

Date: January 27, 2023

In the matter of:)
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Applicant for Security Clearance)
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ISCR Case No. 20-03502

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 28, 2021, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline D (Sexual Behavior), Guideline M (Use of Information Technology), and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On November 10, 2022, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative 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 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 and Analysis

Applicant, who is in his early 40s, is married with five children. He holds a master's degree and works for a defense contractor. He was previously employed by another defense contractor from 2003 until 2011 and was granted a security clearance in the early 2000s.

Applicant committed various acts of misconduct during the course of his previous employment. He viewed pornography on his employer's computer on about a dozen occasions and masturbated in his office about five times. He disclosed this conduct in connection with a 2009 polygraph examination and signed a statement acknowledging that such conduct was against Government policy.

Applicant left the defense industry in 2011, returning in 2013 when he began working for his current employer. He underwent another polygraph examination in 2014, disclosing to interviewers that he had viewed pornography at work during the course of his new job, though on his cell phone. He admitted to additional misconduct at his previous job—loading a private compact disc onto his corporate computer and using a personal USB drive to transfer proprietary text files. In addition, he disclosed that he had transferred proprietary information between late 2013 and early 2014. He stated that during his earlier investigation he had deliberately withheld information about his use of personal USB drives. Applicant admitted knowing that his conduct during the course of both jobs was prohibited by Government as well as by company policy. In the course of the 2014 polygraph examination, Applicant admitted that he had not taken his 2009 signed statement seriously.

In 2015, the Government revoked Applicant's access to classified information and disapproved additional access that he had been seeking in connection with his employment. Applicant has received regular briefings on security matters since beginning his employment in the defense industry. Applicant enjoys an excellent reputation as to his character and trustworthiness, and his performance evaluations are excellent. Applicant has attended counseling sessions in order to resolve his addiction.

In the analysis portion of the Decision, the Judge cited to Applicant's having engaged in significant misconduct during the course of two different jobs, his behavior during his second job occurring despite his having signed a statement acknowledging that such behavior was forbidden. She stated that Applicant had disclosed his conduct during the course of polygraph examinations, which diminished the weight to which his disclosures were entitled. Though she noted the length of time that had elapsed since Applicant's last alleged infraction, she concluded that, under the circumstances of the case, his conduct continues to impugn his reliability, trustworthiness, and judgment.¹

¹ "It is recognized that Applicant has not engaged in this misconduct for almost ten years, however, given his long history of misconduct, his relapses in sexual misconduct due to his addiction, and the fact that if it were not for the polygraph examinations this information may not have been disclosed, there remains uncertainty and concern about his credibility. . . . Under the particular circumstances here, the before-mentioned disqualifying conditions have been established and have not been mitigated." Decision at 9–10.

Discussion

Applicant contends that the Judge's analysis of his security concerns was faulty. Among other things, he contends that it was merely conclusory and that it failed to address significant evidence, for example his counseling, his admissions to his spouse, church officials, counselor, and others, and the length of time that had elapsed since his last instance of security-significant conduct. We have considered Applicant's brief in light of Judge's Decision and the record evidence as a whole. Regarding Applicant's contention that the Judge did not provide sufficient analysis of his security concerns, we note that a Judge is required to:

make a written clearance decision . . . setting forth pertinent findings of fact, policies, and conclusions as to the allegations in the SOR, and whether it is clearly consistent with the national interest to grant or continue a security clearance for the applicant. Directive ¶ E3.1.25.

A Judge's decision is not held to an absolute standard of perfection, and in any event the Directive does not specify a required quantum of analysis. *See, e.g.*, ISCR Case No. 10-03578 at 3 (App. Bd. Oct. 4, 2012); ISCR Case No. 15-06050 at 3 (App. Bd. Oct. 30, 2017). The Judge made extensive findings supported by the record evidence, cited to appropriate disqualifying and mitigation conditions, and clearly set forth conclusions pertinent to the question of whether the continuation of Applicant's clearance was in the national interest. We conclude that the Judge's analysis satisfies the requirements of the Directive.

Applicant argues that the Judge should have given greater weight to evidence that he admitted his misconduct to his wife and to others. He also contends that he was forthcoming with the Government in that he could simply have refused to answer questions about his misconduct in interviews following polygraph examinations. While Applicant's admissions to persons outside his place of employment was evidence the Judge was bound to consider, along with all the other evidence in the record, Applicant had an affirmative duty to disclose security-significant conduct to his employer. *See, e.g.*, ISCR Case No. 15-08163 at 4 (App. Bd. Oct. 25, 2017) ("An applicant must be willing to self-report significant information pertinent to his or her clearance."). That Applicant disclosed his conduct only during interviews connected with polygraph examinations diminishes the weight to which his disclosure might otherwise be entitled. *See, e.g.*, ISCR Case No. 19-02554 at 6-7 (App. Bd. June 23, 2022) (Admission of security-significant conduct following polygraph examination is a factor to consider in determining whether an applicant satisfied the requirement of full disclosure.). All in all, we find no reason to disturb either the Judge's comment that, but for the polygraph examinations, security officials may never have learned about Applicant's behavior or the weight which she gave to the circumstances of his disclosures.

Applicant contends that the Judge engaged in "minor quibbles over semantics insufficient to undermine [Applicant's] veracity." Appeal Brief at 8. To the extent that this is a challenge to the Judge's assessment of Applicant's credibility, we note that the Directive requires us to give deference to a Judge's credibility determinations. Directive ¶ E3.1.32.1. We conclude that the

Judge's treatment of Applicant's credibility, quoted in footnote 1 above, is consistent with the record evidence.² Applicant's argument does not undermine the Judge's credibility determination.

The general tenor of Applicant's brief consists essentially in a disagreement with the manner in which the Judge weighed the evidence, which 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. 12-01578 at 4 (App. Bd. Sep. 24, 2014). For example, he contends that the Judge did not extend appropriate weight to evidence that he attended counseling sessions and that his counselor opined that he is committed to ensuring that his sexual misconduct does not continue. The Judge made a finding about this matter. However, given the nature and extent of Applicant's security significant conduct we find no reason to believe that the Judge mis-weighed this evidence. Indeed, the Judge's findings and the record evidence established the following: (1) Applicant repeatedly used previous employer's computer to view pornography and masturbated, while on the job; (2) Applicant transferred company files to his personal computer in violation of company policy; (3) Following an investigation, Applicant signed a document in 2009 acknowledging that such conduct was not consistent with Government or company policy; (4) Applicant subsequently engaged in similar behavior during the course of employment by a second Defense contractor, though he viewed pornography on his personal cell phone; (5) Applicant knew that his conduct was not permitted, stating that he did not take the 2009 document that he signed seriously; (6) Applicant stated that he had withheld information during the investigation of his misconduct during his previous employment; (7) Applicant disclosed his conduct to security officials only after he had taken polygraph examinations; and (8) Though the last instance of misconduct alleged in the SOR occurred in 2014, Applicant testified that he viewed pornography at work in "either 2017 or 2018." Tr. at 51. The Judge did not make a finding about this testimony. However, it is consistent with her ultimate conclusion that Applicant's conduct continues to cast doubt upon his judgment. We have considered the entirety of Applicant's appeal arguments. He has not rebutted the presumption that the Judge considered all of the evidence in the record, nor has he shown that the Judge mis-weighed the record evidence. *See, e.g.*, ISCR Case No. 18-02872 at 3 (App. Bd. Jan. 15, 2020).

Applicant has not demonstrated that the Judge committed harmful error. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision, both as to the mitigating conditions and the whole-person factors. 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."

² Government Exhibit (GE) 2 is a set of interrogatories that includes a summary of Applicant's clearance interview. Applicant certified that the interview accurately reflected the information he provided during the interview, stating "I do not have any additional information to add on these matters." He signed the affidavit, swearing that the information contained therein was true and correct to the best of his knowledge and belief. GE 2 at 2-4. Applicant did not object to the admission of this exhibit at the hearing. Tr. at 9-10. During the hearing, however, Applicant testified that GE 2 contained statements that he did not believe were true and that in signing the affidavit he was merely swearing that he had read it in an effort to be cooperative with the investigation. Tr. at 55. These statements are not consistent with one another, and inconsistent statements can impugn a witness's credibility. *See, e.g.*, ISCR Case No. 15-03778 at 3 (App. Bd. Aug. 4, 2017).

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