

KEYWORD: Guideline F; Guideline E

DIGEST: Applicant bears the burden on appeal that there is insufficient indicia of reliability to allow the admission into evidence of two credit reports. Applicant fails to meet this burden and fails to establish that there is insufficient evidence to support the Judge's decision. Adverse decision affirmed.

CASENO: 07-08925.al

DATE: 09/15/2008

DATE: September 15, 2008

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In Re:)	
-----)	ISCR Case No. 07-08925
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On October 28, 2007, DOHA 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 that the case be decided on the written record, and submitted documents for the Judge to consider. He also filed a motion to suppress, requesting that two documents submitted by Department Counsel (credit reports) be excluded from the record. The Judge denied Applicant’s motion. On April 25, 2008, after considering the written record, Administrative Judge Shari Dam denied Applicant’s request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: (a) whether the Judge erred by denying Applicant’s motion to suppress and by considering the two credit reports submitted by Department Counsel; (b) whether Department Counsel acted improperly by not “verifying” the accuracy of the information contained in the credit reports and by omitting information favorable to Applicant, in diminution of her responsibility to present the “whole-person concept” to the Judge; and (c) whether the Judge’s decision is arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge’s unfavorable decision.

The gravamen of Applicant’s assertion on appeal is that two credit reports submitted by Department Counsel¹ contained numerous substantive errors, were thus unreliable, and therefore should have been excluded from consideration by the Judge. In the course of proffering his appeal arguments, Applicant made various representations concerning the policies and practices of credit reporting agencies and proper reporting methods. He also includes with his appeal brief a lengthy attachment which he claims is not being submitted as evidence, but as “supporting information for verification of this statement.” Applicant’s assertions about the credit reporting companies and his attachment constitute new evidence offered on appeal, which the Board cannot consider. Directive ¶ E3.1.29.

Applicant contends that the two credit reports are replete with errors. He claims these errors involve matters such as personal data as well as the status of various debts that are listed in the reports. Applicant argues that because of these errors, the credit reports do not meet the requirements for the business record exception under the Federal Rules of Evidence, even when those rules are used as a general guide. Thus, the reports should not have been admitted as evidence in the case.

The Judge has the authority to rule on evidentiary matters. Directive ¶ E3.1.10. Those rulings are subject to review to determine whether they are consistent with pertinent provisions of Executive Order 10865 and the Directive ¶ E3.1.32.2, and whether they are arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. The Board notes that any review of a Judge’s evidentiary ruling must take place in the context of the Directive’s pronouncement that the Federal Rules of Evidence shall serve as a guide and that technical rules of evidence may be relaxed to permit the

¹Government Exhibits 6 and 7.

development of a full and complete record. Directive ¶ E3.1.19.

In terms of the issue of basic admissibility, Applicant bears the burden on appeal of establishing that the indicia of reliability in the method of the promulgation of the record is lacking to the point that it cannot be accepted under the rules governing the business records exception to the hearsay rule. Neither below nor on appeal does Applicant establish that the documents were improperly or irregularly produced, or produced in circumstances that would render their reliability suspect. Rather, Applicant simply makes uncorroborated and conclusory assertions that the documents contain inaccuracies. Such claims, even if proved, would go to the weight the information in the documents should receive, rather than to the documents' admissibility. A review of the Judge's decision reveals that the Judge engaged in a thoughtful and thorough analysis of the admissibility issue and resolved it in a manner that was within her discretion. The Board finds no error in the Judge's admission of the documents into evidence.

Applicant's assertions that Department Counsel acted improperly and unprofessionally by neglecting to verify the accuracy of the contents of the credit reports are without merit. First, Applicant's arguments are based on the premise that the contents of the reports were largely erroneous, a proposition that Applicant fails to establish. Moreover, credit reports are ordinary business records which are routinely accepted in DOHA proceedings. Department Counsel is entitled to rely on the evidence contained therein, and is under no obligation to verify the accuracy of that evidence before presenting it. Applicant is free, of course, to provide any evidence in his possession that speaks to the issue of the accuracy of the information contained in the reports.

Applicant also asserts that Department Counsel acted improperly by omitting from unspecified documents evidence favorable to Applicant. This, Applicant argues, had the effect of "skewing" the whole-person concept that "[c]ounsel is responsible in presenting to the court." Aside from the fact that Applicant offers no proof for his claim and has not stated the claim with sufficient specificity for the Board to effectively evaluate it, there is no affirmative duty on the part of Department Counsel to unilaterally submit evidence establishing the "whole-person." Applicant has the affirmative duty to present evidence on his behalf. Directive ¶ E3.1.15 ("The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."). Absent a showing that Department Counsel did not provide adequate discovery or otherwise improperly withheld favorable evidence from Applicant to his detriment, Applicant's claim is without merit.

Implicit in Applicant's appeal is the assertion that the Judge's decision is not supported by the record evidence and is, therefore, arbitrary, capricious and contrary to law. The Board has examined the Judge's decision in light of the record evidence, and concludes that her findings of fact and conclusions are supported by substantial record evidence. *See* Directive, ¶ E3.1.32.1 (Substantial evidence is "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"). The Judge has drawn a rational connection between the facts found and her ultimate adverse security clearance decision. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006). *See also* *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 consistent with the national security to grant Applicant eligibility for a security clearance” is sustainable on this record. See *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Conclusion

The decision of the Judge is AFFIRMED.

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board