DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
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Date: February 8, 2024

In the matter of:	)	
	)	
-----	)	ISCR Case No. 21-00528
	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Julie R. Mendez, Esq., Chief Department Counsel

FOR APPLICANT
Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On January 18, 2023, DoD issued a Statement of Reasons (SOR) advising Applicant of the basis of that decision – security concerns raised under Guideline M (Use of Information Technology), Guideline K (Handing Protected Information), and Guideline E (Personal Conduct) of the National Security Adjudicative Guidelines (AG) in Appendix A of Security Executive Agent Directive 4 (effective June 8, 2017) and DoD Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). On November 15, 2023, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Pamela C. Benson denied Applicant's security clearance eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Judge's Findings of Fact and Analysis

Applicant is in his early 50s and served in the military from 1990 until his honorable discharge in 2011. He has an extensive background in information technology (IT), including earning a master's degree in IT management in 2007 and receiving various other certifications. In 2014, Applicant was hired by a government contractor as an operations manager, for which he

held a DoD security clearance and one of his responsibilities was to ensure that the company's IT operations ran smoothly. The SOR alleged concerns stemming from this employment, and the Judge found against Applicant on the following alleged conduct.

Under Guidelines M, K, and E, the SOR cross-alleged three concerns, including that Applicant obtained and utilized access to his employer's network drives, which contained corporate sensitive information and the co-owner's personal information, and that he did so without the chief executive officer's (CEO) approval (SOR ¶ 1.a). Additionally, without being tasked to do so, Applicant gave an outside vendor and personal acquaintance access to his employer's network and allowed the vendor to install hardware and software devices on the network without prior approval and without first obtaining a nondisclosure agreement (SOR ¶ 1.b). Finally, in about January 2015, Applicant downloaded his employer's propriety company information, sensitive personal information regarding the company's owners, and project data related to one or more government contracts. Later that same month, he saved approximately seven gigabytes of data to a personal Dropbox account and then deleted evidence of the activity from his work laptop (SOR ¶ 1.c).

Under Guidelines M and E, the SOR cross-alleged five other IT-related concerns (SOR ¶¶ 1.d-1.h), including that Applicant: disabled or failed to run virus protection on his work laptop, resulting in malware virus infestation of his local profile; and, in violation of his employer's policies, used his work laptop to download or access pornographic material, disabled or tampered with "HP Protect" security software on his laptop, created multiple user names and passwords without IT or CEO permission, and installed unauthorized software on his company laptop.

Noting the deference afforded to a company's findings and conclusions in its security investigations, and thereby relying heavily on the employer's investigative report, the Judge found seven Guideline M and K disqualifying conditions applicable[1] because "Applicant had access to network drives and data that he was not authorized to have access to, he downloaded thousands of electronic files, to include proprietary information files, from his former employer's network without authorization, saving it to a personal Dropbox, and then deleting evidence of this activity, and he installed and used software on his work laptop without authorization." Decision at 10, 11 (citing ISCR Case No. 15-08385 at 4 (App. Bd. May 23, 2018)).

Applying four Guideline E disqualifying conditions,[2] the Judge also found that Applicant's "demeanor and testimony lacked credibility," that "the inconsistencies between his testimony and the other evidence in the record further undermined his credibility," and that his "behavior could affect his personal, professional, and community standing." Decision at 14. The Judge concluded that, despite the passage of time, Applicant failed to mitigate the security concerns raised by his conduct, which included serious security infractions and a lack of remorse.

[1] AG ¶¶ 34(b), 34(c), 34(g), 40(c), 40(d), 40(e), and 40(f).

[2] AG ¶¶ 16(c), 16(d), 16(e), and 16(f).

Discussion

On appeal, Applicant reiterates his objection to a Government witness, challenges the Judge's factual findings, and argues that the Judge failed to properly consider his favorable character evidence and the Whole-Person Concept. For the reasons stated below, we affirm the Judge's decision.

Challenge to Government's Witness

During his security clearance hearing, Applicant raised a concern about the Government's witness ("Mr. Z"), who worked as a subcontractor for Applicant's employer during the time of the events alleged in the SOR. Tr. at 18-19. In response to his concerns, the Judge confirmed that Applicant would have the opportunity to cross-examine Mr. Z, at which time he could address the witness's credibility. *Id*. at 19. On appeal, Applicant renews his challenge to Mr. Z's testimony on the basis that "he was not an employee, worked (moonlighted) for a significant competitor, posed a Conflict of Interest on multiple awarded and proposed contracts and business development opportunities and was regularly negligent in his duties as cited by multiple employees during [Applicant's] tenure." Appeal Brief at 1.

The DOHA process encourages judges to err on the side of initially admitting evidence into the record, and then to consider a party's objections when deciding what, if any, weight to give to that evidence. *See* ISCR Case 07-07635 at 2 (App. Bd. Aug. 22, 2008). We find no error in the Judge's decision to allow Mr. Z's testimony, subject to Applicant's ability to cross-examine him, and subsequently determine what weight should be afforded that evidence.

To that end, it is well-established that "[d]etermining the weight and credibility of the evidence is the special province of the trier of fact." *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 856 (1982). While the Judge had to consider Applicant's testimony and explanation for the concerns alleged in the SOR, she was not bound by it. Indeed, it would be arbitrary and capricious to uncritically accept witness testimony without considering whether it is plausible and consistent with other evidence. *See* ISCR Case No. 01-07292 at 4 (App. Bd. Jan. 29, 2004) (citation omitted). Rather, a judge must weigh the evidence and resolve conflicts based upon a careful evaluation of factors such as the evidence's "comparative reliability, plausibility and ultimate truthfulness." ISCR Case No. 05-06723 at 4 (App. Bd. Nov. 14, 2007).

At hearing, Applicant cross-examined Mr. Z about the dates and method of Applicant's having system administrator access and the propriety of Applicant formatting his hard drive and using Dropbox to copy files. *See* Tr. at 131-140. He declined, however, to question Mr. Z about most of the concerns raised at hearing and on appeal, including Mr. Z's alleged work for a competitor, conflicts of interest, and negligence. While Applicant attempted to impeach Mr. Z's knowledge of company operations and the propriety of Applicant's actions by highlighting that Mr. Z did not work on-site and was not part of the company's daily operations, Mr. Z consistently responded to Applicant's questions with the basis of his knowledge:

> MR. Z: And who allowed you to use Dropbox? Who had knowledge of this? I didn't.
>
> APPLICANT: Well, you're not an onsite person, number one. You're also not an employee of the company, number two. So, the fact that you didn't know is not abnormal to me. You're not an employee of [the company]. How would you know that?
>
> MR. Z: Because I manage all the rights, and permissions, and access for the data on the network. You would, you had accounts in Sharepoint. You had accounts for the VPN to use to access data. So of course I knew.
>
> APPLICANT: Yes, but you aren't part of the daily operations of [the company], and you don't know what we talked about. You're only asserting these things because of your professional opinion, which I don't doubt. But normal operating policy and discussions between ownership and me, as the operations manager, you had no idea about. So, whether I was using Dropbox with their consent or not, you really don't know that.
>
> MR. Z: Well, we know it was without their consent because the company policy was not to use Dropbox, especially for government data. It was to use the two access methods we gave. That's clear.

Id. at 137-138. Here, when weighed against Mr. Z's testimony, the company's investigation report, and Applicant's inconsistent explanations, the Judge reasonably found Applicant's testimony less credible. We find no reason not to give deference to the Judge's weighing of this evidence.

Challenge to Factual Findings

Applicant next challenges the Judge's finding that he retired from the military in 2011 at the rank of staff sergeant, averring instead that he "retired as a Captain, unrestricted officer." Appeal Brief at 2. Our review of the record reflects that Applicant achieved a final enlisted rank of staff sergeant in 1998 before being commissioned, but that he had achieved the rank of captain at the time of his 2011 military retirement. *See* Tr. at 12; Government Exhibit (GE) 1 at 18. While the Judge's finding about Applicant's rank upon retirement is incorrect, the error was harmless because it did not likely affect the outcome of the case. *See, e.g.*, ISCR Case No. 10-01846 at 3 (App. Bd. Sep. 13, 2011).

Challenge to Weighing of Evidence

The remainder of Applicant's challenges to the Judge's findings generally advocate for an alternative weighing of the evidence, which is not enough to show that the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See*,

e.g., ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007). For example, Applicant argues that Mr. Z testified falsely that he did not grant Applicant system administrator access. Applicant contends that his system administrator access was "approved by [his] supervisor and CEO . . . and performed by [Mr. Z]." Appeal Brief at 4.

During cross-examination, Applicant asked Mr. Z several times to confirm when Applicant was granted system administrator access. *See, e.g.*, Tr. at 131-132.[3] In response, Mr. Z consistently explained that, to his knowledge, Applicant was never directly granted system administrator access, but instead only had access to a temporary user account that was established to enable a vendor's work. Specifically, Mr. Z responded to Applicant's questions by stating:

> You had access via that temporary account that was only to be used by [the vendor], to collect network data from the network, correct? . . . I never assigned you system administrator access. Only via the temporary account did you have access. Not assigned. You were not assigned any privileges for administrator on the network. . . . You had access to an account that had domain admin rights, but they weren't assigned to you.

Tr. at 134. Mr. Z's testimony is consistent with other record evidence that reflects that Applicant planned to work with a vendor to conduct an audit of the company's IT services, for which he would provide the vendor with network administrator rights. In May 2014, based on this request, Applicant was told that the company would "create a new temporary account with domain admin rights," and he was provided the temporary account's domain information and password. GE 4 at 44-46. In August 2014, months after the vendor's project was complete and while still having access, Applicant commented to the security manager that he possessed all of the company's data. GE 5 at 2. Applicant continued to have access to the temporary account until late September 2014, when another employee realized the extent of Applicant's access and notified the company's security manager, who immediately sought to have Applicant removed from any administrative access. GE 4 at 11; Tr. at 105-106.

Additionally, the Judge found that, in response to the SOR, Applicant adamantly denied ever having system administrator access, which would have prevented him from doing some of the activities alleged in the SOR. At hearing, however, he testified that he emailed the company's co-owner, copying the CEO, to request system administrator access, which was granted in about June 2014 in order to perform a network assessment. He admitted that the access gave him admittance to the owners' personal information and any company proprietary information that was saved on any of the network drives, but denied the SOR allegation because he did not use or take any proprietary or sensitive information.

[3] Applicant appears to contend that being given the passwords to access a temporary user account with system administrator rights is the same as being granted system administrator rights directly. Regardless of Applicant's splitting of hairs, however, the record supports that said access was afforded for a limited purpose and a limited timeframe, both of which Applicant knowingly exceeded.

The Judge weighed Applicant's various explanations – which she found to be inconsistent and ultimately detracted from his credibility – against other record evidence regarding Applicant's system administrator access and reasonably concluded that "Applicant had access to network drives and data that he was not authorized to have access to." Decision at 10. This and the remainder of Applicant's challenges to the Judge's findings fail to establish any harmful error. The Judge's material findings of security concern are "based upon substantial evidence or constitute reasonable inferences or conclusions that could be drawn from the evidence," and Applicant has cited to no harmful error in the Judge's findings. ISCR Case No. 12-03420 at 3 (App. Bd. Jul. 25, 2014).

Challenge to Applicant's Witness Testimony and Charge of Bias

Applicant also argues that the Judge was provided a biased and one-sided case file and contends that his witness ("Mr. P") "was not asked any questions or allowed to address any of the accusations presented in this hearing," despite purportedly having a similar experience departing from the company. Appeal Brief at 5. As an initial matter, Applicant's claim that Mr. P was not "allowed" to address any of the accusations is baseless. At no point during the hearing did the Judge limit the scope of Mr. P's testimony. Rather, the transcript reflects that Applicant introduced his witness by noting that "his time at [the company] and the ending of it is coincidentally very similar. Same allegations, same problems, same all of that stuff. . . . I think his opinion is extremely important here." Tr. at 79. Applicant thereafter asked Mr. P to address several topics, which he did, including Mr. P's experience exiting the company. *Id*. at 81, 87. Throughout the witness's testimony, the Judge engaged in follow-up questions before turning the questioning back over to Applicant. When afforded an opportunity to ask Mr. P any final questions, Applicant asserted that he had none. *Id*. at 89. The record reflects that Applicant's witness was permitted to fully testify to the extent sought by Applicant.

Applicant also contends that "this process does not allow testimony . . . from other witnesses," which "demonstrates a lack of evidence and confidence in this case." Appeal Brief at 6. Contrary to this assertion, witnesses may be presented by either party in security clearance hearings. Directive ¶¶ E3.1.14, E3.1.15. To the extent that Applicant is arguing that the Judge and Government failed to call additional specific witnesses on Applicant's behalf or to sufficiently question Applicant's witness, this challenge is without merit. Once the Government has met its burden of establishing controverted facts, the burden shifts to the applicant to present witnesses and other evidence to rebut, explain, extenuate, or mitigate established facts. *Id*. It is neither the judge's nor the Government's duty to seek additional mitigating evidence or undertake further investigation of the concerns raised in an SOR. *See* ISCR Case No. 15-08885 at 2-3 (App. Bd. Jun. 21, 2017). Rather, the applicant bears the ultimate burden of persuasion as to obtaining a favorable clearance decision. Directive ¶ E3.1.15. The record in this case does not support that Applicant was prevented from offering favorable evidence from any individual, either through live testimony or reference letters.

Finally, Applicant contends that the Government's decision to not interview, call, or question his "actual supervisor" is indicative of bias on the part of the Judge, Government counsel, and the CEO "to hide the truth and present a story that is one-sided." Appeal Brief at 4-5.

Applicant's claim that the Judge evinced bias against him appears entirely based on the foregoing, unsubstantiated allegations that Applicant's ability to develop favorable record evidence was impeded. An appealing party has a heavy burden of demonstrating conduct by a judge that deprived the hearing or decision of fairness and impartiality. *See, e.g.*, ISCR Case No. 94-0282, 1995 WL 272062 at *3 (App. Bd. Feb. 21, 1995) (citations omitted). For the reasons discussed above, we find nothing in the record to support that the Judge impeded Applicant's ability to develop his case through witness testimony or that would likely persuade a reasonable person that the Judge was lacking in the requisite impartiality.

In conclusion, Applicant has not established that the Judge committed harmful error. Our review of the record reflects that the Judge examined the relevant evidence and articulated a satisfactory explanation for the decision, which 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). "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." AG ¶ 2(b).

Order

The decision is **AFFIRMED**.

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

Signed: Gregg A. Cervi
Gregg A. Cervi
Administrative Judge
Member, Appeal Board

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