KEYWORD: Guideline M

DIGEST: Applicant raises two issues related to Government Exhibit (GE) 3, a Joint Personnel Adjudication System (JPAS) Incident History. First, Applicant contends the Judge erred in the Decision by stating that he did not object to GE 3. The transcript supports his contention that he objected to the relevance of that exhibit at the hearing. The Judge overruled his objection and admitted GE 3 into evidence. Besides entries addressing Applicant's alleged misconduct, GE 3 also has entries indicating that his SCI access was suspended in 2009 and later revoked. He argues the information about his 2009 SCI access suspension and revocation was irrelevant. We do not find his argument persuasive. The JPAS Incident History is a Federal Government record that contains relevant information about an applicant's security clearance eligibility. We conclude the Judge committed no error in admitting the JPAS Incident History into evidence. Adverse decision affirmed.

CASENO: 12-01906.a1

DATE: 01/10/2019

DATE: January 10, 2019

In Re:	)	
	)	
----------	)	ISCR Case No. 12-01906
	)	
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 January 26, 2018, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline M (Use of Information Technology) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On September 10, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Darlene D. Lokey Anderson 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 Judge was biased against him, whether the Judge erred in considering non-alleged matters, and whether the Judge's decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant has been working in the defense industry since 2004. He holds a master's degree. In 2016, he downloaded, without authorization and in contravention of a non-disclosure agreement, company proprietary information onto an encrypted thumb drive and took the thumb drive with him after leaving that company's employment.[1] Shortly thereafter, he began working for a competitor of his former company. He wanted to take the information because knew he would be working on the same engineering technology in his new position and planned to use the information in question as a reference. He stated the information was for his personal use, and he had no intention of sharing it with anyone else. He indicated that he became aware of the severity of his actions when he received letters from the FBI and his former company. An internal investigation concluded that he violated company rules and regulations and committed a security violation.

Applicant claimed "he made an honest, naive, and very foolish mistake" in taking the proprietary information and did not understand the ramifications of his actions. Decision at 3. A counselor who provided him psychotherapy after he lost his security clearance in 2009 indicated he would never knowingly damage an employer's privileged information. His previously revoked security clearance was reinstated in 2014. He submitted letters from other individuals who attested to his good character.

The Judge's Analysis

Applicant committed a serious security violation. His downloading of proprietary information was deliberate. He knew or should have known such conduct violated company rules and regulations. "Furthermore, he has a history of negligence and misconduct. His security clearance was first revoked in 2009. In 2014, Applicant, made some very improper decisions that have now negatively impacted his current clearance." Decision at 5. None of the mitigating conditions are applicable.

[1] Applicant also had a covenant not to compete that precluded him from taking technology from his former company. Decision at 3.

Discussion

Applicant claims the Judge was biased against him. Specifically, he stated that the Judge acted in a manner that made him "feel like she departed from her role as impartial arbitrator." Appeal Brief at 1. He also stated that his wife who attended the hearing shared the same sentiment. Except for the assignments of error addressed below, Applicant does not point to any specific comment or action by the Judge that caused him to believe she was biased against him.[2] 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. 10-02364 at 2 (App. Bd. Apr. 4, 2011). From our review of the record, we find nothing to support Applicant's contention that Judge lacked the requisite impartiality.

Applicant raises two issues related to Government Exhibit (GE) 3, a Joint Personnel Adjudication System (JPAS) Incident History. First, Applicant contends the Judge erred in the Decision by stating that he did not object to GE 3. The transcript supports his contention that he objected to the relevance of that exhibit at the hearing. The Judge overruled his objection and admitted GE 3 into evidence. Tr. 20-21. Besides entries addressing Applicant's alleged misconduct, GE 3 also has entries indicating that his SCI access was suspended in 2009 and later revoked. He argues the information about his 2009 SCI access suspension and revocation was irrelevant. We do not find his argument persuasive. The JPAS Incident History is a Federal Government record that contains relevant information about an applicant's security clearance eligibility. We conclude the Judge committed no error in admitting the JPAS Incident History into evidence.[3]

Second, Applicant also contends the Judge erred in considering that his security clearance was revoked in 2009. He argues that consideration of that prior suspension/revocation of his security clearance was unfair and prejudicial. It is well established, however, that a Judge may consider unfavorable non-alleged matters for certain limited purposes, such as (a) in assessing an applicant's credibility; (b) in evaluating an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) in considering whether the applicant has demonstrated successful rehabilitation; and (d) in applying the whole-person concept. *See*, *e.g.*, ISCR Case No. 15-07369 at 3 (App. Bd. Aug. 16, 2017). We find no reason to conclude the Judge considered non-alleged matters for inappropriate purposes.

Applicant also challenges that Judge's conclusion that he "made some very improper decisions" in 2014 that negatively impacts his current clearance eligibility. He argues that nothing negative happened in 2014. The record supports Applicant's contention. This error, however, is

[2] In his appeal brief, Applicant notifies us for the first time that he did not receive a copy of the transcript of the hearing. More specifically, he did not notify us that he had not received the transcript in either his Notice of Appeal or subsequent requests for appeal brief filing extensions. His appeal brief merely mentions that he did not receive the transcript and does not raise that matter as an issue for which he is seeking any relief.

[3] We also note that, in addition to GE 3, Applicant's testimony and other evidence reflected his security clearance was suspended in 2009, later revoked, and was reinstated in 2014. Tr. 34, 45-53, 69, GE 1 and 2, and Applicant's Exhibits A and D.

harmless because it did not likely affect the outcome of case. *See, e.g.*, ISCR Case No. 11-15184 at 3 (App. Bd. Jul. 25, 2013).[4] Applicant's conduct in wrongfully taking proprietary information when he departing a company's employment to work for a competitor in 2016 was more than a sufficient basis for denying his security clearance eligibility.

Applicant's remaining arguments amount to a disagreement with the Judge's weighing of the evidence. He argues, for example, that he is responsible and trustworthy. However, 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. 15-08684 at 2 (App. Bd. Nov. 22, 2017).

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, Enclosure 2 ¶ 2(b): "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security."

[4] It appears the Judge committed a drafting error in stating 2014 instead of 2016.

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