KEYWORD: Guideline E

DIGEST: Applicant contends that the Judge erred in finding that the colleague sought a protective order. He argues that this finding is a misreading of a memorandum for record by the FSO, included in the record as Item 4. He contends that there is no evidence that the colleague actually sought a protective order. The pertinent language in the FSO's memo is as follows: "I was contacted by the [sheriff's office] and advised that the [colleague] was seeking a protective order against [Applicant] as result of [Applicant's] expression of emotional instability and the threatening language of the online conversation." The challenged finding is consistent with this evidence. Adverse decision affirmed.

CASENO: 17-03840.a1

DATE: 02/14/2019

DATE: February 14, 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
Danel A. Dufresne, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On March 19, 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 October 23, 2018, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge John Bayard Glendon denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant 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.

The Judge's Findings of Fact

Applicant works for a Government contractor. He served on active duty with the U.S. military and after that in the National Guard, receiving honorable discharges from both. As a contractor, he performed duties in a war zone, though he quit his job after being accused of insubordination. In 2016, Applicant made some remarks to a colleague that were threatening in nature. Applicant had been showing attention to a female co-worker in whom the colleague was also interested. Applicant's interaction with the female co-worker drew the attention of fellow workers, who complained to the Facility Security Officer (FSO). The threatening remarks in question were contained in online messages exchanged between Applicant and his male colleague. The messages included an admission by Applicant that he was unstable, that he was "10 times stronger" than the colleague, and that he "can carry a weapon." Decision at 3. When the colleague told Applicant that his behavior could threaten his clearance, he replied, "[Y]ou should [know] better [than] to threaten someone who's not all there . . . I hate life[.]" *Id.* The colleague sought a protective order against Applicant based upon Applicant's emotional instability and threatening messages. Applicant's access to classified information was suspended, and his employer terminated him.

In his Answer to the SOR, Applicant admitted that he had been terminated but stated that he did not recall the exact wording of his communications with the colleague. In his background interview, he stated that the colleague had been trying to provoke him and that before writing the messages in question he had consumed alcohol and a prescription drug. Applicant admitted to the interviewer that he had previously sat for an interview by another Government agency (AGA). He disclosed that he had initially misled the AGA interviewer by surmising that the threats in question had been sent by someone who had hacked into his on line social media account. When the AGA interviewer produced copies of the threatening messages, Applicant admitted that "it looked like something I might say." *Id*. at 4.

Applicant did not disclose his job termination in his security clearance application (SCA). He claimed that he was not fired but, rather, "let go" because his clearance had been terminated.

Id. Applicant's excuse demonstrates that his omission was deliberate. The Judge stated that this finding was supported by Applicant's initial attempt to mislead the interviewer for AGA.[1]

The Judge's Analysis

The Judge concluded that none of the mitigating conditions had been established. He stated that Applicant had presented no evidence with regard to the threats, except to assert that he had been drinking and taking a sleep aid medication. The Judge concluded that, given the seriousness of the threats, Applicant's explanation was not entitled to significant weight. The Judge noted his favorable findings for the alleged SCA omission. However, he stated that he was considering the omission in evaluating Applicant's case for mitigation and for the whole-person analysis. The Judge concluded that Applicant had not mitigated the concerns arising from his misconduct.

Discussion

Applicant contends that the Judge erred in finding that the colleague sought a protective order. He argues that this finding is a misreading of a memorandum for record by the FSO, included in the record as Item 4. He contends that there is no evidence that the colleague actually sought a protective order. The pertinent language in the FSO's memo is as follows: "I was contacted by the [sheriff's office] and advised that the [colleague] was seeking a protective order against [Applicant] as result of [Applicant's] expression of emotional instability and the threatening language of the online conversation." Item 4. The challenged finding is consistent with this evidence. Even if the finding is to some extent erroneous, it did not likely affect the overall outcome of the case and, therefore, is harmless. After considering Applicant's brief as a whole, we conclude that the Judge's material findings are based upon substantial evidence or constitute reasonable inferences from the evidence. Applicant has cited to no harmful error in the Decision. *See, e.g.*, ISCR Case No. 16-02640 at 3 (App. Bd. Jul. 2, 2018).

Applicant's argument that the Judge failed to consider mitigating concerns includes things from outside the record, which we cannot consider. Directive ¶ E3.1.29.[2] Applicant cites to matters that he believes are favorable to him, such as evidence that his alleged threats were provoked by messages that the colleague sent to him. He also cites to his explanation that he was under the

[1]The Judge resolved the allegation regarding the SCA omission in Applicant's favor because the allegation misstated the date of the SCA.

[2]Applicant argues that our refusal to consider new evidence constitutes a "kneejerk reaction." Appeal Brief at 6, n. 15. Noting that we will consider new evidence on questions of due process, he contends that the Judge's purported reliance upon "inaccurate evidence" constituted violations of due process that justify our consideration of the additional information that he submitted along with his brief. The prohibition against our considering new evidence is contained in the explicit language of the Directive, and we are bound by it. Applicant' brief argues that the Judge misstated and mis-weighed the evidence, but he does not present a *prima facie* reason to believe that Applicant was denied an opportunity to present evidence in mitigation or that he was otherwise denied the due process afforded by the Directive.

influence of a combination of alcohol and a sleep aid at the time of his conduct. Applicant has not rebutted the presumption that the Judge considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 17-00109 at 3 (App. Bd. Dec. 12, 2018).

Applicant argues the Judge's decision is so implausible that it cannot be ascribed to a mere difference of opinion. The Board does not agree. An ability to argue for a different interpretation of the evidence is not 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. 17-02463 at 2 (App. Bd. Sep. 10, 2018).

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: Charles C. Hale
Charles C. Hale
Administrative Judge
Member, Appeal Board