KEYWORD: Guideline E

DIGEST: We do not agree with Applicant's reliance on the "probable cause" standard. On appeal, we review a Judge's challenged findings of fact to determine whether they are supported by substantial 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. We review a Judge's challenged conclusions to determine whether they are arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. A Judge's conclusions are often subjective in nature and are sustainable if they constitute reasonable inferences drawn from the evidence. Adverse decision affirmed.

CASENO: 18-00496.a1

DATE: 11/08/2019

DATE: November 8, 2019

In Re:	)	
	)	
----------	)	ISCR Case No. 18-00496
	)	
	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Brett J. O'Brien, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On April 10, 2018, 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 decision on the written record. On July 24, 2019, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Juan J. Rivera 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 prove 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 in his early 60s, is a naturalized citizen. He has advanced educational degrees. From 2000 to 2016, he worked for Federal contractors. Specifically, the Judge found:

> The SOR alleges that Applicant was terminated from his employment with a federal contractor for gross negligence in September 2016, after his employer's internal investigation determined that he intentionally and knowingly manipulated program performance test data. Applicant admitted that he was terminated from his employment for gross negligence, but denied any misconduct or that he intentionally or knowingly manipulated the data.
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> * * *
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> Applicant also admitted to his program manager that he intentionally substituted data from another test into his test data. To substitute the data, Applicant had to manually overwrite the test data results. A folder with data was erased from contractor's . . . network. The overwriting and erasing of the data was established through the computer logs. When questioned by a second coworker about the data substitution, Applicant stated that he wanted to "come clean" and asked the coworker to pray for him.
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> * * *
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> The Department of Air Force Office of Special Investigations submitted a report of investigation (ROI) in September 2017. The report titled Applicant for fraud offenses (false pretenses/swindle/confidence game).
>
> During his September 2017 background interview with a government investigator, Applicant stated that he had not disclosed his termination to any member of his family or friends. He lied to his spouse about his termination and told

her that he had retired early. When asked why, he stated that his native country's culture does not allow the head of a household to be disgraced in the eyes of his family. He reiterated that if this become an issue he would retire. [Decision at 2-3.]

Applicant did not disclose his termination to his current employer because the employer identified him as a valuable asset and spent a large sum on his relocation. He also indicated that, following his 2017 background interview, "he had a chat with his wife about his termination and she is now aware of it." Decision at 4.

The Judge's Analysis

"Applicant intentionally and knowingly manipulated program performance test data, resulting in his termination from his employment with a federal contractor for gross negligence in September 2016." Decision at 5. Applicant admits the termination was for gross negligence, but denies intentional manipulation of the data. His emails and memoranda establish he may have inadvertently deleted his working directory before the data was captured and "then knowingly entered the wrong numbers to produce anomalies later discovered . . . ." *Id*. He expressed immense shame for his actions.

Applicant's behavior was serious. He did not disclose his misconduct until the mistakes were discovered. His conduct shows he cannot be trusted to disclose problems to his employer, and it casts doubt on his reliability, trustworthiness, and good judgment. He has not fully admitted his misconduct and continues to perpetuate false statements. He has not taken steps to reduce his vulnerability to exploitation. He has knowingly failed to disclose his prior misconduct to his current employer and his "chat with his wife" is insufficient to establish that she or his family know about his misconduct. None of the mitigating conditions are established.

Discussion

Standard of Proof

Applicant contends the Judge "relied on numerous factual and legal errors in coming to the conclusion that [Applicant] should be denied a security clearance." Appeal Brief at 3. He argues, for example, that the Judge applied the wrong standard of proof standard by asserting:

> Department Counsel has to prove by "substantial evidence," which is a burden of proof higher than "probable cause" but less than a "preponderance of the evidence" standard. Department Counsel failed to meet this burden by alleging conclusions that would not have sufficed for a judge or magistrate to issue a search warrant and [these] unsupportable conclusions were adopted by the Administrative Judge. [Appeal Brief at 9.]

We do not agree with Applicant's reliance on the "probable cause" standard. On appeal, we review a Judge's challenged findings of fact to determine whether they are supported by substantial

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, e.g.,* ISCR Case No. 16-04094 at 2 (App. Bd. Apr. 20, 2018). We review a Judge's challenged conclusions to determine whether they are arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. A Judge's conclusions are often subjective in nature and are sustainable if they constitute reasonable inferences drawn from the evidence. *See, e.g.*, ISCR Case No. 17-02225 at 2-3 (App. Bd. Jun. 25, 2019). *See also*, ISCR Case No. 17-04110 at 2 (App. Bd. Sep. 26, 2019) (setting forth the standard applied to determine whether a Judge's conclusions are erroneous).

Applicant's reliance on the "probable cause" standard to evaluate a Judge's findings or conclusions is misplaced. Applicant cites no authority that supports his argument. As we have previously stated, substantial evidence is more than a scintilla but less than a preponderance of the evidence. *See, e.g.*, ISCR Case No. 98-0761 at 2 (App. Bd. Dec. 27, 1999). *See also Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 477 (1951). We dismiss Applicant's reliance on the "probable cause" standard because it has no application in reviewing the sufficiency of a Judge's findings or conclusions in security clearance adjudications.

Report of the Air Force Office of Special Investigations (AFOSI)

Applicant claims that there are evidentiary issues with the AFOSI report of investigation that was admitted into evidence. In this regard, it first merits noting that Applicant was provided a copy of Department Counsel's File of Relevant Material (FORM) and was given an opportunity to submit objections to the Government's proposed exhibits, which were listed as "Items" in the FORM. In responding to the FORM, Applicant submitted no objections to those proposed exhibits, including the AFOSI investigation. The Judge properly admitted the FORM exhibits into evidence. *See, e.g.*, ISCR Case No. 02-20031 at 3 (App. Bd. Aug. 31, 2004) (an appealing party must take timely, reasonable steps to raise objections or other procedural matters below to preserve them for appeal). Given these circumstances, we conclude the issues that Applicant is raising about the AFOSI investigation do not go to its admissibility, an issue that he forfeited by failing to raise an objection to it below, but rather go to the weight the investigative report should be given.

In challenging the sufficiency of the AFOSI investigation, Applicant contends it "was very rudimentary and merely adopted [the employer's] investigation without re-analyzing or re-interviewing potential witnesses." Appeal Brief at 6. He further argues:

> A sophisticated and complicated situation cannot be resolved simply by interviewing a few people and adopting another entity's investigation as its own. Inspecting and dissecting the data is of the utmost importance. It is also puzzling how a law enforcement officer with no engineering or scientific background can absorb and understand a situation like this and then judge an actual engineer's thought process, discretion, and actions against industry norms (again, without establishing the industry norms in the investigation). [Appeal Brief at 8.]

In this regard, we have previously stated that an employers's decisions and characterizations of events are entitled to some deference. *See, e.g.*, ISCR Case No. 10-03886 at 3 (App. Bd. Apr. 26, 2012). Such deference extends to an employer's internal investigation and is particularly fitting when the conduct in question, as in this case, involves scientific and technical matters. *See also*, DISCR Case No. 93-1234 at 4 (App. Bd. May 19, 1995)(a Judge did not err in admitting a corporate inquiry prepared for Defense Investigative Service (DIS)). We find no error in the Judge's findings and conclusions that are consistent with the employer's stated reasons for terminating Applicant's employment. While Applicant initially challenged his employment termination, he did not succeed in overturning that decision. He claimed that he gave up on challenging the termination because the legal fees were too expensive and he moved to another state for a new job.

Applicant also argues that the AFOSI investigative report contains multiple layers of hearsay. For example, he points out that it contains or incorporates summaries of interviews, which is not uncommon in such investigative reports. While the existence of multiple layers of hearsay in exhibits is a matter the Judge should appropriately consider in evaluating such evidence, investigative reports of this nature are routinely admitted and considered in security clearance adjudications. *See, e.g.*, DISCR OSD Case No. 90-2069 at 6-7 (App. Bd. Mar. 25, 1992)(DIS report); ISCR Case No. 06-06496 at 2-4 (App. Bd. Jun. 25, 2009)(Army Criminal Investigation Division report); ISCR Case No. 11-05079 at 4-5 (App. Bd. Jun. 6, 2012)(Naval Criminal Investigative Service report); and ISCR Case No. 15-02859 at 3 (App. Bd. Jun. 23, 2017)(police report). Furthermore, the weight given to such evidence is a matter within the Judge's special province. *See, e.g.*, ISCR Case No. 18-00857 at 4 (App. Bd. May 8, 2019)(citing *Inwood Laboratories, Inc. v. Ives Laboratories Inc.*, 456 U.S. 844, 856 (1982) ("Determining the weight and credibility of the evidence is the special province of the trier of fact."). In this case, Applicant has failed to establish that the Judge erred in his consideration of the AFOSI investigative report.

Characterization of Applicant's Conduct

Applicant asserts the Judge erred in concluding that Applicant "*intentionally* manipulated data and engaged in *gross* negligence" while employed by a defense contractor. Appeal Brief at 1. [Emphasis in Appeal Brief.] This assertion lacks merit. We first note the defense contractor submitted an adverse information report to the Defense Security Service in 2016 that stated, "[Applicant's] employment with [the defense contractor] was terminated [on a dated in 2016] for gross negligence after an internal investigation determined that [Applicant] intentionally and knowingly manipulated . . . program performance test data." FORM Item 5. This reason for Applicant's termination was also repeated in a Joint Personnel Adjudication System (JPAS) entry (*Id*.) and the AFOSI investigative report (FORM Item 6). Applicant argues the reason presented for his termination, *i.e.*, "gross negligence" and "intentionally and knowingly" engaging in manipulation of data, creates an inconsistency because those are different levels of culpability having distinct "mens rea" that were applied to the conduct at issue. As quoted above, the Judge initially concluded that Applicant intentionally and knowingly manipulated program performance test data but also noted Applicant's misconduct resulted in the termination of his employment with a Federal contractor for gross negligence. This conclusion was consistent with the employer's stated reason for Applicant's termination. The Judge also concluded that Applicant apparently inadvertently

deleted his working directory before data was captured and then knowingly entered the wrong numbers to produce the anomalies that were later discovered. This conclusion involves both negligent and intentional conduct. The Judge thereafter referred to Applicant's conduct as "misconduct and gross negligence." Decision at 6. We find no logical or legal inconsistency in the Judge's conclusions about Applicant's conduct. The important point is that Applicant's conduct – whether characterized as "gross negligence," "intentional and knowing," or both – was sufficient to raise security concerns, such as questionable judgment, untrustworthiness, unreliability, and lack of candor, under Guideline E. Applicant has failed to establish the Judge committed any harmful error in concluding his conduct raised security concerns.

Applicant's Statements

Applicant contends that his admission to his former employer that his conduct constituted gross negligence was in error. We note he made that same admission in responding to the SOR. FORM Item 3. Applicant argues that English is not his native language, and he did not understand exactly what he was saying in using the term "gross negligence." We do not find this argument persuasive. Applicant did not raise this issue below for the Judge to consider. We note Applicant entered the United States 36 years ago, has earned a master's degree and doctorate degree from a prestigious U.S. university, and has worked for Federal contractors for about two decades. FORM Item 4 and Decision at 2. He has not established the Judge erred by failing to disregard or discount his "gross negligence" admission. This admission constitutes substantial evidence that the Judge could rely in making findings of fact and in drawing conclusions. Additionally, Applicant argues that his conduct merely constituted simple negligence in record keeping that does not warrant the denial of his security clearance. We do not share Applicant's view that "simple negligence . . . is very low on the spectrum of security concerns." Appeal Brief at 13. When it comes to protecting national security information, simple negligence can be a matter of grave concern under some circumstances.

Applicant also argues the Judge erred in concluding that insufficient evidence existed to establish that he disclosed his employment termination to his wife. A Judge need not accept an applicant's statement or testimony at face value even if it is unrebutted. Indeed, it would be arbitrary and capricious for a Judge to uncritically accept an individual's statement or testimony without considering whether it is plausible and consistent with other record evidence. *See, e.g.*, ISCR Case No. 05-03554 at 5 (App. Bd. Aug. 23, 2007).

Mitigation and Whole-Person Analysis

Applicant asserts that the Judge erred in his analysis of the mitigating evidence and in his whole-person assessment. He argues, for example, that the Judge gave unfair weight to aggravating factors and dismissed mitigating evidence; that the conduct in question was an isolated incident in an otherwise lengthy career; and that he disclosed his termination on his security clearance application and was not required to disclose it to his new employer. In essence, these arguments are a challenge to the way in which the Judge weighed the evidence and are neither enough to rebut the presumption that the Judge considered all of the evidence in the record nor sufficient to show that

the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 14-01284 at 3 (App. Bd. Apr. 6, 2015).

Conclusion

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."

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