KEYWORD: Guideline E; Guideline F

DIGEST: Although the Board cannot consider new evidence on appeal, we can consider matters outside the record insofar as they reflect upon issues of due process, jurisdiction, etc. Judge's failure to take in evidence Applicant had submitted after the close of the record does not constitute a denial of due process. The Judge's evidentiary rulings were not arbitrary, capricious, or contrary to law. Applicant's argument that the transcript contained errors fails for lack of specificity. Adverse decision affirmed.

CASE NO: 10-01400.a1

DATE: 01/03/2013

DATE: January 3, 2013

In Re:	)	
	)	
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	)	
	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Don C. Whitaker, Personal Representative

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On February 11, 2011, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under Guideline E (Personal Conduct) and Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On September 12, 2012, 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.

Applicant raised the following issues on appeal: whether Applicant was denied due process; whether the Judge erred in some of his evidentiary rulings; whether the Judge's findings of fact contain errors; whether the transcript contained errors; whether the Judge permitted the Department Counsel to perform an improper cross-examination of a witness; whether the Judge's application of the mitigating conditions was in error; and whether the Judge erred in his whole-person analysis. Consistent with the following, we affirm the Judge's decision.

The Judge made the following findings pertinent to the issues raised on appeal: Applicant seeks a security clearance in connection with his employment with a Defense contractor. He served in the U.S. Army from 1974 to 1984, receiving an honorable discharge.

Applicant was court-martialed in 1980. The case arose from Applicant's having shot a friend with a gun while blacked out from the consumption of alcohol. The Judge found that Applicant was convicted of Intention of Bodily Harm. The court did not sentence Applicant to a punitive discharge.

In 1998, Applicant was convicted of Assault with a Deadly Weapon and sentenced to three years probation and 30 days in jail. The case arose from an altercation between Applicant and passengers in another car over a parking space. Among other penalties, the court required Applicant to attend anger management classes. Applicant never advised his security officer of this incident.

In 2005, Applicant tested positive for amphetamines as result of a random urinalysis by his employer. He was suspended form work for three days. Applicant contended at the hearing that he may have been a victim of unknowing ingestion. This incident occurred after Applicant had been granted a DoD security clearance.

In 2006 and again in 2007, Applicant used a company credit card for personal use, on several occasions. These uses did not occur in connection with official travel, as his employer required. His employer reprimanded him for this misconduct. When asked at the hearing why he did this, he replied, "Because I'm stupid, sir." Decision at 3.[1]

The Judge found that Applicant had provided false information on his security clearance application (SCA). In response to various questions, Applicant denied that (1) he had ever been reprimanded by an employer for misconduct; (2) he had used a controlled substance within the previous seven years; (3) he had ever used a controlled substance while holding a security clearance; and (4) he had been counseled, warned, or disciplined for violating the terms of an employer-provided credit card within the previous seven years. The Judge found that Applicant did not provide an explanation for his omissions. Applicant has completed five or six SCAs during the course of his professional life. The Judge found that Applicant's omissions were willful.

In the late 1990s, Applicant was discharged in Chapter 7 bankruptcy. His wife had handled the finances, and she had applied for and received credit cards without Applicant's knowledge. Applicant himself also used credit cards that were part of the bankruptcy procedure.

[1]The SOR alleged the credit card offenses under Guideline E and again under Guideline F.

Applicant and his wife purchased a second house in which to live while they used their first house as investment property. Applicant's wife lost one of her two jobs, and they had difficulty making payments on the second house. The house went into foreclosure. As a consequence, Applicant has two delinquent debts–$231,000 and $89,292–representing the amounts owed on the first and second mortgages on the foreclosed property.

Applicant has a history of gambling once or twice a week. He had used his company credit card to obtain money for gambling. At his employer's urging, he attended two sessions with a counselor and some sessions with Gambler's Anonymous. However, Applicant has stated that he does not have a problem with gambling. The SOR alleged, and the Judge found, that Applicant does not want to take responsibility for his household finances because, if he has access to his wife's bank account, he may spend the money gambling.

In analyzing his findings in light of the Directive, the Judge concluded that Applicant's circumstances set forth security concerns under both of the Guidelines alleged in the SOR. The Judge stated that he could find no Guideline E mitigating condition to be applicable. Under Guideline F, the Judge noted the effect Applicant's wife's job loss had on the couple's financial condition. However, he concluded that Applicant had not acted responsibly in regard to his delinquent debts.[2] He stated that Applicant had neither resolved his debts or demonstrated financial stability.

Applicant contends that he was denied due process. He states that the Judge had held the record open until June 4, 2012, to enable Applicant to submit additional evidence.[3] He claims that he submitted evidence that the Judge did not consider. His Appeal Brief includes a copy of that evidence, a character reference. In the Reply Brief, Department Counsel addresses Applicant's assignment of error. As did Applicant in his Brief, Department Counsel has made certain factual statements that are not contained in the record. We are not authorized to consider new evidence on appeal. Directive ¶ E3.1.29. However, we have, in appropriate cases, considered evidence outside the record insofar as it raises threshold issues of due process, jurisdiction, etc. *See, e.g.*, ISCR Case No. 09-05486 at 3 (App. Bd. Aug. 1, 2012). Accordingly, we will consider the contents of the Briefs of the parties in order to resolve this assignment of error.

[2]Directive, Enclosure 2 ¶ 20(b): "the conditions that resulted in the financial problem were largely beyond the person's control . . . and the individual acted responsibly under the circumstances[.]"

[3]The record contains no mention of the Judge holding the record open past the hearing date. The evidentiary file does include a letter from Department Counsel (not an exhibit) stating that the Judge held the record open until June 4, 2012, and that Department Counsel had received two documents from Applicant and was forwarding them without objection. The Judge also referenced the time extension in his Decision. Department Counsel's Appeal Brief, which was written by a different attorney from the one at the hearing, avers that no extension was granted, and therefore the Judge was under no obligation to consider any post-hearing evidence. Faced with this set of circumstances, we can only conclude that the time extension was granted off the record. For purposes of this appeal, we will assume that the record was held open until June 4, 2012.

As stated above, the Judge gave Applicant until June 4, 2012, to submit additional documents. Department Counsel avers that, on June 4, he received two letters from Applicant, which he passed on to the Judge. These letters are included in the record as Applicant Exhibit A. Department Counsel further avers that, on June 7, 2012, which was after the close of the record, he received a third letter from Applicant, which he also passed on to the Judge. However, this letter did not make its way into the record. There is no reason to believe that the Judge has erred regarding this third letter. A Judge has no obligation to take in evidence after the close of the record. Indeed, were Judges to do so routinely, the practice would undermine the Government's interest in administrative finality. *See, e.g.*, ISCR Case No. 03-20327 at 6 (App. Bd. Oct. 26, 2006). The record as a whole provides no reason to conclude that Applicant was denied the due process afforded him by the Directive.

Applicant contends that the Judge erred in some of his evidentiary rulings. Specifically, he argues that the Judge should not have admitted evidence of the 1980 court-martial, the 1998 conviction, and the 1999 bankruptcy. He argues that these matters are too old to have any probative value. He also argues that Department Counsel, in his hearing argument, conceded that these allegations pertained to conduct that was long in the past. We evaluate a Judge's evidentiary rulings to see if they are arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 09-02839 at 3 (App. Bd. Jun. 22, 2011). In this case, Applicant admitted the allegations regarding the court-martial and the bankruptcy. These admissions were part of the record and were proper matters for the Judge to consider, even without additional evidence. In any event, evidence directly relating to allegations in an SOR are relevant, even if they pertain to events that occurred a long time ago. Age of the alleged conduct may be a proper consideration in evaluating its security significance. However, the passage of time in and of itself does not impair admissibility of otherwise relevant evidence. We do not interpret Department Counsel's argument as conceding that this evidence was not admissible. In any event, comments by Department Counsel are not binding on the Judge. *See, e.g.*, ISCR Case No. 08-10088 at 3 (App. Bd. Jul. 19, 2010). We resolve this issue adversely to Applicant.

Applicant contends that the Judge erred in finding that his false answers on his SCA were deliberate. When an applicant's state of mind is relevant, as it is when the SOR alleges deliberate falsifications, a Judge must consider the applicant's conduct in light of the entire record. *See, e.g.*, ISCR Case No. 10-04821 at 4 (App. Bd. May 21, 2012). In analyzing Applicant's intent, the Judge considered the clarity of the SCA questions at issue, Applicant's prior experience in completing SCAs, and his failure to provide reasonable explanations for his omissions. The Judge's finding that Applicant deliberately failed to answer the questions truthfully is supportable based on the record that was before him.

Applicant argues that the transcript contains errors. He states that the transcript does not properly convey the meaning of statements by the attorneys and the Judge, that it contains misspellings, and that some of the words have missing letters. He has provided no specific example of a transcript error of any sort, much less of one that is harmful. Our review of the transcript discloses no obvious errors. Applicant's argument fails for lack of specificity. *See, e.g.*, ISCR Case No. 08-01306 at 3 (App. Bd. Oct. 28, 2009).

Applicant contends that the Judge erred by not curtailing Department Counsel's cross-examination of a witness. He argues that the cross-examination was repetitive and confusing. We have examined the transcript of this cross-examination and find nothing therein at variance with the requirements of the Directive. Viewed as a whole, this questioning did not elicit cumulative evidence or otherwise contravene the Federal Rules of Evidence, which serve as a guide in DOHA cases. Directive ¶ E3.1.19. Moreover, Applicant's counsel at the hearing did not object to this cross-examination, which waives the issue on appeal. *See, e.g.*, ISCR Case No. 07-15235 at 2, note 1 (App. Bd. Oct. 3, 2008).

The Judge examined the relevant data and articulated a satisfactory explanation for the decision, both as to the mitigating conditions as well as the whole-person factors. 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 Judge's decision is **AFFIRMED**.

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

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board

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