have another theory for admitting it.¹⁰

⁶ *Id.* at 3.

⁷ Appellate Exhibit (App. Exh.) II.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

At the hearing, the Judge asked Applicant if he had any objections to GE 2. Applicant responded that he had no objection to that document, and it was admitted into evidence.¹¹ Tr. at 15-16. During his testimony, Applicant indicated that he had an objection to GE 2 because, among other matters, the “whole thing is wrong.” Tr. at 28. The Judge reiterated that he was going to admit GE 2 into evidence but recognized that Applicant objected to matters in it. Tr. at 29. After the hearing, the Judge sent an email to the parties indicating the he was reopening the record, reconsidering his evidentiary ruling on GE 2, and giving Department Counsel about a week to submit additional evidence, or request a reopening of the hearing, to authenticate GE 2.¹² Department Counsel responded with a Motion for Recusal or, in the Alternative, Motion for Reconsideration and Reversal of Evidentiary Ruling.¹³ The Judge denied the Motion for Recusal, deferred his reconsideration of the evidentiary ruling, and left the record open for submission of additional evidence.¹⁴ Department Counsel submitted no additional evidence, but responded with a written submission setting forth the Government’s position about that document.¹⁵

In his Decision, the Judge reaffirmed his ruling that admitted GE 2 into evidence. He also stated he was giving more weight to those matters in the interview summary that Applicant adopted before or at hearing and acknowledged that “Applicant admits he made certain statements during [the] interview that were accurately captured by the investigator.” Decision at 5-6. In his analysis, the Judge concluded that Applicant’s conduct did not raise security concerns under Guidelines D and E. On appeal, Department Counsel argues Applicant adopted the summary of his PSI without deleting, editing, or commenting on the statements that he paid the adult film actress \$1,200 to have sex with him on about five occasions and that he asked his daughter to leave his villa on one occasion so he could bring the actress there for the purpose of having sex.

It is well settled that a Judge has broad discretion in writing a security clearance decision. However, the Judge’s decision must be written in a manner that allows the parties and the Board to discern the findings the Judge is making and what conclusions he or she is reaching. *See, e.g.*, ISCR Case No. 08-05379 at 2-3 (App. Bd. Nov. 24, 2009). Whether an applicant has adopted statements

¹¹ Applicant’s response to the Judge’s question about whether he had any objections to GE 2 was handwritten in the record. The transcript does not identify who made that modification to the transcript. In admitting GE 2 into evidence, the Judge stated:

All right. Then Government Exhibit 2 for identification’s admitted, obviously subject to, you seem to have made objections within the document itself, and noted that you’re not adopting certain portions, but we’ll get to that at some point down the line. [Tr. at 15-16.]

¹² App. Exh. VI.

¹³ App. Exh. VII.

¹⁴ *Id.*

¹⁵ App. Exh. VIII and Decision at 4.

in an interview summary is a question of fact.¹⁶ In this case, despite the prehearing, hearing, and post-hearing exchanges on the admissibility of Applicant’s interview summary, the Judge failed to make findings as to which of the key statements in the interview summary Applicant either adopted or did not adopt. In other words, we are unable to discern whether key statements were admitted into, or excluded from, evidence. Moreover, because the issue of whether or not Applicant adopted key statements is an important aspect of this case, the Judge was also responsible for explaining the basis of those critical findings. As an example of this quandary, the first paragraph of the decision refers to Applicant’s relationship with the adult film actress as a “platonic relationship.” However, while Applicant took exception to the investigator’s use of the word “prostitution” and stated he did not knowingly or consciously break any laws, his response to the interrogatories contains no expressed denials of engaging in sex with the adult film actress.¹⁷ Did the Judge find that Applicant did not adopt the portion of the interview summary about him engaging in sex with the adult film actress and, if so, what was his basis for making that determination? The Judge’s failure to make findings about whether or not Applicant adopted key statements in his interview summary and the Judge’s failure to explain the basis for such findings was harmful error that warrants correction.

Based on the above, we remand the case to the Judge for processing consistent with the Directive. If another Judge is assigned to this case on remand, each party shall be provided the opportunity to request another hearing.

¹⁶ The Appeal Board has no fact-finding power. *See, e.g.*, ISCR Case No.14-02394 at 3 (App. Bd. Aug. 17, 2015).

¹⁷ Considering the circumstances surrounding Applicant’s adoption of the PSI, it was the Judge’s responsibility first to identify which statements in that document Applicant adopted. Any adopted statements would need to be considered in determining whether any of the disqualifying conditions were established.

Order

The Decision is **REMANDED**.

Signed: Michael Ra'anan
Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

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

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