Date: February 21, 2023

In the matter of:	)	
	)	
-----	)	ISCR Case No. 19-03939
	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Troy L. Nussbaum, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 15, 2020, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct) of DoD Directive 5220.6 (January 2, 1992, as amended) (Directive). Applicant requested a hearing. On December 7, 2022, after the record closed, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Mark Harvey denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30. For reasons stated below, we affirm the decision.

The SOR alleged that Applicant falsified three security clearance application (SCA) responses, including one in his 2004 SCA and two in his 2014 SCA. The Judge found against Applicant on all three allegations. In his appeal brief, Applicant contends that the Judge's decision is arbitrary, capricious, and contrary to law. For the reasons stated below, we affirm the Judge's decision.

In his analysis, the Judge stated:

> In 1996, Applicant was charged with a felony-level cocaine possession with intent to distribute, and the charge was reduced to misdemeanor-level cocaine possession. He received drug treatment in 1997 for about three months. [After successfully completing probation before judgment, t]he cocaine possession charge was dismissed, and his arrest was expunged in 2000.
>
> Applicant's 2004 and 2014 SCAs asked clear and easily understood questions about Applicant's record of charges, and his 2014 SCA asked a clear and easily understood question about drug treatment. Applicant has a bachelor's degree, and his character evidence establishes that [he] is exceptionally intelligent. He understood the information the government sought. He was required to disclose any felony charges on his 2004 and 2014 SCAs, and his drug treatment on his 2014 SCA. He failed to disclose the cocaine-related charge on his 2004 and 2014 SCAs, and he failed to disclose his drug treatment on his 2014 SCA. [Decision at 8.]

In 2016 and 2020 SCAs, Applicant disclosed the cocaine-related charge and drug treatment. Government Exhibits (GE) 1 and Applicant's Exhibit (AE) B.

Drug Treatment Allegation

Applicant attributed his failure to disclose his drug treatment on his 2014 SCA to being rushed to complete it and to not reading thoroughly the specific question at issue. He claimed that the omission was an unintentional mistake. The Judge did not find this claim credible. In making the state-of-mind determination, the Judge noted that the entire record should be examined and that circumstantial evidence could be considered. The Judge concluded, "[Applicant] should have been sensitive to the issue of his cocaine involvement because of his arrest, prosecution, probation, drug treatment, and effort to have the incident expunged. A reasonable inference is that he realized that disclosure of his drug treatment may have led to follow-up questions during his [background investigation] about his involvement with illegal drugs." Decision at 10. The Judge further concluded that Applicant's failure to admit that he committed this falsification established an unwillingness to accept responsibility and detracted from a favorable reform or rehabilitation determination.

Applicant argues that the Judge's analysis was defective. He contends that the Judge erred in the credibility determination and state-of-mind evaluation. We do not find these arguments persuasive. The Appeal Board is required to give deference to a judge's credibility determinations. Directive ¶ E3.1.32.1. We find no reason not to give such deference in this case. Furthermore, we find no error either in the Judge's analysis regarding this allegation or in his conclusion that Applicant continued denial of committing this falsification shows a lack of rehabilitation. *See, e.g.,* ISCR Case No. 03-22819 at 4 (App. Bd. Mar. 20, 2006), reversing grant of a security clearance where the judge concluded that the applicant falsified her SCA—despite the applicant's testimony at hearing that the omission was unintentional—but ultimately found that the security concern resulting from the falsification was mitigated.

Cocaine Charge Allegations

Applicant attributed his failure to disclose the cocaine-related charge on his 2004 and 2014 SCAs to his then-attorney verbally advising him "if he was asked on a job application about being charged, he 'could truthfully answer no, that it never happened.'" Decision at 3, citing Tr. at 34-35. In concluding that Mitigating Condition (MC) 17(b) did not apply, the Judge stated that "Applicant admitted that his counsel's advice was not '**specifically concerning the security processes**.'" Decision at 9 (emphasis in original). On appeal, Applicant argues the Judge erred in his narrow interpretation of MC 17(b) which states:

> (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully[.] [Directive, Encl. 2, App. A ¶ 17(b).]

Applicant contends that the phrase "specifically concerning security processes" does not qualify the advice of legal counsel, but rather is meant only to identify the persons in the latter category, *i.e.*, security professionals. We agree with Applicant's interpretation and find that the Judge erred in concluding that MC 17(b) only applied to an attorney's advice that specifically concerns security processes. For the following reasons, however, we conclude that the Judge's error was harmless in this case. *See, e.g.*, ISCR Case No. 11-15184 at 3 (App. Bd. Jul. 25, 2013) (an error is harmless if it does not likely affect the outcome of the case).

In falsification cases, the key issue is usually whether the omission of required information on an SCA was deliberate. *See, e.g.*, ISCR Case No. 21-01570 at 2 (App. Bd. Dec. 12, 2022) ("In order to prove a deliberate SCA omission, an applicant must have understood the question at issue and must have knowingly failed to disclose requested information."). In evaluating whether the Government has presented substantial evidence regarding the deliberate nature of a false statement or an omission, the administrative judge "must examine the statement or omission in light of the record as a whole." ISCR Case No. 07-03307 at 5 (App. Bd. Sep. 26, 2008). When an applicant claims that the omission was not deliberate, "the Judge should address explicitly any contrary evidence in the record." *Id.*

Although he misstates the parameters of MC 17(b), the Judge's analysis reflects that he properly considered the mitigating condition before concluding that it did not apply. The Judge addressed Applicant's testimony that he relied upon the advice of an attorney when he omitted information about his cocaine arrest from his 2004 and 2014 SCAs. The Judge concluded, however, that Applicant's purported reliance on that advice was unreasonable considering that "Applicant's 2004 and 2014 SCAs asked clear and easily understood questions about Applicant's record of charges," and that "Applicant has a bachelor's degree, and his character evidence establishes that [he] is exceptionally intelligent." Decision at 8. *See, e.g.*, ISCR Case No. 18-01564 at 3 (App. Bd. May 30, 2019) (evidence regarding an applicant's level of education and the clarity of the questions at issue supported the judge's finding that the applicant deliberately falsified his SCA). Based on those factors, the Judge concluded that Applicant understood that he was required

to disclose the drug charge on his SCAs. Decision at 8. The Judge's finding regarding Applicant's state of mind and falsification of the cocaine charge is supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." ISCR Case No. 17-02145 at 3 (App. Bd. Sep. 10, 2018).

Furthermore, the Judge's misstatement of MC 17(b) is also harmless because Applicant's falsification regarding his drug treatment was a sufficient basis independently to support the revocation of his security clearance eligibility.

Weighing of the Evidence

Applicant contends that the Judge mis-weighed the evidence. For example, he argues that, had the Judge correctly evaluated all the evidence, he would have found Applicant's explanation credible and determined that Applicant's omissions were mitigated because he later made prompt, good-faith disclosures before being confronted with the omissions and because of the passage of time and unlikeness of recurrence. Furthermore, he asserts that the Judge failed to draw any conclusion regarding Applicant's state of mind. We do not find these arguments persuasive. Regarding that latter argument, the Judge specifically found that Disqualifying Condition 16(a), "*deliberate omission . . . of relevant facts from any personnel security questionnaire . . . used to . . . determine national security eligibility*" applied. Decision at 7. *See also* Directive, Encl. 2, App. A ¶ 16(a). In general, none of Applicant's arguments are sufficient to rebut the presumption that the Judge considered all of the evidence in the record or to demonstrate that the Judge weighed the evidence in a matter that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 21-01169 at 5 (App. Bd. May 13, 2022).

Conclusion

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 the record. "The general standard is that a clearance may be granted only when 'clearly consistent with 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 national security."

Order

The decision is **AFFIRMED**.

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Chairperson, Appeal Board

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

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