



DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
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KEYWORD: Guideline K; M; E

DIGEST: The allegations Applicant admitted involved him downloading over 2000 files from his unclassified work computer to a personal USB drive. The downloaded files included company proprietary information, third-party proprietary information, and export-controlled information. This downloading occurred two days before Applicant informed the company of his resignation and intent to begin employment with another company. An investigation revealed no evidence that Applicant transferred the files from his USB drive to any other computer or that the USB drive left his residence. The company concluded “Applicant’s downloading and transfer of files to his personal USB drive was a deliberate attempt to obtain proprietary data for outside use” in direct violation of the company’s policies. Decision at 3. In 2017, Applicant had signed a document acknowledging that he was prohibited from using the company’s or a third-party’s proprietary information for his or another’s benefit. Adverse Decision is Affirmed.

CASENO: 20-00230.a1

DATE 12/10/2021

Date: December 10, 2021

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 In the matter of:)
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 Applicant for Security Clearance)
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ISCR Case No. 20-00230

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Marc T. Napolitana, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 27, 2020, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline K (Handling Protected Information), Guideline M (Use of Information Technology), Guideline E (Personal Conduct), and Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On September 28, 2021, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Gina L. Marine 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 met its burden of proof, whether the Judge erred in her findings of fact and credibility determination, whether the Judge was biased against Applicant, 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 and Analysis

Applicant is in his thirties, has taken college courses, but has not yet earned a degree. He served honorably in the military for about six years. Since 2018, he has been employed in information technology positions for two defense contractors. He has previously held a security clearance. Reference letters reflect that Applicant’s work performance and character are highly regarded.

Under Guideline K, the SOR alleged that Applicant downloaded files on two occasions in violation of his company’s policies in June 2019. Both of these allegations were cross-alleged under Guidelines M and E. Under all three guidelines, Applicant admitted the allegations concerning one incident and denied the allegations concerning the other incident. The Judge found against Applicant on the admitted allegations and in favor of him on the denied allegations. The allegations he admitted involved him downloading over 2000 files from his unclassified work computer to a personal USB drive. The downloaded files included company proprietary information, third-party proprietary information, and export-controlled information. This downloading occurred two days before Applicant informed the company of his resignation and intent to begin employment with another company. An investigation revealed no evidence that Applicant transferred the files from his USB drive to any other computer or that the USB drive left his residence. The company concluded “Applicant’s downloading and transfer of files to his personal USB drive was a deliberate attempt to obtain proprietary data for outside use” in direct violation of the company’s policies. Decision at 3. In 2017, Applicant had signed a document acknowledging that he was prohibited from using the company’s or a third-party’s proprietary information for his or another’s benefit.

Under Guideline E, the SOR also alleged Applicant provided false information in two interviews regarding the downloading activity. Applicant denied these allegations. During an

interview with a company investigator in July 2019, Applicant first falsely stated that he had not used any USB drive, then indicated he was unsure whether he used such a device, and, upon being informed of company's computer monitoring, stated he discovered a USB drive on his desk. Applicant also claimed only personal identifiable information (PII) was stored on the USB drive. He later admitted he copied personal files and databases he created for future reference purposes. During an interview with a DoD investigator in December 2019, Applicant stated he downloaded files to a USB drive in the spring of 2019 for use in finding other employment. When confronted with information that the files were transferred two days before submitting his resignation in June of that year, he denied transferring them at that time. He did admit that he may have transferred his employment offer from the other company to the USB drive at that time. Applicant's inconsistent explanations during the two interviews were not credible. Substantial evidence exists to conclude "an intent on the part of Applicant not only to provide false and misleading statements but also to omit and conceal materially relevant information during the interviews[.]" Decision at 13.

Under Guideline F, the SOR alleged that Applicant had 11 delinquent debts totaling about \$48,000. In responding to the SOR, Applicant admitted each of the delinquent debts. The Judge found against Applicant on six past-due student loans totaling over \$31,000 and for him on the other debts. In responding to interrogatories in May 2020, Applicant claimed he was current in making payments under a rehabilitation program for the student loans but did not provide any corroborating documentation. Applicant's credit report from January 2021 does not reflect that the student loans have been rehabilitated or otherwise resolved. He failed to mitigate the security concerns arising from his delinquent student loans.

Discussion

Downloading of Files

Applicant contends that the Judge's analysis of her unfavorable findings regarding the downloading of the files was flawed. In making this argument, Applicant highlights that the company's investigation revealed that there was no evidence he ever transferred files from his USB drive to another computer and no evidence of his intent to do anything nefarious with the files. He also argues the Judge's logic is difficult to follow, noting on the one hand she found he violated company policies and, on the other, he never did anything with the files. Additionally, he challenges the Judge's unfavorable findings regarding downloading allegations by comparing them to her favorable findings regarding those allegations. These arguments are not persuasive. First, Applicant admitted the downloading SOR allegations that the Judge found against him. The Directive presumes there is a nexus or rational connection between admitted or proven circumstances under any of its guidelines and an applicant's security eligibility. *See. e.g.*, ISCR Case No. 15-08385 at 4 (App. Bd. May 23, 2018). Any attempt to argue or infer that Applicant's unauthorized downloading of protected information onto a personal USB drive did not create security concerns lacks merit. Second, the absence of evidence showing that Applicant transferred the files to another computer is not a key issue in analyzing these allegations. The pertinent disqualifying conditions under Guidelines K, M, and E do not require an actual compromise of protected information or a subsequent downloading of that information from the USB drive to

another computer.¹ Applicant's admitted misconduct by downloading protected information onto his personal USB drive in violation of company policies was sufficient to raise security concerns. Third, Applicant's comparison of the Judge's unfavorable and favorable findings involving the two incidents shows no inconsistency because the incidents are distinguishable.

Regarding Applicant's arguments, it also merits noting the Appeal Board gives deference to a company's findings and conclusions in its security investigations. *See, e.g.*, ISCR Case No. 15-08385 at 4 (“[B]ecause of the unique position of employers as actual administrators of classified or protected information programs and the degree of knowledge possessed by them in any particular case, their determinations and characterizations regarding security violations are entitled to considerable deference, and should not be discounted or contradicted without a cogent explanation.”). The Judge committed no error in relying on the company's investigation that concluded Applicant's downloading of files to his personal USB drive was in direct violation of its policies. File of Relevant Material (FORM) Item 7 at 5.

Applicant also contends that the Judge erred in finding he was escorted off the company's premises. This contention lacks merit. The company's investigation reflects that a senior manager directed other employees to expedite Applicant's separation from the company and to “walk him off the property.” FORM Item 7 at 2-3. The investigation further reflects an employee informed Applicant that he would not be allowed to return to his office. When Applicant requested personal items be returned to him, the employee informed him arrangements would be made separately. Applicant surrendered his badge and was “walked off” the property. *Id.* at 3. Substantial evidence exists to support this challenged finding.

Statements to Investigators

Applicant contends the Judge erred in finding against him on the two falsification allegations. In doing so, he challenges the Judge's conclusion that he was not credible. He argues it is “abundantly clear that the Judge had a negative perception of the Applicant due to the [company's] internal investigation.” Appeal Brief at 9. This argument demonstrates no error. As the trier of fact, the Judge is responsible for weighing the evidence, including the company's investigation, and has the inherent authority to assess an applicant's credibility. Moreover, inconsistent and implausible statements can form the basis for a negative credibility determination. The Appeal Board is required to give deference to a Judge's credibility determinations. Directive ¶ E3.1.32.1. Applicant failed to put forth any reason why we should disturb the Judge's unfavorable credibility determination.

Applicant also asserts that he did not know he was downloading files containing proprietary information. He claims the files did not contain any protective information markings. The company's investigation contradicts that claim. The investigation reflects the files contained proprietary information markings. FORM Item 7 at 2. From our review of the record, the Judge's material findings and conclusions regarding Applicant's false statements to the investigators are based on substantial evidence or constitute reasonable inferences drawn from the evidence. *See, e.g.*, ISCR Case No. 17-02225 at 2-3(App. Bd. Jun. 25, 2019).

¹ *See* Directive, Encl. 2, App. A ¶¶ 16(d), 34(b), 34(c), 34(g), 40(d), 40(e), and 40(f).

Student Loans

In arguing that the Judge's analysis regarding the student loans was flawed, Applicant's brief relies on hearing-level decisions in unrelated Guideline F cases. His reliance on those hearing-level decisions is misplaced. As the Appeal Board has previously stated, how particular fact scenarios in other cases were decided at the hearing level are generally not a relevant consideration in our review of a case. *See, e.g.*, ISCR Case No. 19-02593 at 3 (App. Bd. Oct. 18, 2021), setting forth a lengthier discussion of this issue. In short, Applicant's arguments based on favorable hearing-level decisions in cases involving different applicants and different facts do not establish that the Judge's conclusions and analysis regarding the student loans are arbitrary, capricious, or contrary to law.

Weighing of the Evidence

Applicant contends the Judge improperly assessed and weighed the evidence. He argues, for example, that the Judge did not consider his denial of the false statements and that the Judge ignored mitigating and whole-person evidence. His arguments, however, are neither sufficient to rebut the presumption that the Judge considered all of the evidence in the record nor enough 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. 19-01400 at 2 (App. Bd. Jun. 3, 2020).

Bias

Applicant contends that he "was not afforded a fair evaluation." Appeal Brief at 16. To the extent that he is arguing the Judge was biased against him, this argument is not persuasive. Bias is not demonstrated merely because a Judge found against the appealing party. 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. 18-02722 at 5 (App. Bd. Jan. 30, 2020). Applicant has not directed our attention to anything in the record that would likely persuade a reasonable person that the Judge was lacking in the requisite impartiality.

Conclusion

Applicant failed to establish the Judge committed any harmful error. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The decision is sustainable on the record. "The general standard is that a clearance may be granted only when 'clearly consistent with 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 national security."

Order

The decision is **AFFIRMED**.

Signed: Michael Ra'anan

Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: Jennifer I. Goldstein

Jennifer I. Goldstein
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy

James F. Duffy
Administrative Judge
Member, Appeal Board