

KEYWORD: Guideline E

DIGEST: The only error demonstrated by Applicant was the Judge's failure to preserve the record at one point in the proceeding. However, Applicant has not made an offer of proof that as to what occurred at that point. Adverse decision affirmed.

CASENO: 14-00281.a1

DATE: 12/30/2014

DATE: December 30, 2014

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In Re:)	
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-----)	ISCR Case No. 14-00281
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)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Sean M. Bigley, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On April 11, 2014, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that

decision—security concerns raised under Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On September 26, 2014, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Nichole L. Noel 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 Applicant was denied due process; whether the Judge was biased against Applicant; whether the Judge failed to consider significant contrary record evidence; whether the Judge’s findings contained errors regarding the substance of Applicant’s testimony; and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge’s Findings of Fact

Applicant has worked for her current employer, a Federal contractor, since mid-2014. She previously worked for another Federal contractor, resigning from that job in 2012 in lieu of being fired for violating her employer’s corporate integrity policy.

In late 2011, Applicant had taken out a “payday” loan to cover certain expenses on behalf of her daughter. The lender charged her a substantial amount in interest, with the result that she was not able to make payments on the principal of the loan. She engaged in an unsuccessful effort to renegotiate the terms of the loan.

Applicant then created a document using clipart from her employer’s website. The document bore the letterhead of her employer and purported to be from the company’s human resources (HR) department. The letter, addressed to Applicant, stated that her job was being eliminated due to budgetary constraints and bore a signature ostensibly of an HR official. Applicant faxed the letter to the lender from a friend’s office. Upon receipt, the lender got in contact with Applicant’s employer to verify the alleged job loss. When representatives of Applicant’s employer confronted her, she admitted the misconduct. The employer allowed her to resign in lieu of termination.

Two of Applicant’s former supervisors testified that they believed the penalty to have been excessively harsh. They considered her to have been an outstanding employee; however, the company’s policy did not allow for a lesser penalty.

At the hearing, Applicant admitted her wrongdoing, testifying that she showed poor judgment. However, on cross-examination, she was evasive when asked about details of the forgery. She would not provide clear answers to questions about whether she directed her friend to sign the letter and send it to the lender on her behalf. When advised by the Judge that the hearing was not concerned with identifying the friend, Applicant admitted that she directed her friend to sign the letter but continued to deny any knowledge of or take responsibility for the signature on it.

Applicant’s current supervisor testified about her excellent duty performance and work ethic. He also stated that, when she was hired, Applicant informed the supervisor that she had a financial

issue that might impact her ability to get a clearance. It was not until Applicant's probation period expired and she had sat for a clearance interview that she admitted her misconduct. He testified that he had put Applicant's dilatory reporting aside due to her outstanding work performance.

The Judge's Analysis

The Judge concluded that Applicant's misconduct raised concerns under Guideline E. In explaining her conclusion that Applicant had not mitigated these concerns, she cited to the willful nature of the misconduct and to Applicant's "evasive and incredible testimony at the hearing." Decision at 4. She stated that none of the Guideline E mitigating conditions applied. In the whole-person analysis, the Judge stated that, despite Applicant's qualities as an employee, her actions show that she is not an acceptable security risk.

Discussion

Applicant contends that she was denied due process. She notes that Department Counsel asked her a number of questions about her financial problems, the Judge eventually inquiring whether Department Counsel believed that the Judge should amend the SOR to add allegations under Guideline F. Department Counsel declined to so move. Applicant contends that it was an error for the Judge to have permitted such extensive questioning on an issue that was not raised by the SOR and for which Applicant, who acted *pro se* at the hearing, was not prepared to address. While it is true that Applicant's finances were not alleged in the SOR, it is permissible for a Judge to consider non-alleged conduct for certain limited purposes, such as examining an applicant's case for mitigation and rehabilitation and for performing a whole-person analysis. *See, e.g.*, ISCR Case No. 09-07219 at 5 (App. Bd. Sep. 27, 2012). In the case before us, Applicant's misconduct originated from her effort to ease financial pressures caused by her interest payments on the loan. It was within the Judge's discretion, therefore, to permit Department Counsel to question Applicant about her current financial condition to determine the extent to which Applicant might still be tempted to engage in security-significant actions. In any event, the Judge made no findings about Applicant's general financial condition and did not discuss the issue in her analysis. Therefore, even if a reasonable person might think the Judge permitted the questioning to go on too long, it did not have a discernible impact on her decision.

Applicant raises a related issue concerning a question she posed to the Judge, seeking clarification regarding an aspect of the hearing. Department Counsel had requested to go off the record in order to give herself time to determine if she wanted to seek an amendment to the SOR, and the Judge agreed. Applicant then stated, "Can I ask a question . . . before we go off the record?" Tr. at 92. The Judge replied that she could. Applicant then said, "I understand what you just stated . . ." and the transcript says "whereupon the above-entitled matter went off the record at 11:31 a.m. and resumed at 12.04 p.m." *Id.* The question itself was not recorded, nor was any answer by the Judge. After the resumption of the hearing, the Judge did not summarize any discussions that the parties may have had while off the record. In her brief, Applicant states that, during the 33 minutes break, "an enormous amount of reversible error could have occurred." Applicant Brief at 9. We conclude that Applicant has a point concerning the failure of the Judge to preserve the record.

Whenever a break occurs in a hearing, once the parties are back on the record a Judge should summarize any discussions that may have taken place during the hiatus or state that nothing of substance was discussed. Failure to do this puts reviewing authorities, such as the Appeal Board, at a disadvantage in evaluating claims of error alleged to have arisen during a break. In this case, however, Applicant has not made an offer of proof regarding anything the Judge may have said that impaired her rights. Her argument that harmful error “could have occurred” is merely speculative. The argument fails for lack of specificity. *See, e.g.*, ISCR Case No. 09-06691 at 3 (App. Bd. May 16, 2011).

Applicant also contends that the Judge erred by asking her a couple of questions after the parties had presented their closing statements. We find no error in this, insofar as the Judge’s questions occurred before the close of the record. After considering Applicant’s arguments in their entirety, we conclude that she was not denied the due process afforded by the Directive.

In making her argument about due process, Applicant contends that evidence about her finances may have resulted in the Judge being biased against Applicant. We have considered the entirety of the hearing transcript and the Judge’s decision. We find nothing therein that would likely persuade a reasonable person that the Judge lacked the requisite impartiality. Applicant has not met her heavy burden of persuasion on this issue. *See, e.g.*, ISCR Case No. 11-13949 at 3 (App. Bd. Sep. 5, 2013).

Applicant contends that the Judge erred in her findings. Specifically, she argues that the Judge erred in characterizing her testimony about the details of the forgery as evasive. We examine a Judge’s findings to see if they are supported by “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record.” Directive ¶ E3.1.32.1. We have examined the challenged findings in light of the testimony upon which they are based. We conclude that the statements in the Judge’s findings and in her analysis are a reasonable interpretation of Applicant’s testimony. We give deference to a Judge’s credibility determinations. *Id.* The Judge’s material findings of security concern are supported by substantial evidence. *See, e.g.*, ISCR Case No. 10-03898 at 3 (App. Bd. Jul. 3, 2014).

Applicant contends that the Judge erred by accepting a certain witness’s testimony without considering a prior inconsistent statement by the witness. In particular, Applicant called her current supervisor as a character witness. He testified that he learned the nature of Applicant’s misconduct after Applicant had been hired and after her probationary period had expired. Applicant also presented a letter by this same witness, in which he stated “[u]pon my decision to interview and to subsequently hire [Applicant], she revealed the incident in question. She explained the incident in full detail, including the circumstances which caused her to falter in her judgment.” Applicant Exhibit (AE) A. Applicant believes that AE A is not consistent with the witness’s hearing testimony, arguing that it shows that the witness had known the essence of Applicant’s misconduct before she was hired. Applicant contends that this prior written statement renders the witness’s testimony unworthy of belief and that the Judge erred in failing to consider it.

We have examined AE A in light of Applicant’s appeal brief. The exhibit is not obviously inconsistent with the witness’s hearing testimony, in that a reasonable person could interpret it to mean that Applicant admitted the forgery after she had been hired, which was the gist of the witness’s hearing testimony. In any event, as noted above, the witness and AE A were both offered by Applicant. Any inconsistency, therefore, is within Applicant’s own evidence. A Judge’s task is to resolve apparent conflicts in the evidence. *See, e.g.*, ISCR Case No. 13-12407 at 3 (App. Bd. Aug. 18, 2014). A reasonable person could find the hearing testimony of the witness to be worthy of belief and to find it more credible than AE A, to the extent of a conflict. While the Judge could have discussed AE A explicitly, she is presumed to have considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 09-07219 at 5, *supra*. Applicant has not rebutted this presumption.

The Judge examined the relevant data and articulated a satisfactory explanation for the decision. The 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 Decision is **AFFIRMED**.

Signed: Michael Y. Ra’anan
Michael Y. Ra’anan
Administrative Judge
Chairperson, Appeal Board

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

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