



**DEPARTMENT OF DEFENSE
 DEFENSE LEGAL SERVICES AGENCY
 DEFENSE OFFICE OF HEARINGS AND APPEALS
 APPEAL BOARD
 POST OFFICE BOX 3656
 ARLINGTON, VIRGINIA 22203
 (703) 696-4759**

Date: April 20, 2022

In the matter of:)	
)	
-----)	ISCR Case No. 20-02818
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Alan V. Edmunds, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On December 29, 2020, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 2, 2022, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Carol G. Ricciardello denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Under Guideline B, the SOR alleged Applicant’s immediate family members are citizens of China and one is employed by the Hong Kong government. Under Guideline E, the SOR alleges six issues of concern, to include: an incident of sexual harassment, online financial relationships with two women of unknown national origin, a misuse of information in Applicant’s workplace, an avowed willingness to access work databases for personal use, and a history or questionable judgment and vulnerability to manipulation and exploitation. Applicant denied all allegations. The Judge found for Applicant on one of the Guideline E allegations, but found adversely to him on the remaining five Guideline E allegations and on the Guideline B allegations.

Applicant raised the following issue on appeal: whether the Judge failed to properly consider all available evidence, rendering her adverse decision arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact: The Judge's findings are summarized in pertinent part.

Applicant is in his mid-forties. Born in Hong Kong, he immigrated to the United States in 1997, became a naturalized citizen in 2003, served in the Reserve force from 2005 to 2013, and deployed to Iraq in 2007. While on active duty from 2013 to 2014, Applicant received an Article 15 nonjudicial punishment for sexual harassment and fraternization and was discharged with an honorable discharge. As a prospective government contract employee, Applicant completed a security clearance application (SCA) in May 2018 and responded "No" to a question that asked whether he had been subject to a court-martial or other disciplinary action in the past seven years.

In his June 2018 clearance interview, Applicant disclosed Ms. M as a foreign contact with whom he established an online romantic relationship in 2013 in response to an unsolicited email from her. They never met in person or by video, but exchanged photographs. When Ms. M reported to him that she was in danger and seeking to escape Togo, Applicant sent her funds via an attorney in Togo. They lost contact after Applicant could no longer afford to help her financially and have had no further contact.

In response to subsequent government interrogatories, Applicant confirmed that his last contact with Ms. M was in March 2017, that she was a refugee from an unknown country, and that he provided her funds between 2015 and 2017. At his hearing, Applicant testified that he sent Ms. M approximately \$7,000 and took out loans to provide her with the funds. He initially stated that he expected to receive \$500,000 from her as a reward for helping, but later said he did not expect to receive any reward. He no longer believes her story, and testified that the incident made him more skeptical. Applicant provided contradictory testimony and was not credible.

In early 2018, Applicant received another unsolicited email from a Ms. H., whom he describes as his girlfriend. She sent him nude photos on numerous occasions, and he sent her nude photos about six times, as well as videos of him nude and performing sexual acts. They have never met in person. Ms. H told Applicant that she needed to send him money from her clients; she asked him to open bank accounts, deposit the money and then send money orders to two people whom he did not know. When asked at hearing if he believed Ms. H was using him for money laundering, Applicant wavered in his response.

Applicant testified that he used two accounts for Ms. H's money. After being blocked by two companies that transfer money, he sent the funds through Bitcoin. He deposited money from an unknown source and sent Ms. H these funds, but also sent Ms. H his own money. He estimated that he deposited and transferred back to Ms. H about a total of \$10,000 of her funds and about \$2,000 of his own money. At the time he completed his interrogatories in November 2020, Applicant was still sending her funds via Bitcoin to cover living expenses. When asked at hearing for the last time he sent money, Applicant responded that he sent her \$1,500 the week prior to hearing. Although he was not initially suspicious, Applicant now believes Ms. H's actions were not legitimate and has cut off communication with her.

When Ms. H first contacted Applicant, she lived in a neighboring state, but did not ever meet each other. She is now in Nigeria. After he asked for a copy of her passport, she provided one, which assuaged his concerns. He provided a copy for the hearing. An examination of the passport reveals it to be fraudulent. Applicant did not seem to understand that the scenarios he participated in with both women were scams and did not believe he had been manipulated.

At the Government's request, Applicant submitted to a psychological evaluation. In addition to discussions about the relationships outlined above, Applicant described an incident where he inappropriately obtained derogatory information about a supervisor by retrieving documents from a copy machine, confronted her with the information, and then shared it with a colleague. At hearing, Applicant admitted he did not have the authority to view the documents or to disclose the information. Applicant also told the psychologist that, if Ms. H had a driver's license, he would access his state's database to check her status. Though his job, Applicant has access to the state's database for drivers' licenses, but is not authorized to use it for personal use. Applicant testified that he does not believe he was manipulated or that he could be exploited. Applicant repeatedly contradicted himself. He minimized, justified, and rationalized his conduct.

Applicant's mother is a citizen of China and a permanent resident of the United States. She immigrated in 1999, worked in the United States, and is now retired. She maintains a Chinese passport and returns to China about every two years to visit relatives. Applicant's father is a naturalized citizen. Applicant's brother and sister-in-law are residents and citizens of China, and his brother works for the Chinese government.

The Judge's Findings Analysis: The Judge's analysis is quoted in pertinent part.

Guideline E

Applicant does not grasp the gravity of his conduct. Through unsolicited emails, he established relationships with two women who told him obvious scam stories. He sent them money. He unwittingly participated in what is likely a money laundering scheme, but he still does not believe it despite transfer services blocking his account due to potential fraud, and continues to have contact with this woman, even after being provided with an obvious fraudulent passport. He does not recognize how he could be exploited by sending nude photos and sexually explicit videos of himself. He believes his conduct of inappropriately obtaining derogatory information about his supervisor, confronting her, and sharing it with a colleague was justified because of his high expectations for his supervisor. His willingness to access his employer's database for his personal use is a concern.

Applicant's conduct is not minor or infrequent. He says he stopped communicating with Ms. H as of his last email on January 7, 2022. It is obvious she was exploiting him. . . . Applicant's conduct casts doubt on his reliability, judgment, and willingness to comply with rules and regulations. None of the mitigating conditions apply. [Decision at 9.]

Guideline B

Applicant's mother, brother, and sister-in-law have ties to China. His brother works for the Chinese government. Applicant maintains contact with them. Applicant engages in questionable conduct which creates an increased risk of vulnerability, manipulation and exploitation by China, a country that actively engages in espionage and exploits Chinese citizens or persons with family ties to China to gain insider access to sensitive and classified information. None of the mitigating conditions apply. [Decision at 11.]

Discussion

Applicant has not challenged any of the Judge's specific findings of fact. Rather, he contends that the Judge erred in three regards.

First, Applicant argues that the Judge "failed to adhere to the procedures required . . . when she failed to consider all relevant evidence submitted by Appellant." However, counsel cites to no evidence that the Judge failed to consider. "The appeal brief must state the specific issue or issues being raised, and cite specific portions of the case record supporting any alleged error." Directive ¶ E3.1.30. Applicant's counsel failed to comply with this fundamental requirement and failed to carry his burden on this issue.

Second, Applicant argues that the Judge repeatedly interrupted Applicant's testimony, that she asked questions "not posed by the department counsel or Applicant's lawyer and outside the scope of the direct examination," that she did not allow the Applicant to present his case, and that she "creat[ed] her own bias against the Appellant." Appeal Brief at 6. Applicant further contends the interruptions and interjections establish that he "was not able to present evidence on [his] behalf." *Id.* at 5-6. The transcript confirms that the Judge asked numerous questions during direct and cross examination. As the finder of fact, the Judge is required to issue a decision that sets forth findings of fact and conclusions as to each allegation in the SOR. Directive ¶ E3.1.25. In this case, those allegations were wide-ranging and numerous. Our review establishes that the Judge, as permitted, questioned the Applicant to clarify ambiguities in his testimony, to better understand the evidence before her, and to facilitate the development of a more complete and accurate record. *See, e.g.*, ISCR Case No. 94-1055 at 2 (App. Bd. May 8, 1996). Applicant was represented by counsel at the hearing. Near the end of the hearing, counsel was asked whether he had anything further to present, and he responded in the negative. Tr. at 176. Our review of the entire record discloses no basis to conclude that Applicant was denied the rights due him under the Directive to present his case.

To the extent that Applicant is alleging bias, he cites to nothing in the record to support this allegation, other than the curious assertion—ungrounded in the Directive or controlling precedent—that the Judge asked questions outside the scope of direct examination. Applicant has failed to rebut the presumption that the Judge was impartial and unbiased. *See, e.g.*, ISCR Case No. 18-02722 at 5 (App. Bd. Jan. 30, 2020).

Third, the remainder of Applicant’s brief is fundamentally an argument that the Judge misweighed the evidence. None of Applicant’s arguments, however, are enough to rebut the presumption that the Judge considered all of the record evidence or to demonstrate the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. Moreover, the Judge complied with the requirements of the Directive in her whole-person analysis by considering all evidence of record in reaching her decision. *See, e.g.*, ISCR Case No. 19-01400 at 2 (App. Bd. Jun. 3, 2020). Although we give due consideration to the Hearing Office cases that Applicant’s counsel has cited, they are neither binding precedent on the Appeal Board nor sufficient to undermine the Judge’s decision. *See, e.g.*, ISCR Case No. 17-02488 at 4 (App. Bd. Aug. 30, 2018).

Applicant has failed to establish that the Judge committed any harmful error or that he should be granted any relief on appeal. 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: James F. Duffy
James F. Duffy
Administrative Judge
Chairperson, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

Signed: Moira Modzelewski
Moira Modzelewski
Administrative Judge
Member, Appeal Board