

Date: January 10, 2023

In the matter of:)
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Applicant for Security Clearance)
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ISCR Case No. 20-02747

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 December 13, 2021, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline M (Misuse of Information Technology) and Guideline E (Personal Conduct) of DoD Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant initially requested a hearing, though he later withdrew the request in favor of a decision on the written record. On November 22, 2022, after considering the record, 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’s findings of fact contained errors, whether the Judge erred in concluding that Applicant’s conduct raised security concerns, and whether the Judge’s mitigation analysis was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings and Analysis

Applicant, who is in his late 20s, is married and has no children. He holds a bachelor's degree and is seeking a security clearance in connection with his employment by a Defense contractor, a job he has held since 2019.

Between late 2017 and mid 2018 Applicant used a prior employer's computer to stream and view pornographic videos and images. This was in violation of company policy. When doing so, he used the InPrivate mode, which enabled him to explore the internet without leaving a browsing history, temporary internet files, cookies, etc., thereby attempting to conceal conduct that he knew was in violation of company policy. By gaining access to videos and images through YouTube and other sites, Applicant introduced malware into his employer's IT system.

Upon discovery of Applicant's misconduct, his employer conducted an investigation. When interviewed by company officials, Applicant provided false or misleading answers until they confronted him with evidence. After the investigation was completed, the employer gave Applicant a choice of resigning or being fired. He chose the former option. Applicant provided false statements to an investigator during the course of his clearance interviews. Specifically, he stated that he thought that, because the sites he accessed were not blocked, that it was acceptable to view pornographic content on them. However, he knew that his conduct was not acceptable and that other employees had gotten into trouble for similar behavior.

Applicant also provided misleading information on his 2019 security clearance application (SCA). He stated that the reason he left his prior employment was the lack of a long-term career path following his inadvertent introduction of malware onto the employer's IT system. He also stated that, upon discovery of the malware, his prior employer suspended him with pay and that such action did not constitute formal discipline.

Applicant was not truthful in his response. Applicant's misconduct instigated a formal investigation that concluded that he violated company policy, resulting in his job termination. In lieu of termination, Applicant was suspended without pay during the investigation period, and the company would have fired him for cause had he not taken the option they gave him to resign. Decision at 3.

Applicant admitted that he had initially attempted to deny his misconduct. He stated that he always knew that his actions were wrong and in violation of company policy. He attends regular sessions with a certified sex-addiction counselor and belongs to a support group for those suffering from that condition. Applicant believes that his problems stem from the trauma of having been molested as a child. Applicant's character evidence cites to progress that he has made in addressing his problems and rates him highly for integrity, reliability, and trustworthiness.

In the Analysis portion of the Decision, the Judge cited to the nature of Applicant's security-significant conduct and his knowledge that it violated company policy. Though recognizing that several years had passed since the last incident, the Judge concluded that, due to its egregiousness, it continues to cast doubt upon Applicant's reliability, trustworthiness, and good judgment. The Judge also cited to Applicant's false or misleading statements regarding his

infractions, concluding that if he “did not consider his discipline to be a formal punitive action, he was wrong.” Decision at 8. She concluded that the record left her with questions and doubts as to Applicant’s suitability for access to classified information.

Discussion

Applicant challenges some of the Judge’s findings of fact. We examine a Judge’s findings to see if they are supported by such relevant evidence as a reasonable mind might find adequate to support a conclusion in light of all the contrary evidence in the same record. Directive ¶ E3.1.32.1.

Applicant notes the finding that he had been working for his current employer since 2019. As he points out in his brief, Applicant began working for this employer since 2018. Item 4, SCA, at 16. Accordingly, this finding is in error. Applicant also challenges the Judge’s findings of deliberate false statements during the processing of his SCA. He contends that he did not intend to mislead in his answers to questions regarding his employment or in his answers during his clearance interview. Regarding the explanation in his SCA for having left his former job, Applicant stated that it had been the result of an inadvertent introduction of malware into his employer’s IT system. He did not disclose the true reason for his resignation, which was his employer’s discovery of his knowing and willful violation of company policy by accessing pornography with company IT equipment. The Judge did not err in finding that this answer was materially misleading. Regarding Applicant’s claim in the same SCA that he had not been suspended without pay or subjected to formal discipline, the evidence is less clear. While the employer advised the CAF at the beginning of its investigation that Applicant had been suspended without pay, Applicant himself contended that this decision was rescinded after the company investigation was completed. Item 7, Employer Message to CAF; Interview Verification – Additional Facts, included in Item 5, at 13. The evidence as a whole does not refute Applicant’s contention that his employer ultimately compensated him for the time he was under suspension. In any event, although Applicant’s SCA answer did include a denial that he had been subjected to formal discipline, which a reasonable person could find specious, he did state “yes” to the following question: “[I]n the last seven (7) years, have you received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace, such as a violation of security policy?” Item 4 at 19. As this “yes” pertained to the misconduct at issue in this case, we conclude that this SOR answer, viewed as a totality, is not materially misleading. The Judge’s finding to the contrary is erroneous.

Applicant challenges the finding that he had misled the clearance investigator during his interview. The pertinent language is as follows: “[Applicant] continued to access the adult site and because it was not blocked by the company IT . . . he thought it was OK.” Interview Summary, included in Item 5, at 7. The company investigation discloses that, although he initially denied knowing that his conduct was prohibited, Applicant finally admitted to the contrary after they confronted him with evidence. Report of Employer Investigation, included in Item 8, at 3. In addition, Applicant’s having used the InPrivate mode for viewing the videos and images in question most reasonably suggests an attempt to evade discovery, which he would not likely have done had he really believed that his conduct was permitted. The record supports the Judge’s finding that this portion of Applicant’s clearance interview answer is materially false.

On the question of whether the false or misleading statements were deliberate, we note the embarrassing nature of Applicant's misconduct,¹ his efforts described above to avoid detection, and the multiple nature of his false statements, including those to his employer, which he has admitted. *See, e.g.*, ISCR Case No. 15-08163 at 5 (App. Bd. Oct. 25, 2017) for the proposition that the multiple nature of false statements can give rise to an inference that they are deliberate. The record viewed as a whole supports the Judge's findings that Applicant's description in his SCA of his reason for having left his former job was deliberately misleading and that his claim to the clearance investigator that he believed that his conduct was not forbidden was deliberately false.² Although the Judge's findings may have contained errors such as those identified above, they are harmless in that they did not likely affect the overall outcome of the case. *See, e.g.*, ISCR Case No. 18-02581 at 3 (App. Bd. Jan. 14, 2020). Applicant has not cited to any harmful error in the Judge's findings of fact. The Judge's material findings of security concern are sustainable.

Applicant contends that his misconduct does not "correlate to a national security risk, nor does [his] choice to lie to company representatives in an effort to conceal [his] personal misbehavior correlate to [his] willingness to comply with national security standards." Appeal Brief at 4. We construe this as an argument that his conduct does not raise security concerns. We note first of all that the Directive presumes a nexus between admitted or proved conduct and an applicant's eligibility for a clearance. *See, e.g.*, ISCR Case No. 18-02581 at 4. Moreover, evidence that Applicant knowingly misused his employer's IT system and that he made false statements about that behavior raises reasonable questions as to his willingness to comply with rules and regulations, thereby prompting concerns that he may not protect sensitive information. *See* Directive, Encl. 2, App. A ¶¶ 15, 39. The Judge did not err in concluding that Applicant's conduct raised security concerns.

Applicant contends that the Judge erred in concluding that he had not mitigated any concerns arising from his security-significant conduct. He draws our attention to the four years that have elapsed since his last incident of IT system misuse, his having engaged in counseling to resolve his problems, and the support he enjoys from his wife, who is aware of his circumstances. These matters are not frivolous and certainly weigh in Applicant's favor. However, given (1) that Applicant knowingly and repeatedly misused his employer's IT system over the course of several months; (2) that the misconduct was, by Applicant's admission, addictive or compulsive,

¹"I attempted to deny my behavior and maintain secrecy until I was no longer able to do so . . . I lied to [employer] investigators not only to avoid the consequences for my actions, but also to avoid the pain and embarrassment of traumatic exposure in front of a mixed gender panel of complete strangers." Response to File of Relevant Material (FORM) at 4.

² Applicant contends that his SCA answer was based upon advice that he received from officials at his former place of employment that his only reportable offense was the introduction of malware into the employer's IT system. Response to FORM at 1-2. He advises that he sought, but did not receive, corroborating statements on this matter. We note that the employer's message to the CAF specifically referenced Applicant's having viewed pornography (Item 7) and that there is nothing in the record to corroborate Applicant's claim that the employer considered his only reportable offense to have been an inadvertent introduction of malware. Moreover, there is nothing in the record to demonstrate that in completing his SCA in connection with follow-on employment Applicant relied upon "advice of legal counsel or of a person with professional responsibilities for advising or instructing [him] concerning security processes." Directive, Encl. 2, App. A ¶ 17(b). Given that the previous employer gave Applicant a choice of resigning or being fired by having accessed pornography on his official computer, he could not honestly have believed at the time he completed his SCA that his answer to the question at issue was completely truthful.

suggesting that it was difficult for him to control; (3) that he remains in counseling for sex addiction; and (4) that he made multiple false statements to his employer and to the DoD, we are not able to say that the Judge erred in her conclusion that Applicant had failed to meet his burden of persuasion. We note in particular the Directive’s requirement that failure to provide full, frank and truthful answers during a clearance investigation “will normally result in an unfavorable national security eligibility determination[.]” Directive, Encl. 2, App. A ¶ 15. On the whole, Applicant’s appeal arguments amount to a disagreement with the Judge’s weighing of the evidence, which is not enough to demonstrate that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 20-02304 at 2 (App. Bd. Dec. 8, 2022).

We have considered the entirety of Applicant’s contentions on appeal and conclude that the Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. Applicant has cited to no harmful error in the Judge’s findings or analysis. 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: 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