

KEYWORD: Guideline D; Guideline E

DIGEST: In this case, as the Judge noted, the official who conducted Applicant’s interview and prepared the interview summary contained in GE 2 satisfied the authentication requirement of ¶ E3.1.20. Moreover, GE 2 meets the second prong of ¶ E3.1.20 because it is admissible as evidence of statements by a party opponent in accordance with FRE 801(d) or, in the alternative, is admissible as a record of a regularly recurring activity—in this case a security clearance investigation—under FRE 803(6). The Judge’s decision to admit GE 2 was not arbitrary, capricious, or contrary to law. Adverse decision affirmed.

CASENO: 16-02536.a2

DATE: 03/11/2019

DATE: March 11, 2019

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 27, 2016, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline D (Sexual Behavior) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On April 11, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Francisco Mendez granted Applicant’s request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

On August 23, 2018, we remanded the case to correct an identified error. On November 28, 2018, Administrative Judge LeRoy F. Foreman denied Applicant’s request for a security clearance. Applicant appealed pursuant to the Directive.

Applicant has raised the following issue on appeal: whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

Note: The basis for the remand was to clarify the status of Government Exhibit (GE) 2, Answers to Interrogatories, that included a summary of Applicant’s clearance interview. The prior Judge had admitted this document into evidence, though he noted Applicant’s claim that parts of it were not accurate. The Judge gave the parties an opportunity after the hearing to submit additional evidence or argument concerning this exhibit, though neither did. The Judge made no additional findings or rulings regarding it.

In considering Department Counsel’s appeal of the prior Judge’s favorable holding, we were not able to conclude from the record that was before us what parts of the interview description Applicant had adopted or had not adopted. That is, we were “unable to discern whether key statements were admitted into, or excluded from, evidence.” Decision at 2. Accordingly, we remanded the case for further processing. During the hearing on remand, the Judge stated that he would consider the evidence admitted at the prior hearing, including the transcript. He stated that the remand hearing would focus upon the admissibility of GE 2.

The Judge’s Findings of Fact

Applicant has worked for Federal contractors for more than thirty years and has held a clearance since 1970. He served on active duty with the U.S. military from 1970 to 1975. He holds a doctoral degree. Married and divorced twice, he has five children.

At the remand hearing, Department Counsel called the investigator who had prepared the interview description contained in GE 2. This person testified about her training and experience and the methods that she employs when questioning applicants and memorializing their answers. Specifically, she testified that she wrote down an applicant’s answers using whatever words the applicant had used and did not paraphrase them. Although she admitted that she did not remember the details of Applicant’s interview, she testified as to her confidence that the interview description was a 100% accurate presentation of Applicant’s answers. The Judge concluded that this witness had authenticated the GE 2, and he admitted it into evidence.

The Judge's findings of security concern were drawn substantially from GE 2. In essence, Applicant had a relationship with a foreign woman who appeared in pornographic videos. Applicant had joined a fan club through which he could watch these pornographic videos. The woman led Applicant to understand that she would have sex with him, and on about five occasions he paid her \$1,200 for sex. He traveled to different cities for that purpose and would usually meet her for dinner, followed by engaging in sexual activity in a hotel room. He also invited her to a vacation home that he owned, asking his daughter, who was staying at the home, to leave for a few hours so that he could be alone with the woman. He characterized himself as her customer and friend. Applicant admitted that he knew that prostitution was illegal.

The Judge's Analysis

The Judge found that the interviewer's testimony authenticating GE 2 resolved the issue that was the reason for the remand. He also stated that, although he was not convinced that GE 2 was 100% accurate, neither was he convinced that the contents of the description regarding the woman were a fabrication, as Applicant claimed. The Judge noted the presumption that Government officials discharge their duties in good faith and found no reason to deny the good faith of the authenticating witness. In examining Applicant's case for mitigation, the Judge concluded that the conduct in question was recent, frequent, and not unlikely to recur. He did note that the conduct took place in private and that it was consensual. However, the Judge concluded that Applicant's conduct impugned his judgment, and he entered adverse formal findings under both Guidelines.

Discussion

Applicant contends that the Judge erred in holding against him. He contends that GE 2 was neither substantiated nor corroborated, as required by case law. He argues that the Judge's adverse findings and conclusions constituted an improper substitution of a credibility determination for actual evidence.

We examine a Judge's decision to admit evidence to see if it is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 15-05047 at 4 (App. Bd. Nov. 8, 2017). Because GE 2 was drawn from a DoD background report of investigation (ROI), the Judge properly evaluated its admissibility under Directive ¶ E3.1.20. This paragraph states, in pertinent part, as follows:

Official records or evidence compiled or created in the regular course of business, other than [a] DoD [ROI], may be received and considered by the Administrative Judge without authenticating witnesses . . . An ROI may be received with an authenticating witness provided it is otherwise admissible under the Federal Rules of Evidence[.]

In this case, as the Judge noted, the official who conducted Applicant's interview and prepared the interview summary contained in GE 2 satisfied the authentication requirement of ¶ E3.1.20.

Moreover, GE 2 meets the second prong of ¶ E3.1.20 because it is admissible as evidence of statements by a party opponent in accordance with FRE 801(d) or, in the alternative, is admissible as a record of a regularly recurring activity—in this case a security clearance investigation—under FRE 803(6). The Judge’s decision to admit GE 2 was not arbitrary, capricious, or contrary to law.

Applicant appears to argue that, insofar as he denied the truthfulness of GE 2, the Government was required to provide independent corroborating evidence of the facts stated therein as a condition of admissibility. He cites to Directive ¶ E3.1.20 and its requirement of an authenticating witness, and we construe the argument to mean that the Government was required to present a witness who could not merely authenticate, or identify, GE 2 but independently corroborate the matters asserted therein before the Judge could consider the exhibit. However, as our discussion above attests, authentication is simply a means whereby the proponent of evidence establishes that the evidence is what it purports to be, in this case a record of Applicant’s clearance interview. *See* FRE 901 for a discussion of authentication as a condition precedent to admissibility.¹ The Directive does not require independent substantive corroboration of the facts asserted within an interview description or similar document. Once a DoD ROI is authenticated and found admissible under the Federal Rules of Evidence, a Judge may consider it for the truth of the matter asserted, even if there is no other evidence of those matters. Applicant cites to numerous Appeal Board cases in his brief. However, these cases address the admissibility of interview descriptions when there has been no authenticating witness, for example when the applicant waives an objection to the evidence (ISCR Case No. 15-01807 (App. Bd. Apr. 19, 2017)) or when the applicant admits that the report accurately depicts his answers (ISCR Case No. 09-06218 (App. Bd. Sep. 6, 2011)). None of these cases establish a requirement that even when a witness has authenticated an interview description within the meaning of the Directive, the Government must still present independent evidence of its assertions before it can be admitted and considered over an applicant’s objection.²

To the extent Applicant is disagreeing with the weight the Judge gave to the evidence or is disagreeing with the Judge’s conclusions, such disagreements are not sufficient to demonstrate that the Judge erred. *See, e.g.*, ISCR Case No. 18-00310 at 3 (App. Bd. Dec. 19, 2018).

¹FRE 901(a) provides that 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.” Authentication simply means that it is authored by, or issued by, or has its source in, what or who is claimed. It does not, in and of itself, mean that factual statements in the document must be accepted as true. For this the document must be evaluated for admissibility as a hearsay exception, etc. *See* Rothstein, Practice Comment to 901(a), Federal Rules of Evidence, Third Edition (2008).

²We also note Applicant’s argument that the Judge’s decision was based upon non-alleged conduct. However, non-alleged conduct means conduct that is not alleged in the SOR, which denies the applicant fair notice of the concerns to be addressed in the DOHA proceeding. Applicant’s conduct was indeed alleged in the SOR, and the Government’s evidence, including the properly admitted GE 2, constitutes substantial evidence of the allegations. The Judge’s material findings are supported by substantial evidence or constitute reasonable inferences that could be drawn from the evidence. *See, e.g.*, ISCR Case No. 16-02640 at 3 (App. Bd. Jul. 2, 2018).

The record supports a conclusion that the Judge examined the relevant data and articulated a satisfactory explanation for the decision, “including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Judge’s adverse 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, Encl. 2, App. A ¶ 2(b): “Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.”

Order

The Decision is **AFFIRMED**.

Signed: Michael Y. Ra’anan

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

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy

James F. Duffy
Administrative Judge
Member, Appeal Board