

KEYWORD: Guideline F

DIGEST: The Appeal Board evaluates a Judge’s rulings on evidence to see if they are arbitrary, capricious, or contrary to law. Clearance interview summary that Applicant had certified as accurate and that was included in his interrogatory answers was admissible as an admission by a party opponent. Favorable decision remanded.

CASE NO: 11-13999.a1

DATE: 02/03/2014

DATE: February 3, 2014

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In Re:)	
-----)	ISCR Case No. 11-13999
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Marvin I. Schlackman, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On March 22, 2013, DoD 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 August 28, 2013, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Wilford H. Ross 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 declining to admit a Government exhibit and whether the Judge's favorable decision was arbitrary, capricious, or contrary to law. Consistent with the following, we remand the case to the Judge.

The Judge's Findings of Fact

Applicant is an employee of a Defense contractor. His SOR listed 10 delinquent debts, totaling approximately \$79,593. These debts include unpaid Federal income taxes. He has a payment plan with the IRS, which originally covered tax years 2007, 2008, and 2009. Taxes for the first of these years have been paid. The plan has been amended, however, to include taxes owed in 2010 and 2011. As of the close of the record, Applicant owed the IRS \$10,012.77. He is paying \$175 a month on this plan. Applicant had delinquent taxes owed to his state for tax years 2007, 2008, and 2009. He has satisfied these debts.

Applicant also owes delinquent debts on seven credit cards, in amounts ranging from \$1,374 to \$21,880. Applicant has entered into an agreement with a debt resolution company, and these credit card debts are being resolved. He also owes \$82 for a cell phone. He has attempted to resolve this debt, but has not had success. The account appears to be closed.

His financial problems began when he had a "bad breakup" with his girlfriend. Decision at 4. She lost her job, and he took on all the expenses of the relationship, including her mother's medical and subsequent funeral expenses. He has also experienced unexpected dental expenses. Applicant attempted to resolve his problems himself, but he was not successful. He lives frugally and has the financial ability to pay his current indebtedness, as well as to pay off his delinquent debts.

The Judge's Analysis

The Judge concluded that Applicant's financial circumstances raised concerns under Guideline F. In resolving these concerns favorably to Applicant, the Judge cited to evidence that the majority of Applicant's problems resulted from his breakup with his girlfriend. He noted that Applicant entered into the debt resolution program prior to his receipt of the SOR, that he has resolved his state tax debts, and that he has entered into a repayment plan for his Federal taxes acceptable to the IRS. In the whole-person analysis, the Judge cited to permanent behavioral changes by Applicant, that he has little potential for duress, and that there is a low likelihood of recurrence.

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).

The Judge’s Ruling on Admissibility of Evidence

Department Counsel contends that the Judge erred in declining to admit a portion of Government Exhibit (GE) 2, Answers to Interrogatories. We examine a Judge’s rulings on evidence to see if they are arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 10-08390 at 3 (App. Bd. Mar. 30, 2012).

GE 2 consisted of DOHA interrogatories concerning Applicant’s debt problems and his answers thereto. It included a copy of the summary of his clearance interview, prepared by the investigator in his case. Regarding this summary, GE 2 contained the following language:

1. Enclosed is the report of your subject interview on August 31, 2011, as recorded by an authorized investigator for the Department of Defense. Please read carefully the investigator’s summary of the statement you made . . . during your interview. On the last page of these interrogatories, you will be asked to verify the accuracy of the investigator’s summary of the interview.
2. Does the report of investigation reflect accurately the information that you provided to the authorized investigator for the Department of Defense on the day you were interviewed?

Applicant answered “no” to Item 2 above. GE 2 then went on as follows:

3. If the report of investigation does not reflect accurately the information that you provided, please explain how the report is not correct. Add additional pages if necessary.

Applicant provided the following response to Item 3:

In addition to some of the [reasons] that I incurred financial burdens; I stated that my former live-in Domestic Partner's Job Loss & Mother's death & Funeral expenses, also added to my debt matters.

Item 4 advised Applicant that he "may also add additional information at this time regarding the matters discussed during your interview." Applicant responded "Currently enrolled in Debt Consolidation/Relief & also Financial Planning assistance."

GE 2 then stated as follows:

5. Subject to any additions or deletions made above, do you agree with and adopt the investigator's summary as accurately reflecting your interview? If you agree, these interrogatories, along with the content of the attached report of your interview, may be admitted into evidence at a hearing to determine your suitability to hold a security clearance. (emphasis added)

Applicant stated "yes" in response. After providing Applicant with an additional opportunity to state facts or circumstances pertinent to the adjudication of his clearance, an opportunity Applicant accepted by citing to his good work record, GE 2 included the following:

I swear (or affirm) that I have read the enclosed summary of my interview conducted on August 31, 2011, and I either found the interview report to be accurate or I have added corrected entries to Item Three (3). If I made entries to Item Four (4), I swear (or affirm) such entries are true and correct to the best of my knowledge and belief. Further, I swear (or affirm) that the information furnished is true and correct to the best of my knowledge and belief.

Applicant affixed his signature to this certification under oath before a notary public, whose name clearly appears along with her notary seal.

Applicant's counsel objected to the admission of the interview summary on the ground that it was not clear that Applicant understood the significance of his answers and his certification regarding the interview summary. He also stated that the interview summary was not accurate. Tr. at 17 - 20. The Judge admitted all of GE 2 except the interview summary, which he renumbered GE 7 for Identification. Applicant did not object to the admission of GE 2 without the interview summary. Tr. at 23.

At the conclusion of the hearing, the Judge declined to admit GE 7. He stated that, during cross examination, Department Counsel had not laid a foundation for the admission of the interview summary.

[Y]ou didn't question him sufficiently as to how he filled out the interrogatories, whether he was adopting them, whether it was a present recollection, recorded past

recollection, refreshed. I didn't see any of that during your questioning of him. Tr. at 108.

The Judge did not grant a request by Department Counsel to recall Applicant in order to lay a foundation for the admission of GE 7.

The Judge's view that GE 7 lacked an adequate foundation would be more understandable had that document been offered as a stand-alone exhibit by Department Counsel and had it not been integrally connected to other admissible evidence. However, GE 7 was not a stand-alone exhibit. It was offered as part of GE 2, and it was the Judge's decision to make it a separate exhibit. As the interview summary was originally submitted, it was part of Applicant's interrogatory answers and, under the facts of this case, its inclusion was necessary in order to render some of those answers comprehensible. That is, the Judge admitted, without Applicant objection, Applicant's written correction to the summary, a correction that did not challenge the accuracy of what was represented but supplemented the summary with additional information. Additionally, the Judge admitted, without Applicant objection, Applicant's adoption of the interview summary, as corrected, as an accurate depiction of what he had actually stated to the interviewer. Having done so, it was inconsistent for the Judge to have excluded the very document that was the subject of Applicant's comments and corrections and without which those comments and corrections are without meaning.¹ Evidence that might otherwise be severable from a larger exhibit, but which, under the circumstances of a particular case, is necessary in order fully to understand that exhibit, should not be excluded without an adequate reason, and one was not supplied in this case. We find no support for Applicant's counsel's opinion, stated during his objection, that Applicant did not appear to have understood the questions at issue. To the contrary, the questions were clear and Applicant's answers, as with his answers elsewhere in GE 2, were appropriate and did not betray any lack of comprehension.²

The Judge's concern appears to have been connected with Directive ¶ E3.1.20, which provides that a report of a DoD clearance background investigation (ROI) may be received into evidence at a DOHA hearing if supported by an authenticating witness. Because Department Counsel did not call the interviewer or lay a foundation through Applicant, the Judge appears to have concluded that the requirements of E3.1.20 had not been satisfied. However, even though the summary may have been drawn from a DoD ROI, it represented Applicant's own statements regarding his security-significant conduct (as opposed to statements by third party interviewees), and, incorporated as it was into Applicant's interrogatory answers, it should have been evaluated

¹See, e.g., *U.S. v. Soures*, 736 F.2d 87 at 91 (3d. Cir. 1984), cert. den. 469 U.S. 1161 (1985), for discussion of policy underlying the doctrine of completeness: if a portion of a document is admitted into evidence, it may be necessary to admit other portions in order to explain the admitted portion, place it in context, or avoid misleading the trier of fact.

²Applicant's assertion that the summary was not accurate is not supported by testimony or by other evidence, insofar as the summary is generally consistent with Applicant's presentation at the hearing. In any event, this would go to the weight of the evidence rather than its admissibility.

as an admission by a party-opponent. *See* Federal Rule of Evidence (FRE) 801(d)(2).³ We have held that interview summaries are admissible in other DOHA cases under circumstances similar to those at issue here. *See, e.g.*, ISCR Case No. 09-06218 at 5 (App. Bd. Sep. 6, 2011). *See also Sea Star Line v. Emerald Equipment Leasing*, 648 F. Supp. 626 (D. C. Del. 2009) (party's interrogatory answers constitute admissions by a party-opponent). Applicant's corrections and notarized certification and adoption under oath as to accuracy of the interview summary and of GE 2 *in toto* are sufficient to satisfy Department Counsel's threshold requirement to show that the exhibit is authentic for purposes of Directive ¶ E3.1.20.⁴ There is no evidence in the record to rebut the reasonable inference that GE 2 was what Department Counsel claimed it to have been. The Judge's failure to admit the interview summary was arbitrary, capricious, and contrary to law.

Sufficiency of the Judge's Mitigation Analysis

Department Counsel argues that the record does not support the Judge's analysis of Applicant's case for mitigation. He states that the Judge did not take into account contrary record evidence. We find this argument to be persuasive. Although a Judge cannot be expected to discuss every piece of record evidence, which would be a practical impossibility, he should discuss significant contrary evidence, and failure to do so can undermine a Judge's decision. *See, e.g.*, ISCR Case No. 07-10158 at 4 (App. Bd. Aug. 28, 2008).

As Department Counsel observes in his brief, the Judge based his favorable mitigation analysis on Applicant's contention that his financial problems resulted from his breakup with his girlfriend and from some dental bills. While there is evidence regarding these matters, which the Judge was bound to consider, the record contains other evidence less favorable to Applicant. We note the following, drawn from the record.

a. When asked for an explanation for his failure to pay his Federal and/or state income taxes, Applicant replied "Lack of Focus & Prioritizing Personal Matters (Poor Budgeting of personal matters due to Family Deaths)." GE 2 at 2.

b. During the hearing, Applicant testified that his tax problems were due to his failure properly to complete the forms.

I used to do my own taxes and so often whenever I'd do them . . . so many times the IRS would send me a little letter and they would tell mere that there was an adjustment or something that I didn't do right. And invariably that would always cost me extra money . . ." Tr. at 92.

³**Admission by Party-Opponent.** The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth . . ." Although the Federal Rules of Evidence are not strictly applied in DOHA hearings, they do serve as a guide. Directive ¶ E3.1.19.

⁴*See* FRE 901(a): "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

c. Applicant provided similar information during his interview.

[Applicant] has federal and state back taxes he owes from tax years 2007, 2008 and 2009. [Applicant] would file his federal and state tax returns and would owe taxes each year. He could not afford to pay the taxes. GE 7 at 2.

d. Applicant attributed his other delinquent debts, at least in some part, to his over- generosity.

Family is important to me. Many people that I've met through my years and work and through education, those things matter tremendously to me. And it's not responsible, as well as appropriate, to continue to allow yourself to sometimes out of the goodness of your heart to help when you're sometimes not in the best position. Tr. at 84-85.

It is axiomatic that a Judge must address an applicant's security significant conduct in light of the record as a whole. The Judge's analysis in this case did not sufficiently address circumstances that were within Applicant's control or that impugned his good judgment. We also find persuasive Department Counsel's argument that the Judge did not establish a nexus between those conditions that were outside his control, such as his breakup with his girlfriend, and his financial problems. Department Counsel cites to ISCR Case No. 06-23362 (App. Bd. Apr. 4, 2008) for the proposition that there must be a nexus between an applicant's security concerns and his mitigating history. As it is, the Judge's analysis is not sustainable.

We conclude that the best resolution of this appeal is to remand the case to the Judge with instruction that he admit GE 7 into the record and consider it, after which he is to issue a new decision that takes into account the issues discussed in our appeal decision.

Order

The case 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

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