KEYWORD: Guideline J; Guideline D; Guideline B

DIGEST: Army CID report is an official record for the purposes of E3.1.20 of the Directive. Because such a report is admissible without an authenticating witness, Applicant was not denied any right of confrontation under E3.1.22 of the Directive. Adverse decision affirmed.

CASENO: 06-06496.a1

DATE: 06/25/2009

DATE: June 25, 2009

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| Applicant for Security Clearance | ) | |
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**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**
Francisco Mendez, Esq., Department Counsel

**FOR APPLICANT**
Claire Shapiro, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On April 22, 2008, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under Guideline J (Criminal Conduct), Guideline D (Sexual Behavior), and Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On March 31, 2009, after the hearing, Administrative Judge Carol G. Ricciardello 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 failed to comply with the Directive in admitting an Army criminal investigation report and whether the Judge erred in her weighing of the evidence.[1] Finding no error, we affirm.

The Judge made the following pertinent findings of fact: Applicant is a 43-year-old network engineer employed by a Defense contractor in a foreign country (Host Nation). He has resided in that country since 1993. He married his wife in 1995, and he and his wife had a daughter in 1998. His wife is a national of a third country and the daughter was born there.

In December 2002 Applicant and his family traveled to the U.S. to visit Applicant's parents. Toward the end of the visit, Applicant's wife insisted that they stay at a hotel rather than with the parents. Applicant checked his wife and daughter into a hotel, but he stayed with his parents. The next morning Applicant visited them, and, while he went to an ATM machine to get money, the wife and daughter checked out of the hotel. Applicant returned to the Host Nation and continued his employment for the defense contractor. Applicant stated at the hearing that he did not know where his family went, or where they had been since that day. In early 2003 he was informed by a representative of the local office of the Staff Judge Advocate that his wife had made allegations against him. These allegations were that Applicant had raped and assaulted his wife and that he had physically and sexually abused his daughter, and some of those alleged incidents occurred in the Host Nation where Applicant accompanied the Army. The Judge stated, in a footnote, that it "is unnecessary to describe in detail the sexual conduct, other than to find the conduct was inappropriate and would constitute physical and sexual assaults and indecent acts with a child." Decision at 6. The wife and daughter were interviewed by the protective services system (PPS) of State A. PPS prepared a report, included as part of Government Exhibit 2, Army Criminal Investigation Command (CID) Report. The wife also filed for custody of the daughter, alleging physical and sexual abuse of the daughter as well as abandonment. The Judge's findings quote at length a signed, sworn statement by the wife describing abuse alleged to have been inflicted by Applicant upon the wife and daughter. The abuse is of an emotional, physical, and sexual nature.

Department Counsel's case rested chiefly on the contents of the investigative report prepared by the Army CID in the Host Nation. Applicant contends that this report was not admissible, because it contained statements adverse to Applicant without providing him the opportunity to cross-

[1]The Judge's favorable findings under Guideline B are not at issue in this appeal.

examine the makers of the statements. *See* Directive ¶ E3.1.22. Applicant also argues that the CID report did not satisfy the requirements of Directive ¶ E3.1.20, which permits the admission, without authenticating witnesses, of "[o]fficial records or evidence compiled or created in the regular course of business." Regarding the latter argument, Applicant contends that the CID investigation was outside the scope of authority of the CID.[2] Applicant relies upon AR 195-2, apparently in effect at the time of Applicant's case, in its description of circumstances in which an Army interest in investigation will generally be said to exist. These circumstances do not explicitly include those of Applicant.[3] However, the regulation does not limit CID investigative authority to those five criteria set forth therein–the language of the regulation is illustrative, not exhaustive. Construing the regulation in its entirety, its plain meaning would include circumstances, such as these, where a holder of a security clearance is accused of committing felonies while accompanying the Armed Forces overseas. The record demonstrates that the PPS of State A, aware that Applicant was overseas working with the Army, notified DoD Family Advocacy officials in Arlington, VA of the wife's complaint. DoD Family Advocacy, in turn, forwarded the information to Army officials in the Host Nation. Upon receipt, CID agents interviewed the wife in State A, interviewed Applicant in the Host Nation, and compiled the evidence in the investigative report at issue here. This report states that, prior to issuance, CID officials coordinated with the Federal Bureau of Investigation and with the office of the servicing Staff Judge Advocate. The Board notes that federal agencies are entitled to a presumption of good faith and regularity in the performance of their responsibilities. *Sierra Club v. Costle*, 657 F.2d 298, 334 (D.C. Cir. 1981); *Broderick v. American General Corp*., 71 F.2d 864, 869 (4th Cir. 1934); *Glisson v. United States Forest Service*, 876 F. Supp. 1016, 1023-4 (S.D. Ill 1993). The record as a whole does not sustain a conclusion that Applicant has rebutted the presumption of good faith and regularity as regards the activities of the DoD or Army officials in his case. There is nothing on the face of the report or in its contents to suggest that it was not an official CID record or that it was prepared and maintained other than in the regular course of CID business.[4] Therefore, the report satisfied the requirements of Directive ¶ E3.1.20.

Applicant states that the report is not complete, insofar as some of the exhibits listed as attachments were not submitted into evidence at the hearing. Applicant does not allege, nor does the record suggest, that Department Counsel withheld relevant documents that were in his

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[2]The CID Command "is the sole agency within the United States Army responsible for the investigation of felonies[.]" Army Regulation (AR) 195-2, *Criminal Investigation Activities*, October 30, 1985, ¶ 1-5(a). The CID exercises the Army's investigative authority under ¶ 3-1 of this regulation.

[3]AR 195-2 ¶ 3-1. In this regard, Applicant argues that an Army interest exists for investigative purposes "only" where the circumstances fall in one of the five criteria in subparagraph 3-1b.

[4]The Board notes that, although Applicant was not subject to the Uniform Code of Military Justice, he was subject to 18 U.S.C. § 1361, which establishes extraterritorial criminal jurisdiction over persons serving with the Armed Forces outside the United States. This jurisdiction extends to Defense contractors. The applicable Status of Forces Agreement provides that the U.S. military authorities have the right of criminal jurisdiction over, *inter alia*, "civilian persons . . . who are in the employ of, serving with, or accompanying the United States armed forces . ."

possession. A review of the list of these attachments, included in the CID report, provides no reason to conclude that any of them not admitted at the hearing were exculpatory or that, had they been admitted, the Judge would have decided the case differently. Accordingly, the Board resolves the assignment of error under Directive ¶ E3.1.20 adversely to Applicant.

Applicant also cites Directive ¶ E3.1.22, which forbids the admission of oral or written statements adverse to Applicant unless there is an opportunity for cross-examination. However, as Applicant's brief acknowledges, this provision does not establish a blanket right of confrontation but, rather, is qualified by other provisions of the Directive. *See*, for example ISCR Case 03-06770 at 3-4 (App. Bd. Sep. 9, 2004), which upheld a Judge's admission of a police report under ¶ E3.1.20, despite the fact that the maker of the report was not available for cross examination. The Board stated that "DOHA proceedings are civil, administrative proceedings in which strict rules of evidence need not be applied . . . [I]t is well-settled that hearsay evidence can be admitted and considered in federal administrative proceedings, including security clearance adjudications" (internal citations omitted). The Board also stated that, in any event, police reports are admissible as an exception to the hearsay rule, for example as public records under Federal Rule of Evidence (FRE) 803(8). *See also* ISCR Case No. 98-0265 at 7 (App. Bd. Mar. 17, 1999). Because ¶ E3.1.22 does not require exclusion of statements that are admissible under ¶ E3.1.20 or as exceptions to the hearsay rule under the FRE, and because the CID report was admissible as an official record under the Directive, Applicant was not denied a right of confrontation.

Applicant contends that the Judge erred in the weight she assigned to the evidence contained in the CID report, insofar as it was hearsay and was, in Applicant's view, uncorroborated. The Board has considered the Judge's decision in light of the record as a whole, finding therein no basis to conclude that her weighing of the evidence was arbitrary, capricious, or contrary to law or that her decision contravened the weight of the record evidence. *See, e.g.,* ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007). 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 decision that "it is not clearly in the interests of national security to grant Applicant eligibility for a security clearance" is sustainable on this record. Decision at 19. *See also Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) ("The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security'").

## Order

The Judge's adverse security clearance decision is AFFIRMED.

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
Member, Appeal Board