

KEYWORD: Guideline D; Guideline J; Guideline M; Guideline E

DIGEST: The Board defers to a Judge’s credibility determination. However, when there is contrary evidence, such as inconsistent statements, etc., the Judge should address such evidence in performing his credibility determination. When an applicant chooses a decision on the written record, the Judge’s credibility determination is not entitled to the deference appropriate to a hearing. Official records are routinely admitted in DOHA cases. Official records are presumed to be reliable by virtue of the agency’s duty of accuracy and the high probability that it has satisfied that duty.

CASE NO: 11-07509.a1

DATE: 06/25/2013

DATE: June 25, 2013

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In Re:)	
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)	ISCR Case No. 11-07509
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Alison O’Connell, Esq., Department Counsel

FOR APPLICANT

Jon L. Roberts, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On April 4, 2012, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline D (Sexual Behavior), Guideline J (Criminal Conduct), Guideline M (Use of Information Technology Systems), and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On February 11, 2013, after considering the

record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert Robinson Gales granted Applicant's request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Judge erred in holding that a Government Exhibit was unreliable; whether the Judge's analysis under Guidelines D and E was erroneous; and whether the Judge's whole-person analysis was erroneous. Consistent with the following, we reverse the decision.

The Judge's Findings of Fact

The Judge found that Applicant is an employee of a Defense contractor. He was granted a Secret clearance in 2002, but a subsequent application for a Top Secret clearance was denied by another government agency (AGA). AGA denied Applicant's appeal of that decision.

AGA's processing of Applicant's request for a clearance included a polygraph examination. Agents in the employ of AGA conducted an interview with Applicant, making a written record of his responses. This summary was redacted by AGA, although that agency's General Counsel offered to make an un-redacted copy available to the Judge to facilitate a ruling on admissibility. The General Counsel letter and attached summary are included in the record as Item 7. The Judge stated that an un-redacted copy had not been submitted as part of the File of Relevant Material.

The gravamen of the Government's case was set forth in Item 7, to the effect that Applicant engaged in a series of sexual acts that impugned his worthiness for a clearance. Several of the allegations revolved around three "stag weekends" Applicant had attended with friends. As with other allegations, the Judge's findings on this matter consist principally in comparing and contrasting the contents of Item 7 with Applicant's later affidavit wherein he sought to recant the statements attributed to him by AGA.

In essence, Applicant attended three weekend gatherings, during at least one of which pornographic films were shown, including depictions of child pornography. The Judge noted Applicant's statement that the pornography was brought by an uninvited guest and that the other participants in the weekend gathering had not sought nor condoned child pornography. He noted that Item 7 told "another story." Decision at 4. In this version, Applicant and his companions viewed numerous pornographic images of children under 10, between 10 and 12, between 10 and 14, and between 12 and 14. The Judge characterized the summary as "rambling" and that it included later incidents in its depiction of the weekend activities.

Other allegations surrounded an incident whereby Applicant viewed child pornography on his home computer. Item 7 describes Applicant as advising the interviewers that he admitted looking for pornography on his home computer, though later in the interview he denied having done so. The Judge stated that this apparent inconsistency was not addressed. He went on to find that Item 7 describes Applicant as having observed "Lolita-like" images of female children. The Judge contrasted this version with the later one presented by Applicant in which he admitted having looked

at pornography on his home computer. He stated that he had advised AGA that some of the images “could have been” those of children. *Id.* He stated that, when asked by AGA interviewers, if it were possible that some of the pornographic images were of children, he replied that it was possible.

Another set of allegations concerned Applicant’s having viewed magazines containing child pornography. Applicant admitted that he worked on construction sites from 1978 to 1981 and that he sometimes purchased pornographic magazines or viewed others purchased by colleagues. The Judge found that, in the interview contained in Item 7, Applicant stated that magazines at the construction site displayed prepubescent females. Elsewhere in the interview he is reported to have stated that, a few years prior to the weekend getaways, he viewed sexual images of females under 10 in a magazine.

In addition to the above, Applicant’s SOR alleged under Guideline M that he had used his work computer to perform an internet search using certain sexual terms as keywords. The Judge found that Applicant denied having done this, because he had been advised by management that he had no expectation of privacy on his work computer. The Judge found that no expectation of privacy did not equate to a policy not to use his work computer to search for pornography. The Judge stated that there is no evidence that his computer was ever examined or analyzed for evidence of pornographic searches.

The Guideline E allegations incorporated the previously described sexual infractions. In addition, this Guideline included allegations that Applicant had falsified his security clearance application (SCA) and that he falsified material facts during a subsequent OPM interview. The Judge found that Department Counsel’s interpretation of the evidence was that Applicant’s answers to the SCA and to OPM were not consistent with his answers to the AGA interviewers years prior.

Applicant enjoys an excellent reputation for trustworthiness and integrity. One supervisor noted, however, that Applicant needed to hone his communication skills so that he would not be misunderstood during “collaborative efforts.” *Id.* at 6.

The Judge’s Analysis

The Judge found that Applicant’s circumstances raised security concerns under each of the Guidelines contained in the SOR. However, regarding Guideline E, he found that the Government’s evidence did not raise disqualifying conditions concerning deliberate falsifications, omissions, etc.¹ Rather, he concluded that the only Guideline E disqualifying condition raised by Applicant’s conduct was 16(e)² (“personal conduct or concealment of information about one’s conduct that creates a vulnerability to exploitation, manipulation, or duress . . .”)

¹See Directive, Enclosure 2 ¶¶ 16(a) and (b).

² Directive, Enclosure 2 ¶ 16(e).

The Judge also concluded that Applicant had mitigated all of the security concerns raised by his conduct. The Judge cited to the 10 years which had elapsed since the last incident of sexual misconduct as constituting a sufficient time in which to demonstrate rehabilitation as well as to evidence that Applicant had admitted his conduct to his wife and others, thereby lessening the chance that he could be blackmailed.

However, the essence of the Judge's analysis was his view that Item 7 was less worthy of belief than Applicant's later statements. He cited such things as the redacted nature of the interview summary and the absence of signatures or other identifying information regarding those who prepared it. He cited to evidence that Applicant may be deficient in communication skills, leading to misinterpretation. He also noted that Applicant was never prosecuted or disciplined for any of the misconduct alleged to have occurred and that his recantations had been consistent in the years since the AGA interview.

Discussion

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. *See* Directive ¶ E3.1.15. The standard applicable in security clearance decisions "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). "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

In deciding whether the Judge's rulings or conclusions are erroneous, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Department Counsel argues that the Judge's credibility determination concerning Item 7 was not supported by the evidence. We give deference to a Judge's credibility determinations. Directive ¶ E3.1.32.1. However, that deference is not without limits. When there is a reason to question an applicant's credibility, such as inconsistent statements, contrary record evidence, etc., the Judge should address that aspect of the case in a reasonable manner. *See, e.g.*, ISCR Case No. 07-10158 at 5 (App. Bd. Aug. 28, 2008). When, as here, an applicant has chosen a decision on the written record, his or her credibility cannot be evaluated in the context of a personal hearing, with its opportunity for the Judge to observe the applicant's demeanor, ask questions clarifying the evidence, etc. In such circumstances, the Judge's credibility determinations are not entitled to the same

deference on appeal as they would receive if there had been a hearing. *See, e.g.*, ISCR Case No. 07-13890 at 3 (App. Bd. Jan. 27, 2009).

Department Counsel points to evidence that, she contends, undermines the Judge's credibility determination. She notes the cover letter, which states that the interview summary was prepared in the regular course of AGA business by personnel with knowledge of the matters recorded and that it was made at or near the time of the interview. The letter states that the redactions pertained to matters that were extraneous, administrative, or classified. Otherwise the summary is a true copy of the original. The cover letter provides a reason for finding the summary to be credible.³ The Judge addressed this cover letter in a footnote, conceding that the summary may be a true copy of the original. However, he noted that, despite AGA's offer of the un-redacted summary for the Judge's review, such a document was not included in the FORM. Accordingly, he stated that it was difficult for him to assess the reliability of the redacted summary.

Of course, the offer from the AGA was not that the un-redacted summary would be made available for inclusion in the record. Rather, the offer was that it would be made available to the Judge for *in camera* inspection preparatory to ruling on the admissibility of Item 7. As Department Counsel notes, no one requested such a procedure.

We examined a similar document in ISCR Case No. 10-08390 (App. Bd. Mar. 30, 2012). In that decision, we addressed the question of redactions, which, as with Applicant's case, were asserted to have been made for purposes of protecting national security and removing extraneous matters in accordance with the law. We stated that in a DOHA proceeding, in which protection of national security is paramount, a party's interest in full disclosure must be balanced by another agency's lawful interest in safeguarding national security information. *Id.* at 4-5. Accordingly, in the earlier case, it was not unreasonable for AGA to have redacted the interview summary. The Judge failed to address Item 7 in light of ISCR Case No. 10-08390, which impairs his analysis.

Department Counsel also cites to the contents of the summary which, she contends, support its credibility. She points out numerous admissions attributed to Applicant, including that he had viewed several images of child pornography on his home computer. He described some of the scenes he had viewed as "Lolita-like,"⁴ in reference to the lack of physical development of the girls depicted. He admitted having viewed videos of children being raped and or forced to engage in oral sex with an adult. He described this as depicting enough of the act so as to be "titillating." Applicant's descriptions of the photographs and videos were detailed and reasonably appear to have been based upon actual observation of the images.

³Official records or evidence compiled in the regular course of business are routinely admitted in DOHA hearings. Directive ¶ E3.1.20. *See* ISCR Case No. 04-12678 at 3-4 (App. Bd. May 7, 2007). As with public records admitted under Federal Rule of Evidence 803(8), official records are presumed to be reliable by virtue of the agency's duty of accuracy and the high probability that it has satisfied that duty. *See, e.g., United States v. Carter*, 591 F.3d 656, 659 (D.C. Cir. 2010).

⁴*Lolita*, by Vladimir Nabokov, is a novel about a middle-aged man's affair with a young girl.

Department Counsel states that Applicant described having viewed pornographic magazines at a construction site, that included photographs of young prepubescent girls. He stated that he viewed pornographic images on his work computer by searching for keywords that were slang expressions for the human sexual anatomy.

In response to an interviewer's question, Applicant defined child pornography as sexual activity, both actual and simulated, involving prepubescent children. When queried about the weekend activities at the cabin, he admitted that he watched child pornography because he did not want to seem "weak" or "wussy." He acknowledged that child pornography is illegal and that if the police or FBI had shown up at the cabin, the participants would have been arrested. He claimed to have viewed pornography once on his work computer by accident, but he later stated that he had used the keywords referenced above to search for the material. He stated that he viewed less than ten images from his work computer.

Furthermore, Item 7 also presents Applicant as describing other kinds of pornography that he has viewed, including videos involving rape, bestiality and a possible snuff film, in which a woman was killed during sex. Although this evidence was not alleged in the SOR, it is relevant in evaluating the sufficiency of the Judge's credibility determination. *See, e.g.*, ISCR Case No. 10-03430 at 4 (App. Bd. Sep. 19, 2011).

Considering the evidence as a whole, we note the detail with which Item 7 depicts Applicant's descriptions of pornography, as well as the variety of images and the scope of his interests. In holding in Applicant's favor, the Judge cited to evidence that Applicant's efforts at communication sometime lack clarity, implying that this may have led the interviewers to misunderstand his answers. However, on the record that was before the Judge, it is not reasonable to suppose that Applicant attempted to communicate to the interviewers that in his entire life he had seen only one example of child pornography, but, through verbal imprecision, created the false impression that he routinely viewed pornography depicting child sex, rape, sex with monkeys, and murder. Contrary to the Judge's analysis, a reasonable person would not likely conclude that the summary was an inaccurate depiction of Applicant's answers. Neither would a reasonable person likely conclude that it was a willful fabrication by officials of AGA. *See* ISCR Case No. 10-08390, *supra*, at 5.

In fact, Applicant has asserted that the interviewers were trying to get him to make statements that were not true. *See*, Item 5, SCA, at 44. He has presented no evidence to suggest a reason for the interviewers to have done this or to have made up the answers attributed to him. Federal agencies and employees are entitled to a presumption of good faith in the performance of their duties. Applicant has presented no evidence to rebut that presumption. Item 7, viewed as a whole and in light of the entire record, supports a reasonable conclusion that the answers attributed to Applicant summarize what he actually said. Moreover, we note a paucity of record evidence to demonstrate that Applicant is a person susceptible to making false confessions simply to please a persistent interrogator.

We note other evidence that undermines the Judge's credibility determination. He concluded that Applicant's affidavit, included in the record as Item 8, bore greater indicia of credibility than Item 7. This affidavit, signed in 2010, attempts to explain why AGA denied him a clearance. He states in part: "I was denied a top secret clearance by [AGA] in 2005. I appealed the Decision in March 2007. The denial was upheld in December 2008. *The reasons for the denial are stated below.*" (emphasis added) Applicant then described, *inter alia*, circumstances germane to the case before us. He stated that he had attended one weekend getaway at which another person brought child pornography, which, given the circumstances, it was not practical for him to avoid. He stated that he had never been involved before or since with such material and that he does not condone the possession or viewing of pornography. The gist of Item 8 is that the Sexual Behavior aspect of the denial was based upon a single exposure to child pornography under circumstances that were unusual and not of Applicant's making.

Item 6, however, is a letter to Applicant from AGA explaining the decision to deny him a clearance. Concerning his activities with pornography, Item 6 advised Applicant the following:

[Y]ou admitted deliberately viewing child pornography during annual "stag weekend" trips from 1996 to 1998. You admitted viewing images of children under the age of 10 engaging in sexual activities, as well as children between the ages of 10 and 14 years old. You have also viewed 25 images of child pornography in magazines. You also disclosed that in 2002 you viewed on your home computer no more than 15 images of children, ages about 10 to 13, who were engaged in sexual activities. You acknowledged knowing that deliberately viewing child pornography is illegal. You also disclosed that you viewed pornography less than 10 times on your work computer.

The document went on to explain how Applicant could appeal that decision which, as stated above, ultimately was not successful.

It may not be surprising that Applicant's affidavit attempted to present his circumstances in the best possible light. However, it was unreasonable to conclude that the affidavit on its face is a truthful description of the reasons that AGA denied him a clearance, as it purported to be. To the contrary, a reasonable person would likely find Applicant's affidavit to have been self-serving and that it minimized the reasons for the denial to the point of obfuscation. This is a significant aspect of the case which the Judge failed to address, and this failure undermines the Judge's credibility determination as well as his favorable conclusions regarding rehabilitation. This failure also impairs the Judge's conclusion that Department Counsel had not presented substantial evidence of a false statement by Applicant. On the record that was before him, this conclusion by the Judge was erroneous. Moreover, the record does not support a conclusion that Applicant had mitigated the concerns arising from these falsifications.

Under the facts of this case, the Judge's favorable decision, based heavily as it was upon a flawed and inadequate credibility determination, failed adequately to address contrary record evidence. After considering the record as a whole, we conclude that the decision failed to consider

important aspects of the case and ran contrary to the weight of the evidence. ISCR Case No. 03-22861, *supra*. Given the totality of the record evidence, the Judge's decision is not sustainable under the *Egan* standard.

Order

The Decision is **REVERSED**.

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