

KEYWORD: Guideline E; Guideline F

DIGEST: Although the Government presented substantial evidence of a Guideline e security concern, based in large measure upon a finding of liability in a civil trial, Applicant was precluded from presenting his case in mitigation in absence of evidence concerning the precise nature of his conduct. Adverse decision remanded.

CASE NO: 11-00180.a1

DATE: 06/19/2012

DATE: June 19, 2012

In Re:)	
)	
-----)	ISCR Case No. 11-00180
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

David F. Hayes, Esq., Department Counsel

FOR APPLICANT

John V. Berry, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 29, 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 March 8, 2012, after the hearing, Administrative Judge Joan Caton Anthony 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 erred in her findings of fact; whether the Government had presented substantial evidence of Guideline E security concerns;

whether the Judge erred in her application of the mitigating conditions; and whether the Judge erred in her whole-person analysis. For the reasons that follow, the Board remands the case to the Judge.

Facts

The Judge made the following pertinent findings of fact: Applicant is a senior program manager for a Government contractor. He enlisted in the military, earned a commission, and retired as an officer. He held security clearances during his military service.

After retirement, he worked for a small technology company, for which he signed a non-disclosure agreement. This company was purchased by Company A, a Defense contractor. Applicant worked for Company A from 2000 until 2009. He did not sign a non-disclosure agreement after coming to work for Company A.

In January 2008, a former colleague of Applicant left Company A and began a Government services division at Company B. In 2009, Applicant and another colleague left Company A and set to work for Company B. Upon leaving Company A, Applicant turned in all equipment provided him by the company. He took with him a 20 gigabyte hard drive, which he had used at Company A during the nine years of his employment. This hard drive was Applicant's own, the one provided by the company contained insufficient memory. He stated that there were personal matters on the computer, as well as some power point presentations on the hard drive.

Although Applicant claimed he left Company A on good terms, within two weeks of starting his new job, Applicant, three other colleagues, and Company B were named as defendants in a lawsuit. The civil complaint alleged various kinds of economic harm to Company A. The case was tried before a jury, lasting 11 days. Applicant testified, both on direct examination and on cross-examination, for 65 minutes. The jury found Applicant liable for breach of fiduciary duty, breach of the non-disclosure agreement, violation of the State Computer Crimes Act, violation of the State Business Conspiracy Act, civil conspiracy, misappropriation of trade secrets, and for conversion.

After considering motions by both sides, the judge entered an order of final judgment. This order directed (1) Applicant and co-defendants to pay over \$12,000,000 for violations of the State Business Conspiracy Act;¹ (2) Applicant to pay \$350,000 in punitive damages; and (3) Applicant and co-defendants to pay over \$1,400,000 in attorney fees.

Applicant and co-defendants filed an appeal to a higher state court. The appeal lists five assignments of error, all relating to the amount of damages and to evidentiary matters at the trial pertaining to damages. Liability was not raised on appeal. Applicant's salary is currently the subject of a garnishment action.

¹The court entered judgment against Applicant and his colleagues based on all of the claims found against them. However, the court concluded that the damages were duplicative. Accordingly, she fixed the damages based on the State Business Conspiracy Act claim. Final Order, included in Government Exhibit (GE) 2, Answers to Interrogatories.

In the Analysis, the Judge found in Applicant's favor regarding the Guideline F allegations and one allegation under Guideline E, which simply alleged that Applicant had appealed his case to a higher state court. However, she found against him regarding two SOR allegations pertaining to the lawsuit itself. She cited to record evidence that Applicant was represented at the trial by counsel, testified, and was found liable as described above. She concluded that the circumstances of his case raised two disqualifying conditions under Guideline E, 16(c)² and (d).³

However, she concluded that Applicant had not demonstrated mitigation of these two disqualifying conditions. In performing her analysis, the Judge relied on evidence of Applicant's lawsuit and the results thereof, to include his appeal to a higher state court, stating that the conduct implicit in this litigation indicated a failure to follow rules and regulations. She concluded that none of the Guideline E mitigating conditions were entitled to full application. She also cited Applicant's testimony that he and his colleagues had "done nothing wrong." Decision at 10. She stated that this testimony, and other evidence of a similar kind, were not consistent with Applicant's higher state court appeal, which did not challenge liability. She also stated that Applicant's denial of wrongful conduct, and his claim on the day of the hearing not to know what a claim of conversion meant, despite his intimate involvement with protracted litigation on that very issue, most reasonably suggested that he did not understand the gravity of his security significant conduct.

Discussion

Applicant contends that the Judge erred in her finding that his appeal of the jury verdict was exclusively devoted to challenging damages. Rather, he points to aspects of the appeal brief,⁴ in which Applicant contends that allegedly improper evidence concerning damages may have inflamed the jury and affected their overall verdict. He also notes that the appeal seeks a new trial, not simply a new hearing on damages. We examine a Judge's finding to see if it is supported by substantial record evidence, that 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. *See* ISCR Case No. 11-00970 at 2 (App. Bd. Feb. 28, 2012).

²Directive, Enclosure 2 ¶ 16(c): "credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other singled guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information[.]"

³Directive, Enclosure 2 ¶ 16(d). "credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person ;may not properly safeguard protected information. This includes but is not limited to consideration of . . . (3) a pattern of dishonesty or rule violations." This is the portion of 16(d) which the Judge found to have been raised in this case.

⁴This brief is attached to GE 2.

We have examined GE 2, along with the other record evidence. The evidence is inconsistent on the point of whether the appeal of the civil case goes only to the issue of damages. Applicant's brief asserts several alleged errors in the jury trial, all of which center on the question of damages. For example, one of the assignments of error contends that the court abused its discretion in permitting a plaintiff's witness to testify as to a model of goodwill damages that, Applicant asserts, was not consistent with state law. Other assignments of error address different aspects of the plaintiff's award of damages. On the other hand, the prayers at the end of both briefs filed in the civil trial ask for a reversal of the judgment of the trial court and an order for a new trial, with no limiting language pertaining only to damages. We note Applicant's argument that, by seeking a new trial, he is hoping for a reversal of the entire case. It is the job of the Judge to resolve conflicts in the record evidence. After a review of the record, the Board concludes that the Judge's finding that the appeal in the civil trial pertains to damages is sustainable.

Applicant contends that the Government failed to present evidence of security concerns. He states that the Government did not present any evidence of the specific underlying conduct by Applicant which would demonstrate concerns under Guideline E and that the Judge erred in relying simply on the results of the trial. In a DOHA hearing, the Government's burden is to present substantial evidence regarding any controverted allegation. In this case, although Applicant admitted in his response to the SOR that he had been found liable, he denied wrongdoing. Accordingly, the Government was required to come forward with evidence in support of the allegations in the SOR.⁵

We note findings by the Judge and record evidence, as follows:

- (1) Applicant originally worked for a small technology company. He signed a non-disclosure agreement with that company.
- (2) The company was purchased by Company A, and Applicant worked for Company A for nine years.
- (3) While performing his duties at Company A, Applicant used his personal hard drive, because the one supplied by his employer did not have sufficient memory.
- (4) Some of Applicant's colleagues left Company A and formed a division of Company B. Applicant subsequently followed them in joining Company B.
- (5) When leaving Company A, Applicant took his hard drive with him.
- (6) Within two weeks of beginning work at Company B, Applicant was served with process for a lawsuit. The lawsuit was filed by Company A.

⁵The Guideline E security concern is, in pertinent part, as follows: Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Directive, Enclosure 2 ¶ 15.

(7) The lawsuit was based, at least in part, upon allegations that Applicant and his colleagues participated in a conspiracy to lure people away from Company A, that Applicant and his colleagues misappropriated computer technology, and that Applicant and his colleagues did not abide by their employment agreement. Applicant Personal Subject Interview, included in GE 2.

(8) Company A also asserted that the hard drive Applicant had taken with him contained information relevant to their business. Tr. at 70. According to Applicant, Company A contended that his hard drive contained “detrimental information.” Applicant Personal Subject Interview, included in GE 2.

(9) The trial in this lawsuit lasted 11 days. At the conclusion, the jury found Applicant and his colleagues liable for, *inter alia*, conspiracy, breach of fiduciary duty, breach of the non-disclosure agreement, and misappropriation of trade secrets.

(10) After the trial, and after considering motions by all parties, the court entered findings against Applicant and his colleagues, though reducing the amount of damages awarded.

(11) Applicant’s appeal to a higher state court focused on the issue of damages rather than liability.

We note record evidence of an exculpatory nature, for example Applicant’s claim that his hard drive, which he had used for nine years in performing official duties, did not contain company information, only recipes, personal letters, etc. However, the findings and evidence cited above, taken together, could persuade a reasonable person to believe that Applicant had acted in such a way as to compromise Company A’s legitimate interest in protecting its proprietary information.

Though Applicant insisted that he had done nothing wrong, the Judge appeared to find Applicant’s claims to be lacking credibility. We note, for example, the skeptical nature of her comment about his purported ignorance of the meaning of conversion. We are required to give deference to a Judge’s credibility determination. Directive ¶ E3.1.32.1. We conclude that the Government presented substantial evidence of conduct by Applicant that impugns his trustworthiness and reliability. This evidence is sufficient to establish security concerns under disqualifying conditions 16(c) and (d) of Guideline E, as the Judge concluded.

The Government’s establishing of security concerns under the disqualifying conditions of Guideline E, does not end the inquiry however. Applicant also argues that the Judge’s analysis under the Guideline E mitigating conditions is problematic, owing to the paucity of evidence regarding what Applicant actually did, or was accused of doing, during the course of his departure from his former company. Applicant asserts essentially that the Judge could not properly evaluate whether or not his conduct was mitigated without knowing more about what that conduct was. Applicant’s argument has merit.

This is a difficult and unusual case involving complex business litigation culminating in a jury trial lasting eleven days where there are dozens of counts, multiple defendants, joint and several liability among those defendants, and, as of the close of the record, the case was on appeal to a higher state court.⁶ The record evidence as presently constituted identifies civil claims such as “breach of fiduciary duty,” “breach of a non-disclosure agreement,” “misappropriation of trade secrets,” and “civil conspiracy,” but does not go much further. The evidence does not identify with any specificity the conduct underlying these legal concepts that was engaged in by Applicant. The issue of collateral estoppel was raised early at the hearing, and the Judge’s comments regarding the collateral estoppel shaped the subsequent evidentiary portion of that hearing. At one point, Department Counsel acknowledged that “the government’s flying somewhat blind here.”⁷ At another point, Applicant suggested that the case be continued so that he might be afforded an opportunity to obtain additional evidence from the records of the civil trial, thus affording him the chance to provide some explanation as to what the underlying facts are in this case. Department Counsel objected, relying on the doctrine of collateral estoppel and stating that adopting Applicant’s suggestion would amount to re-litigating the civil matter. The Judge basically agreed with Department Counsel, stating that she was not there to re-litigate the case below, ultimately deciding to go forward with the hearing without re-litigating the civil trial, and while “being respectful of the three-pronged collateral estoppel test, which we must be fully cognizant of in going forward.”⁸ There was no subsequent discussion about continuing the case to expand the record. At the conclusion of the hearing, the Judge declared the record closed.⁹ After a review of the record and the arguments of the parties, the Board concludes that the issue of the applicability of the collateral estoppel doctrine to this case is squarely before us.

The Board has held that the doctrine of collateral estoppel applies in DOHA hearings. Guided by federal law, the Board has adopted a three-pronged test to be used to analyze the appropriateness of applying the doctrine. *See* ISCR Case No. 04-05712 at 8 (App. Bd. Oct. 31, 2006). First, the party against whom the earlier decision is asserted must have been afforded a full and fair opportunity to litigate the earlier case. Second, the issues presented for collateral estoppel must be the same as those resolved against the opposing party in the first trial. Third, the application

⁶Given the then pending appeal to a higher state court, the issue of whether or not the case was ripe for review in front of DOHA was discussed by the Judge and the parties. The issue of ripeness is not before us on appeal.

⁷Tr. at 35.

⁸Tr. at 43-44, 52.

⁹ Tr. at 168. Department Counsel correctly points out that, at the hearing, the Judge did not directly rule on Applicant’s raising of the possibility of a continuance for the purpose of getting additional evidence, nor did she rule definitively on the applicability of the collateral estoppel doctrine. The Judge instead preferred to proceed, and if matters implicating the doctrine arose, further argument could be made and a ruling requested. Notwithstanding the fact that Applicant did not formally object to moving forward without the additional evidence, and did not raise the issue again subsequent to the Judge’s suggestion to proceed, the Board concludes that the issues of whether or not the record supports the Judge’s mitigation analysis, along with the related issue of the applicability of the collateral estoppel doctrine, were sufficiently preserved for appeal.

of collateral estoppel in the second hearing must not result in unfairness. The Board's focus in this case is upon the third, or unfairness prong.

Implicit in the adoption of the test for the collateral estoppel doctrine is the acknowledgment that applying the doctrine may not be appropriate in all circumstances. The case before us is not like most other cases in that, owing to the technical and complex nature of the proceedings in the civil trial, the underlying facts are not readily discernable.¹⁰ The current state of the record supports a conclusion that Applicant's conduct or circumstances raise a security concern. It is not sufficient, however, to afford a meaningful evaluation of security significant conduct in the context of mitigation. Considerations of procedural due process require that Applicant be given the chance to explain the conduct, present it in a meaningful context, and ultimately to mitigate it, if that is what the facts support. The way the hearing proceeded effectively prevented him from doing these things. At the heart of the matter is the notion that DOHA ought not deny an applicant access to classified information unless the record establishes with specificity an applicant's conduct or circumstances of security significance, so as to place them in a proper context, and whether or not the conduct or circumstances have been mitigated. *See* Directive, ¶ E3.1.3 and ¶ E3.1.15. The Board is not convinced that such a threshold has been reached on the current record.

The problem becomes most apparent upon a consideration of the Judge's remarks regarding mitigation. The Judge concluded that "Applicant failed to demonstrate that he understood the gravity of the conduct the jury found him responsible for." The Judge further concluded that "He also failed to demonstrate that he understood what had caused his unreliable conduct and, as a result, was unable to ensure that such behavior was unlikely to occur." The Board concludes that the Judge cannot make such assessments based on the current record. The gravity of the conduct, Applicant's attitude toward it, and the cause of the conduct cannot be properly assessed until more is known about the underlying facts and circumstances of the case. Thus, the Judge erred in her mitigation analysis. The error was a result of her stated intent to adhere to the collateral estoppel doctrine in a setting where it was not appropriate, i.e., where it resulted in unfairness to Applicant by preventing him from presenting a case for mitigation, rebuttal, extenuation, or explanation.

Applicant raises several other issues on appeal. Given the Board's disposition of the case, it would be premature to address those issues at this time.

It is the conclusion of the Board that the case should be remanded to the Judge for further proceedings. The parties should be afforded an opportunity to present any additional evidence regarding the civil trial and his underlying conduct for the Judge's consideration. These matters

¹⁰Most of the DOHA cases where the collateral estoppel doctrine has been invoked involve violations of the criminal law, where the collateral proceeding employed the beyond the reasonable doubt standard, and where the security significant conduct could be reasonably understood without delving deeply into the details of the case. *See, e.g.*, ISCR Case No. 96-0525 (App. Bd. Jun. 17, 1997)(sexual abuse); ISCR Case No. 99-0116 (App. Bd. May 1, 2000)(possession of a controlled substance). The doctrine has also been invoked in civil cases, but again, in a context where the underlying conduct was easy to identify and evaluate in terms of security significance. *See, e.g.*, ISCR Case No. 03-24233 (App. Bd. Oct. 12, 2005)(making false statements under oath); ISCR Case No. 00-0596 (App. Bd. Oct. 4, 2001)(civil judgments for a car repossession and unpaid income taxes). The facts of the present case do not fit this pattern.

should include, but are not necessarily limited to, the civil trial pleadings, opening and closing statements of the attorneys, direct and cross-examination of Applicant, and any special findings of the jury. Any additional evidence submitted by a party is subject to review and objection by the party opponent, with the limitation that the Board has concluded that the collateral estoppel doctrine shall not preclude Applicant from submitting evidence in mitigation. The Judge should then issue a new decision after consideration of any new evidence that is properly brought before her.¹¹

Order

The Judge's adverse security clearance decision is REMANDED.

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

DISSENTING OPINION OF ADMINISTRATIVE JUDGE JAMES E. MOODY

I respectfully disagree with my colleagues in their resolution of this case. Like them, I conclude that the Government has presented substantial evidence of a Guideline E security concern, specifically that Applicant failed to protect the proprietary information of the plaintiff, his former employer. My disagreement arises from my evaluation of Applicant's evidence in mitigation. This evidence included his testimony and that of two of his co-defendants at the trial. These witnesses testified, among other things, that they had done nothing wrong and that they did not understand why they were sued. *See* Tr. at 87, 147-8:

Q: And was your position with the attorney [representing you] I did absolutely nothing wrong, I don't know why I'm here? A: Yes, sir[;]" "Q: And did you ever determine the underlying reason for the litigation in the first place? A: A true reason? No. . . I mean we never found out a true reason behind the litigation.

¹¹The Board notes that during the pendency of this DOHA appeal, a higher state court has issued a decision on appeal from the trial court.

I do not believe that Applicant was denied a full and fair opportunity to present his case. I find no reason in Applicant's brief to believe that he had additional evidence that was not presented and that would likely have produced a different result.

Viewing the record in its totality, I believe that the Judge's weighing of the evidence of security concern against Applicant's evidence in mitigation is supportable. We are required to give deference to a Judge's credibility determinations. Directive ¶ E3.1.32.1. I would affirm the Judge's decision.

Signed: James E. Moody

James E. Moody

Administrative Judge

Member, Appeal Board