



Date: March 12, 2025

In the matter of:

Applicant for Security Clearance

ISCR Case No. 23-00525

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Andrea M. Corrales, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On May 30, 2023, DoD issued a Statement of Reasons (SOR) advising Applicant of the basis of that decision – security concerns raised under 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 January 30, 2025, Defense Office of Hearings and Appeals Administrative Judge Marc E. Curry denied Applicant security clearance eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Judge's Pertinent Findings of Fact and Analysis

Applicant is in his early 50s and has two adult children. He has worked for various defense contractors during his career as a network engineer, for which his duties include protecting data security. Applicant has held a security clearance since 2001 and is currently employed as a senior network engineer and information security systems officer.

In 2018, Applicant's then-contract employer was replaced by another contract employer, and he remained working at the same facility and continued to use the same computer after the change. During a network migration pursuant to the change in contractors, Applicant was notified that content was being diverted from his computer to servers in the People's Republic of China through a web browser developed by a Chinese company, which Applicant had installed on his work computer without authorization. Following an investigation into the matter, Applicant was terminated from the employment in June 2018. Under Guideline M, the SOR alleged the foregoing conduct and termination.

Applicant admitted installing the browser on his computer while working with his previous contract employer and explained that nothing derogatory was ever flagged. At hearing, in response to why he used this relatively obscure unauthorized browser owned by a Chinese company instead of an employer-approved mainstream browser, Applicant pointed to personal preferences that provided minor convenience. He provided no other reason for using the unauthorized browser. In 2022, Applicant was re-hired by the company that terminated him in 2018.

In his mitigation analysis, the Judge considered the applicability of AG ¶ 41(a)¹, noting favorably the lack of evidence that Applicant had ever misused information technology before the SOR-alleged conduct or since, that the employer that fired him in 2018 rehired him in 2022, and that he is highly respected at his current job. The Judge concluded, however, that "[t]he nature and seriousness of Applicant's misuse of information technology was amplified by the fact that his job involved data security protection," which ultimately outweighed the conduct's "isolated nature and the passage of time that has elapsed since the misuse of information technology." Decision at 6.²

Discussion

A judge's decision can be arbitrary or capricious if: "it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts 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." ISCR Case No. 95-0600 at 4 (App. Bd. May 16, 1996) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

On appeal, Applicant contends that he "provided evidence to support a favorable ruling to keep [his] clearance" at hearing, but also expresses regret for not having explained his continuous training and current responsibilities in more detail. Appeal Brief at 1. To the extent that Applicant is arguing that his evidence was sufficient to support mitigation and granting his eligibility, he is essentially disagreeing with the Judge's 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* ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

¹ AG ¶ 41(a): so much time has elapsed since the behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

² Under Guideline F, the SOR also alleged various delinquent federal and state tax obligations and a delinquent consumer account. The Judge found favorably on all Guideline F allegations, which are not subject to this appeal.

There is no bright-line rule for what constitutes a sufficient period of without recurrence of past misconduct to demonstrate reform and rehabilitation, and such a determination requires reasoned analysis of the facts and circumstances of an applicant's case based on a careful evaluation of the totality of the record. *See* ISCR Case No. 02-08032 at 4 (App. Bd. May 14, 2004). When the record reflects a significant period without subsequent misconduct, the judge must articulate a rational basis for concluding why that period is insufficient to warrant a finding of reform or rehabilitation. *Id.*

During the hearing, the Judge distinguished between unauthorized installation and use by someone with minimal IT experience and a seasoned IT professional with at least 18 years of experience, such as Applicant. This distinction is reflected in the Judge's analysis and weighed in the severity ultimately assigned to Applicant's conduct, as was the fact that Applicant's conduct not only *could have* resulted in a security breach, but actually *did*. Considering those factors together, the Judge concluded that the intervening six and a half years without similar incident was insufficient to find reform or rehabilitation. We find that this analysis reflects a rational basis for concluding that the passage of time was insufficient to mitigate the security concern and that the Judge's determination that AG ¶ 41(a) did not apply is sustainable.

To the extent that Applicant is suggesting that he was unaware of his responsibility to present mitigating evidence regarding the Guideline M concern, this also does not establish error. In DOHA proceedings, it is the applicant's duty to present evidence sufficient to mitigate the concerns established by the Government, and the applicant bears the ultimate burden of persuasion for obtaining a favorable clearance decision. Directive ¶ E3.1.15. It is neither the judge's nor the Government's duty to seek additional mitigating evidence or to undertake further investigation of the concerns raised in an SOR. *See* ISCR Case No. 15-08885 at 2-3 (App. Bd. Jun. 21, 2017). All applicants, including those that are *pro se*, are expected to take timely and reasonable steps to protect their rights under the Directive. *See* ISCR Case No. 00-0086 at 2 (App. Bd. Dec. 13, 2000).

The remainder of Applicant's appeal reiterates his explanation for the 2018 incident and requests reconsideration of the decision. Applicant also provides new evidence in the form of two professional certificates of appreciation and two letters of recommendation. The Appeal Board does not review cases *de novo* and is prohibited from considering new evidence on appeal. Directive ¶ E3.1.29.

Conclusion

Applicant has not established that the Judge committed harmful error. Our review of the record reflects that the Judge examined the relevant evidence, weighed the disqualifying and mitigating evidence, and articulated a satisfactory explanation for the decision. The record is sufficient to support that the Judge's findings and conclusions are sustainable. "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. 23-00525 is **AFFIRMED**.

Signed: Moira Modzelewski

Moira Modzelewski
Administrative Judge
Chair, Appeal Board

Signed: James B. Norman

James B. Norman
Administrative Judge
Member, Appeal Board

Signed: Allison Marie

Allison Marie
Administrative Judge
Member, Appeal Board