

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

Applicant is in his early fifties and married, with two children and a stepchild. He served in the military during the 1990s and was honorably discharged. He earned a master's degree in 2013 and has worked for his current employer since 2019.

After his discharge from the military in the late 1990s, Applicant worked for a defense contractor and then as a civilian employee of the Army. In March 2009, he was counseled for "inappropriate behavior of either making suggestive comments to other female employees or making them feel uncomfortable with his comments." Decision at 2, quoting Government Exhibit 3 at 162. In April 2010, Applicant was notified of a proposed suspension for sexual harassment, inappropriate touching, and false statements. The alleged conduct included sexual banter in the presence of three female coworkers, sitting on the lap of a female coworker, and discussing sexual matters with a female coworker. In late June 2010, Applicant and his command reached a settlement agreement in which Applicant accepted a five-day suspension, served partially on non-duty days, and the command agreed to remove the suspension documents from Applicant's Official Personnel File within two years if there were no further infractions.

In July 2015, Applicant provided a statement in which he admitted that he took a test for another employee who was having difficulty passing the test, using the employee's common access card (CAC) and personal identification number (PIN). Applicant stated that he felt pressured to assist his colleague, that time was apparently of the essence, and that he took the test on the weekend on his own time. At his hearing, Applicant provided a different version of events, testifying that he helped the fellow employee while the employee took the test, but that he did not take the test for him. He testified that he did not remember his statement from 2015 and speculated that it may have been altered.

In late 2018, Applicant's command ordered an inquiry into allegations of misconduct by Applicant. The report of investigation, issued in February 2019, revealed sexual harassment based on unwanted attention by Applicant to three women, to include comments about Applicant's sex life, questions about their sex life, or solicitations for sex. The commander and his staff attorney "found the investigation legally sufficient, the findings and recommendations supported by sufficient evidence, and the recommendations consistent with the findings." *Id.* In March 2019, Applicant resigned from his position and received a deferred retirement.

Applicant has denied committing both the workplace misconduct that led to his 2010 suspension and the workplace misconduct documented in the 2018 command inquiry. He stated his belief that multiple people lied, either because they were biased, coerced, or compensated for doing so, and he submitted documents in support of his position. "I considered Applicant's documents and his testimony, but I did not find his testimony credible." *Id.* at 5.

The Judge's Analysis

The conduct alleged in the March 2009 counseling letter, the April 2010 notification of proposed suspension, and the 2018 command inquiry reflects questionable judgment and an

unwillingness to comply with rules and regulations, and created a vulnerability to exploitation, manipulation, and duress. Security concerns are established under Guideline E. Under Guideline M, Applicant testified that, although he helped another employee take a test, he did not take the test for him as alleged. However, his 2015 statement contradicts that testimony and is a more accurate description of what occurred. In summary, the Judge concluded:

I accept that Applicant committed the misconduct identified in the April 2010 notification of a proposed suspension and in the Commander's Inquiry. I am also convinced that he used another employee's CAC and PIN to take a test for him. Finally, he has been dishonest for years, including at his hearing. Applicant's conduct casts doubt on his current reliability, trustworthiness, and good judgment. Personal conduct security concerns are not mitigated under any of the mitigating conditions. [Decision at 10.]

Discussion

Applicant challenges three aspects of the Judge's decision. First, Applicant appears to argue that the Judge erred in considering the command investigation of 2010, as it was purged from his personnel record as part of the settlement agreement. At hearing, however, Applicant's counsel voiced no objection to the admission of the document. Tr. at 9. Having failed to object to the admissibility of the investigative report at the hearing, Applicant cannot now complain that the document was admitted into evidence and considered by the Administrative Judge. *See, e.g.*, ISCR Case No. 98-0123 at 2 (Oct. 28, 1998). Moreover, even had counsel objected, the report is admissible both as an official record under Directive ¶ E3.1.20 and as a public record under Federal Rule of Evidence 803(8). To the extent that Applicant is also arguing that the Judge gave this investigative report undue weight, we find no basis in the record to support this assertion. *See, e.g.*, ISCR Case No. 06-06496 at 4 (App. Bd. Jun. 25, 2009). The arguments regarding the 2010 command inquiry are without merit.

Second, Applicant revisits an SOR allegation that he falsified his security clearance application. However, the Judge found favorably for Applicant on the falsification allegation, and it is not a matter before the Appeal Board.

Third, Applicant argues that the Judge mis-weighed the evidence on the Guideline M allegation that he took an online exam on behalf of another employee. The Judge's decision in this regard was based in large part on his determination that Applicant's testimony was not credible, and we defer to that credibility determination. Directive ¶ E3.1.32.1. None of Applicant's arguments are sufficient to rebut the presumption that the Judge considered all of the evidence in the record or 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).

Applicant failed to establish that 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 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: Jennifer I. Goldstein
Jennifer I. Goldstein
Administrative Judge
Member, Appeal Board

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

Signed: Allison Marie
Allison Marie
Administrative Judge
Member, Appeal Board