KEYWORD: Guideline E

DIGEST: Applicant asserts that the Judge "gave deference to the Government, raising concerns of Due Process" and established one standard for the Government and another for him for presenting evidence. To the extent that he is arguing the Judge is biased, we do not find this contention persuasive. There is a rebuttable presumption that a judge is impartial and unbiased, and a party seeking to overcome that presumption has a heavy burden of persuasion. We find nothing in the record either to persuade a reasonable person that the Judge lacked impartiality or to show the Judge applied different standards to the parties for presenting evidence. Applicant has failed to met his heavy burden of persuasion to establish bias. Both parties were provided an equal opportunity to present evidence supporting their cases. Adverse decision affirmed.

CASENO: 17-02662.a1

DATE: 03/07/2019

DATE: March 7, 2019

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
Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 17, 2017, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On December 6, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Braden M. Murphy 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 Government failed to establish the sole SOR allegation and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant, who is 37 years old, served honorably in the military for about five years. He is married, has one child, and his wife is expecting another. Since earning a bachelor's degree in 2009, he has worked for Federal contractors with some periods of unemployment.

The SOR alleged that Applicant was terminated from a defense contractor position in 2016 for falsifying his timecards. In 2014, he began working full time for two defense contractors. He worked the day shift for one and the night shift for the other. In 2016, he was required to complete ten on-line training courses for one employer that was expected to take a total of about 25 hours to complete. He requested to complete these self-paced courses during a 40-hour work week (October 3-7) while teleworking from home. His supervisors noted Applicant erroneously billed the 40-hours on his timecard as overhead rather than training, but he later changed it to reflect eight hours of training for each of those days.

In reviewing the course materials, the supervisors noted that Applicant started and completed only two courses on two of those workdays and that he logged into the training program for only 2 hours and 15 minutes. When his supervisors confronted him about this apparent discrepancy, Applicant stated that he conducted eight hours of training on all five days but was unable to explain the incongruity. Applicant offered to change his timecard to reflect 40-hours of personal time off and was told to resubmit an accurate time card. He resubmitted the timecard so that it reflected 25 hours of training and 15 hours of personal time. The supervisors decided that Applicant had a sufficient opportunity to be truthful and recommended he be terminated. The human resources (HR) office later issued a memorandum noting Applicant routinely reported working 40 hours but his badge swipes showed a patten of working fewer hours and coworker corroborated that he often left early. His employer subsequently terminated him.

Applicant denied that he falsified his timecards. He claimed his immediate supervisor gave him permission to submit a timecard reflecting 25 hours of training and thought there was a lack of communication between the immediate supervisor and the next-level supervisor. Instead of watching the training videos and then taking the associated test, he claims he worked the whole week, first watching all the training videos, and then taking all the tests at the end of the week. He

contends that he received credit for only a few hours of training because he just passed two or three of the tests and did not receive credit for taking tests he did not pass.

Before the hearing, Applicant reached out to his former supervisor to confirm his claims. The former supervisor had been advised to refer Applicant back to the HR office, which Applicant did without success. He sought to subpoena the former supervisor to testify, but was advised the Judge did not have authority to subpoena witnesses. He continues to work for the other defense contractor and received a favorable 2018 mid-term review.

The Judge's Analysis

"GE 3, GE 4, and GE 5 are company business records establishing that Applicant was terminated [in late 2016] for what the company concluded was falsification of his timecards. An employer's characterization of events underlying an adverse action are entitled to some deference.[1] Applicant's disagreement with the reasons for his termination is not enough to overcome that presumption." Decision at 8. Applicant's assertion that his supervisor told him to change his timecard to reflect 25 hours of training is simply not credible. His testimony that he was not credited for logging in for tests he failed is not credible. No personal conduct mitigating conditions apply.

Discussion

Applicant's appeal brief contains documents and assertions that are not included in the record. The Appeal Board is prohibited from considering new evidence on appeal. Directive ¶ E3.1.29.

Applicant asserts that the Judge "gave deference to the Government, raising concerns of Due Process" and established one standard for the Government and another for him for presenting evidence. Appeal Brief at 1-2. To the extent that he is arguing the Judge is biased, we do not find this contention persuasive. There is a rebuttable presumption that a judge is impartial and unbiased, and a party seeking to overcome that presumption has a heavy burden of persuasion. *See, e.g.*, ISCR Case No. 17-00661 at 3 (App. Bd. Sep. 7, 2018). We find nothing in the record either to persuade a reasonable person that the Judge lacked impartiality or to show the Judge applied different standards to the parties for presenting evidence. Applicant has failed to met his heavy burden of persuasion to establish bias. Both parties were provided an equal opportunity to present evidence supporting their cases.

Applicant contends the Government failed to present evidence establishing he falsified his timecard by stating "the Government never presented any 'evidence' raising security concerns but made allegation without any supporting documentation" and "company records . . . should be considered allegations not evidence." Appeal Brief at 1. He also notes he did not have the opportunity to cross-examine witnesses and asserts his former company could have furnished

[1] The Judge cited two Appeal Board decision for this proposition, *i.e.*, ISCR Case No. 14-00114 at 3 (App. Bd. Sep. 30, 2014)(citing ISCR Case No. 10-03886 at 3 (App. Bd. Apr. 26, 2012).

documents, such as computer logs or training records, to support their claim, but did not do so. These contentions lack merit. A Judge's findings must be supported by substantial evidence, *i.e.*, "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 also,* ISCR Case No. 16-04094 at 2 (App. Bd. Apr. 20, 2018). In this case, the Judge found that Applicant's timecard falsification was based on business records (GE 3, GE 4, and GE 5), which are an admissible form of evidence as an exception to the hearsay rule. *See*, Directive ¶ E3.1.20 and Federal Rule of Evidence 803(6). *See also*, ISCR Case No. 96-0277 at 3 (App. Bd. Jul. 11, 1997). Moreover, an applicant's right to confrontation is not violated by admission of documents that fall within well-established exceptions to the hearsay rule, such as the business records exception. *Id.*[2] Furthermore, the Directive does not require either party to present specific types of evidence, such as computer logs, to prove controverted facts. Finally, business records need not be independently corroborated to be admissible into evidence. In this case, the Judge's material findings were based on substantial evidence. Applicant has failed to establish he was not afforded the due process rights afforded him under the Directive.

Applicant also notes that the Judge highlighted his failure to corroborate his testimony, while the Government did not corroborate the business records that it offered into evidence. This argument, in essence, is a disagreement with the Judge's weighing of the evidence. In this regard, Applicant also cites to his military service, educational and athletic achievements, family situation, and other accomplishments. However, the presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. A party's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.,* ISCR Case No. 15-00650 at 2 (App. Bd. Jun. 27, 2016).

Applicant has not established that the Judge committed any harmful errors. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. 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, 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."

[2] It also merits noting the Directive presumes there is a nexus or rational connection between proven circumstances under any of the guidelines and an applicant's security eligibility. Direct or objective evidence of nexus is not required. *See, e.g.*, ISCR Case No. 15-08385 at 4 (App. Bd. May 23, 2018).

Order

The Decision is **AFFIRMED**.

Signed: Michael Ra'anan
Michael 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