



DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
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Date: August 21, 2024

In the matter of:)	
)	
-----)	ISCR Case No. 22-01946
)	
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 December 19, 2022, DoD issued a Statement of Reasons (SOR) advising Applicant of the basis of that decision – security concerns raised under Guideline E (Personal Conduct), Guideline D (Sexual Behavior), Guideline F (Financial Considerations), and Guideline M (Use of Information Technology) 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 July 8, 2024, after a hearing, Defense Office of Hearings and Appeals Administrative Judge Robert Tuider denied Applicant’s security clearance eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

The SOR alleged under Guideline E that Applicant was terminated for misconduct in violation of company policies regarding: (1) timesheet accounting, (2) employee misconduct and disciplinary action, (3) information technology acceptable use policy, and (4) company standards of ethics and business conduct; and under Guideline D for using his company computer to view pornographic images on a recurring basis between March 2021 and April 2021. Both allegations were cross-alleged under Guideline M. In addition, under Guideline F, Applicant is alleged to have mischarged approximately 15.5 hours of time to a direct program that he did not work based on

recurring inappropriate use of his company computer during working hours between March 2021 and April 2021. In Applicant's SOR response, he admitted the personal conduct (Guideline E) and misuse of information technology allegation (Guideline M) with explanations and denied the remaining allegations. The Judge found against Applicant on all of the SOR allegations. Consistent with the following, we affirm.

Judge's Findings of Fact and Analysis

Applicant is in his mid-60s, employed by a defense contractor. He has a bachelor's and a master's degree. He served honorably in the U.S. Navy from 1980 to 1991, and in the Navy Reserve from 1991 until retiring in 2010 as a Captain (pay grade O-6). The conduct that gave rise to the SOR occurred during Applicant's employment with a defense contractor and resulted in his involuntary termination in May 2021.

Applicant's employer found that he used his company computer to view pornographic images in his workspace on a recurring basis between March and April 2021, in violation of company policy. Applicant mischarged approximately 15.5 hours of time to a direct program that was not actually worked because of recurrent access to pornographic websites during working hours, in violation of company timesheet accounting policies. Applicant's excuse for this misconduct is that he intended to flag the lack of IT support and the improper blocking of military websites he needed for his work. Applicant's claim that he completed his work assignments while the open pornographic sites were "minimized" was found not credible. Applicant continued to engage in this inappropriate behavior until he was caught. The Judge found that this recurring and repeated searching and accessing of pornographic sites, in and of itself, raise serious concerns about Applicant's judgment, and showed his failure to take accountability for his actions.

In his whole-person assessment, the Judge acknowledged Applicant's successes, accomplishments, and positive character evidence, but stated:

When evaluating this case, two things come to mind. Either Applicant is telling the truth and exercised a severe lack of judgment over an extended period of time by accessing pornographic sites during a two-month period to get the attention of and demonstrate to his company's IT department that his company had a problem with their firewalls. Alternatively, Applicant is lying about intentionally accessing pornographic sites during work hours on his company-issued computer and caused his company to bill clients for the time when he was accessing these sites. In either case, he did so in clear violation of company policy. Applicant failed to provide proof that he notified his supervisor or IT personnel that he was experiencing these firewall problems that he claims inhibited his ability to complete his job assignments. The record evidence and objective assessment of his credibility establish that [Applicant] lied when he provided a false narrative about his reasons for going to pornographic sites during the duty day. His false statements and attempted justifications at his hearing show a lack a rehabilitation and weigh against continuing his national security eligibility for access to classified information. [Decision at 14-15.]

Discussion

There is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government produces evidence raising security concerns, an applicant bears the burden of persuasion concerning mitigation. *See* Directive ¶ E3.1.15. The standard applicable in security clearance decisions “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.” Directive, Encl 2, App. A ¶ 2(b).

In deciding whether the Judge’s rulings or conclusions are erroneous, we will review the Judge’s decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *E.g.*, ISCR Case No. 14-02563 at 3-4 (App. Bd. Aug. 28, 2015).

On appeal, Applicant does not challenge the Judge’s decision so much as he challenges the fact that the SOR was issued without consideration of his education, background, performance, and responsibilities. He further contests that the SOR was issued without considering the underlying facts surrounding his admitted sexual conduct and argues that the allegations resulting from his conduct were not based in fact. These contentions misconstrue the nature of an SOR. The issuance of an SOR simply is a step along the continuum of a security clearance adjudication and in and of itself, does not constitute or effectuate an adverse adjudicative determination. The administrative process set forth in the Directive provides applicant with the opportunity to address those allegations, which he did. *See* Directive, Enclosure 3. The fact that allegations in an SOR ultimately are found for or against an applicant does not impugn the issuance of the SOR.

Alternatively, Applicant’s somewhat circuitous arguments may be interpreted as alleging that the Judge’s findings of fact are not supported by record evidence and that the Judge similarly overlooked his education and background. However, Applicant has not pointed to any findings of fact that were unsupported by the evidence or any failure of the Judge to consider particular evidence in mitigation. Rather, Applicant appears to be rearguing his case in mitigation, including his version of the facts in the same manner as was addressed at the hearing.

We have long held that a disagreement with or an ability to argue for a different interpretation of the evidence is not sufficient to demonstrate that the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *E.g.*, ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007). Concerning the factual assertions made on appeal that are already part of the record, the Directive does not empower the Board to weigh the record evidence *de novo* and make its own findings and conclusions about the case. Rather, the Board addresses the material issues raised by the parties to determine whether the Judge has made factual or legal error. Likewise, with regard to Applicant’s disagreement with the issuance of the SOR, the Appeal Board has no jurisdiction or authority to supervise security clearance

investigations or pass judgment on the necessity or sufficiency of such investigations. *See, e.g.*, ISCR Case No. 01-19823 at 3 (App. Bd. Dec. 3, 2003).

To the extent that Applicant disagrees with the Judge's weighing of the evidence, none of his arguments are sufficient to establish the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. Here, despite Applicant's favorable character evidence, the Judge's conclusions that Applicant lied and falsely attempted to justify his actions are sufficiently supported by the record. In our analysis of the Judge's decision, we find that the Judge considered all aspects of the case and reasonably concluded that the disqualifying concerns were of such significance that they were not mitigated by Applicant's explanations.

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 in ISCR Case No. 22-01946 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: James B. Norman

James B. Norman
Administrative Judge
Member, Appeal Board