

KEYWORD: Guideline F

DIGEST: Both parties have demonstrated the Judge made errors which were ultimately harmless. Adverse decision affirmed.

CASENO: 08-06334.a1

DATE: 01/15/2010

DATE: January 15, 2010

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In Re: )	
)	
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)	
Applicant for Security Clearance )	
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**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer I. Goldstein, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On March 2, 2009, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant

requested a hearing. On September 21, 2009, after the hearing, Administrative Judge Martin H. Mogul denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30. Department Counsel cross-appealed pursuant to Directive ¶ E3.1.28.

Applicant raised the following issues on appeal: whether certain of the Judge's findings of fact are supported by substantial record evidence and whether the Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. On cross-appeal, Department Counsel raises the following issue: whether the Judge erred in concluding that three of the SOR allegations did not raise Guideline F security concerns. Finding no harmful error, we affirm.

A. Applicant's appeal:

The Judge found that Applicant had numerous delinquent debts, for which she had not demonstrated mitigation sufficient to meet her burden of persuasion under the standard set forth in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). These debts were for such things as cable services, consumer debts, etc. Applicant contends that the Judge erred in concluding that one of the debts, for medical services, had not been paid off. A review of Government Exhibit (GE) 7, Credit Report, demonstrates that Applicant had paid off this debt. Therefore, the Judge's finding on this matter is error. However, it is harmless in that, even if the error had not been made, the result of the case would have been the same. *See* ISCR Case No. 01-23362 at 2 (App. Bd. Jun. 5, 2006); ISCR Case No. 03-09915 at 5 (App. Bd. Dec. 16, 2004); ISCR Case No. 01-11192 at 5 (App. Bd. Aug. 26, 2002). In light of the record as a whole, the Judge's adverse conclusions are sustainable.

B. Department Counsel's cross-appeal:

The SOR contains three Guideline F allegations that describe acts of fraud by Applicant. The first of the three alleges that, in 1995, she admitted to using another person's ATM card without the owner's authority. The second alleges that in 1997 Applicant was charged with larceny of a personal check, larceny of Government funds, and larceny of private property, for which she was debarred from a military installation. The third alleges that, in 1999, Applicant was arrested in a civilian jurisdiction and charged with Financial Card Theft (felony) and Financial Card Fraud. Applicant pled guilty to the second count and the other was dismissed. Concerning the first two of these allegations, the Judge stated that neither allegation "gives any specific insight in this case." Decision at 3. Concerning the third, the Judge found that the Government had not provided any information on this matter other than a report from the FBI describing the charges and the disposition. In the Analysis portion of the decision, the Judge did not explain why he apparently concluded that the three allegations were not supported by substantial record evidence or otherwise did not set forth Guideline F security concerns.

Department Counsel persuasively contends that the Judge erred. As regards the first of the three incidents, the 1995 ATM use, Applicant admitted to this allegation in her response to the SOR. Accordingly, the Government was under no obligation to present evidence concerning this matter. Nevertheless, the Government did present a report by a military criminal investigation organization,

in which Applicant admitted to having used the victim's ATM card.<sup>1</sup> This incident occurred on a military installation. Applicant's admission to the military investigators is corroborated by statements of other witnesses, including the victim, who advised that she did not give Applicant permission to use the card. This allegation of fraudulent use of an ATM card, which Applicant has admitted both in the report and in the response to the SOR, raises Financial Considerations Disqualifying Condition (FCDC) 19(d).<sup>2</sup> The Judge's failure to identify this disqualifying condition, and to analyze it in the context of Applicant's burden of persuasion as to mitigation, is error.

Regarding the second fraud allegation, the 1997 larceny of a personal check, the Government presented a report, also by a military criminal investigation organization.<sup>3</sup> All incidents pertinent to this allegation occurred on a military installation. The report established that Applicant was arrested in a stolen vehicle. The vehicle contained a checkbook belonging to the victim, who had reported it stolen along with her wallet. Someone had written several checks on the victim's bank account without her permission. The victim told the investigators that, after the theft, a female contacted her saying that she would return the stolen wallet. The victim and the female agreed to meet at a location on base for the return of the property. The victim did meet with a female on the date in question, but she did not receive her wallet. The victim and her husband, who was also present, both independently identified Applicant in a photo lineup as the female they met in hopes of getting back the wallet. The report concluded that there was probable cause to believe Applicant stole the wallet and checkbook. The U.S. Attorney declined to prosecute Applicant, though the military commander debarred her from all of the service's installations in the state. The Judge did not explain why he concluded that this evidence does not shed light on Applicant's case, insofar as the evidence tracks the SOR allegation in all of its particulars. The Government has presented substantial evidence<sup>4</sup> of this allegation, raising FCDC 19(d), and the Judge's failure to treat it this way is error.

The third allegation in question, the 1999 incident in which Applicant was convicted of Financial Card Fraud, is supported by a report prepared by the FBI.<sup>5</sup> This report demonstrates that Applicant was arrested for two apparently related offenses in July 1999. She was tried in a state District Court and was represented by a public defender. She pled guilty to the lesser offense, a misdemeanor, while the greater offense, a felony, was dropped. Applicant was sentenced to 30 days confinement, 12 months supervised probation, and a requirement to pay restitution. Concerning this allegation, the Judge stated only that the Government presented no further evidence beyond that in

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<sup>1</sup>GE 8, Criminal Investigation Report, dated October 12, 1995, at 12, 18.

<sup>2</sup>Directive ¶ E3.19(d): "deceptive or illegal financial practices such as embezzlement, employee theft, check fraud . . . and other intentional financial breaches of trust[.]"

<sup>3</sup>GE 9, Criminal Investigation Report, dated January 7, 1997.

<sup>4</sup>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." Directive ¶ E3.1.32.1.

<sup>5</sup>GE 10, FBI Identification Record, dated March 13, 2007.

the FBI report, which we construe as meaning that the Government had failed to meet its burden of production. However, under the facts of this case, Applicant's conviction by a court of competent jurisdiction, pursuant to a plea of guilty, of Financial Card Fraud is sufficient to meet the Government's burden. Moreover, the Judge appears to have treated this allegation in a somewhat piecemeal fashion, rather than in the context of the record as a whole. For one thing, he did not discuss the fundamental similarities among the three allegations at issue in the cross-appeal, all of which involve theft of a financial instrument—whether card or check—giving Applicant access to another person's bank account or line of credit. These similarities warranted the Judge's discussion. Additionally, the similarities are pertinent on the issue of Applicant's *mens rea* and undermine Applicant's denial of criminal intent.<sup>6</sup> Also, the Judge did not discuss Applicant's inconsistent or contradicted statements, which affect the credibility of her denials of intentional wrongdoing.<sup>7</sup> Again, the Government has presented substantial evidence of this allegation, raising FCDC 19(d), and the Judge's cursory treatment of this allegation is error.

In light of the errors demonstrated by Department Counsel's cross-appeal, we might remand the case to the Judge for a new decision in which he analyzes the extent to which Applicant met her burden of persuasion as to mitigation. However, in light of the fact that the Judge denied Applicant a security clearance based on her delinquent debts, a decision which is sustainable on the record before us, no purpose would be served by remand. Therefore, we conclude that these errors are ultimately harmless in that, even were they to be corrected, the outcome of the case would not change.

### Order

The Judge's adverse security clearance decision is AFFIRMED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan  
Administrative Judge  
Chairperson, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin  
Administrative Judge

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<sup>6</sup>See Federal Rule of Evidence 404(b), which holds that evidence of other wrongs may be admissible to prove motive, intent, knowledge, absence of mistake, etc.

<sup>7</sup>In her Subject Personal Interview, contained in GE 4, Answers to Interrogatories, Applicant advised the interviewer that "she was never arrested, booked or processed while at the police department. She was never summoned to court on this matter." This is facially contradicted by GE 10. Additionally, it appears to be inconsistent with Applicant's testimony at the hearing, in which she does not deny that she was arrested and admits that she was charged and pled guilty, though she denied criminal intent. Tr. at 48 - 52. Additionally, Applicant made inconsistent statements concerning the 1995 incident. In GE 8, Applicant advised military investigators that she used the ATM card in order to assist a third person in recovering money which was purportedly owed to the third person by the victim. However, at the hearing, she stated that she had used the ATM to purchase medication for the victim, who was ill. Tr. at 44 - 46.

Member, Appeal Board

Signed: James E. Moody

James E. Moody

Administrative Judge

Member, Appeal Board