Date: June 15, 2023

In the matter of:	)	
-----	)	ISCR Case No. 19-02790
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

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

FOR APPLICANT
Ryan C. Nerney, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On July 24, 2020, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline K (Handling Protected Information), Guideline E (Personal Conduct), Guideline B (Foreign Influence), and Guideline F (Financial Considerations) 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). The Government subsequently amended the SOR to withdraw all allegations under Guideline K and Guideline F and one allegation under Guideline B and to add eight Guideline E allegations. Applicant requested a hearing. On April 6, 2023, after close of the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge LeRoy F. Foreman denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

As amended, the SOR alleged two security concerns under Guideline B and nine security concerns under Guideline E. The Judge found favorably for Applicant on the Guideline B allegations and on five of the Guideline E allegations. He found adversely to Applicant on four Guideline E allegations, all of which related to falsification of security clearance applications (SCAs). On appeal, Applicant raised the following issues: that the Judge misstated facts in his analysis and that he failed to consider all the evidence in mitigation, rendering his decision arbitrary and capricious. Consistent with the following, we affirm.

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

Applicant is in his mid-fifties. He attended college on an ROTC scholarship, was commissioned as an officer in the National Guard upon graduation in 1989, and was honorably discharged from the Guard in 1992 to enter active duty. He was on active duty until January 1999, when he was separated with a general discharge under honorable conditions. Applicant then served in the Reserve force from July 2000 to September 2002 and received an honorable discharge. In addition to his undergraduate degree, Applicant earned a master's degree in 1992 and a master's in business administration in 2001. Applicant first received a security clearance in 1992.

In November 1998, while Applicant was on active duty, he received nonjudicial punishment under Article 15, Uniform Code of Military Justice, for charges stemming from a July 1998 incident. The charges included violating a general order by being in an off-limits club and by engaging in private employment at the off-limits club, committing an indecent act with a female stripper, and ejecting the female stripper from his apartment while she was naked above the waist. Applicant's punishment included forfeitures of pay and restriction, and he was discharged with a general discharge under honorable conditions in January 1999.

Applicant's clearance was suspended in July 1998 while the above conduct was under investigation. In August 1999, following Applicant's discharge, an attorney acting on his behalf requested reinstatement of the clearance, and it was reinstated in May 2001.[1] When submitting SCAs in November 2007, August 2014, and December 2018, Applicant answered "No" to the question asking if he had ever had a security clearance suspended or revoked. Those three failures to disclose the suspension of his clearance are alleged as SOR ¶¶ 2.a, 2.f, and 2.g.

> At the hearing, Applicant testified: "I took the question as asking about operational suspension, and I did not remember any at the time. Because it happened between out-processing from one unit and in-processing into another unit, I did not consider it to be an operational suspension, and I forgot about it completely as a reportable event." [Decision at 4, quoting Tr. at 25.]

[1] The reinstatement request contains a letter from Applicant. Even though Applicant was awarded nonjudicial punishment for the July 1998 incident and then discharged from the military with a general discharge, Applicant states in that letter, "I am applying for reinstatement of my top-secret security clearance which was suspended July of 1998 while I was facing criminal charges. Those charges were found groundless and were dropped." Government Exhibit (GE) 7 at 5.

In January 2003, Applicant was charged with obstructing an officer, disorderly conduct involving drugs or alcohol, and disturbing the peace. In March 2003, he pled *nolo contendere* and was convicted. His sentence included a fine, restitution, and two years' probation. In his November 2007 SCA, Applicant answered "No" to the questions asking: "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?" and "In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in response to [other law-enforcement-related questions]?" His failure to disclose the 2003 charges and conviction on his 2007 SCA is alleged as SOR ¶ 2.e.

In November 2012, Applicant filed a petition seeking dismissal of the 2003 charges. In January 2013, the plea and finding of guilt were vacated and the charges were dismissed. At hearing, Applicant testified that his attorney advised him that a *nolo contendere* plea would result in the entire proceeding being expunged from his record, but he did not provide any documentation of his claim of erroneous advice.

The Judge's Analysis: The Judge's analysis is quoted in pertinent part below.

> The evidence establishes . . . SOR ¶ 2.e, alleging concealment of the fact that he was charged with an alcohol-related offense. While Applicant submitted evidence that his conviction was set aside, he offered no explanation for failing to disclose in his SCA that he had been charged with an alcohol-related offense. When he submitted the SCA in November 2007, he was a well-educated adult who had previously gone through the adjudication process in 1992. The questions in the SCA clearly asked whether he had been arrested, charged, or convicted of an alcohol-related offense. I conclude that his failure to disclose that he was charged with an alcohol-related offense was an intentional omission.
>
> The evidence establishes the falsifications alleged in SOR ¶¶ 2.a, 2.f, and 2.g. Applicant may not have known that his security clearance was suspended while his conduct in 1998 was being investigated, and falsification of this part of his 2007 SCA is not alleged. However, he knew that the suspension raised security issues when he submitted SCAs in August 2014 and December 2018, because he had hired a lawyer in August 2011 to seek reinstatement of his clearance. His quibbling about whether the suspense was an "operational suspension" is not persuasive. A security clearance investigation is not a forum for an applicant to split hairs or parse the truth narrowly.
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> . . .
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> The following mitigating conditions are relevant:
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> AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and
>
> AG ¶ 17(c): the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances

that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

AG ¶ 17(a) is not established. Applicant made no effort to correct his SCAs until confronted with the evidence.

AG ¶ 17(c) is established for the [underlying offenses/misconduct from 1998 and 2003], which are mitigated by the passage of time. It is not established for the falsifications alleged in ¶¶ 2.e, 2.f, and 2.g. They are not minor offenses, and they reflect a pattern of deception. An act of falsification has security significance independent of the underlying conduct. The mitigation of the underlying conduct has little bearing on the security significance of the falsification, particularly where there are multiple falsifications. Falsification of a security clearance application "strikes at the heart of the security clearance process." [Decision at 8–10.] (internal citations omitted)

Discussion

Jurisdiction

Before turning to the issues raised by Applicant on appeal, a jurisdictional issue merits mentioning. As a matter of necessity, a Hearing Office Judge and the Appeal Board have the authority to consider and resolve the threshold issue of whether there is subject matter jurisdiction to adjudicate a particular security clearance case under the Directive. *See, e.g.*, ISCR Case No. 02-24227 at 4 (App. Bd. Oct. 7, 2003) (citing *Barnett v. Brown*, 83 F.3d 1380, 1383 (Fed. Cir. 1996)). The lack of subject matter jurisdiction is a non-waivable issue. It can be raised by either party at any time during the proceeding and can be raised *sua sponte* by the Appeal Board even if neither party raises it. *Id.*

Under the Directive, DOHA generally has jurisdiction to make security clearance eligibility determinations in cases forwarded through proper channels that involve U.S. citizens who hold or require access to classified information in connection with their employment in the private sector. Directive ¶¶ 2.3 and 3.1. In this case, the Judge found that Applicant was employed by "another government agency" (Decision at 2), which raises the issue whether DOHA has jurisdiction to process this case under the Directive. Based on our review of the record, however, we conclude the Judge's finding is in error. The record sufficiently establishes that Applicant works for a defense contractor and that DOHA has jurisdiction to process this case. *See* Correspondence File.

Applicant's Assignments of Error

On appeal, Applicant has two primary arguments. The first is that the Judge made harmful factual errors in his analysis of the allegations related to Applicant's failure to disclose suspension of his clearance (SOR ¶¶ 2.a, 2.f, and 2.g). The second argument is a broader claim that the Judge failed to consider all the mitigation evidence. We turn first to the allegation of harmful error in the Judge's analysis section.

Factual Errors in Analysis

Applicant does not challenge the Judge's findings of fact regarding the suspension of his clearance and its reinstatement, that is, Applicant concurs in the Judge's findings that his clearance was suspended in July 1998, that an attorney acting on his behalf requested reinstatement in August 1999, and that the clearance was reinstated in May 2001. Appeal Brief at 7–8, 14. We note that the record firmly supports those uncontested dates. GE 7. Applicant highlights, however, that the Judge made a factual mistake with regard to those dates in his subsequent analysis section and argues that this was "clear harmful error" as the Judge "bases his entire analysis" on the erroneous dates. Appeal Brief at 14. This argument is of mixed merit. We agree that the Judge made factual errors in his analysis section but conclude that the errors are harmless.

Having found as fact that Applicant hired an attorney in August 1999 to seek reinstatement of his suspended clearance (Decision at 3), the Judge later conflated dates and stated that Applicant "hired a lawyer in August 2011 to seek reinstatement of his clearance." Decision at 8. Based on this erroneous date, the Judge stated that Applicant "knew that the suspension raised security issues when he submitted SCAs in August 2014 and December 2018," but "may not have known that his security clearance was suspended while his conduct in 1998 was being investigated." *Id*. Moreover, the Judge noted that "falsification of this part of his 2007 SCA is not alleged." *Id*. This analysis is factually incorrect in at least two regards. First, Applicant inarguably hired an attorney to seek reinstatement of his clearance in August 1999, not August 2011. Second, the falsification of his 2007 SCA regarding this matter is alleged (SOR ¶ 2.f). Indeed, the Judge found adversely to Applicant on this allegation in his formal findings.

Based on these errors, Applicant makes two arguments: first, that "the Judge's analysis of the facts completely clears" Applicant of his 2007 falsification (SOR ¶ 2.f), formal finding notwithstanding; and, second, that the Judge's "factual basis" for the 2014 and 2018 falsifications (SOR ¶¶ 2.g, 2.a) is "clearly erroneous" because "no Attorney was hired in 2011." Appeal Brief at 8. Applicant argues that these errors render the Judge's decision arbitrary, capricious, and he seeks reversal or remand. *Id*. at 11. We are not persuaded.

First, we concur that the Judge erred in his analysis by misstating dates that he earlier stated correctly in his findings of facts. We turn now to our determination of whether that error is harmful or harmless. In making that determination, we consider the identified errors in the context of the Judge's decision as a whole. *See, e.g.*, ISCR Case No. 00-0621 at 4 (App. Bd. Jan. 30, 2002). Upon review of the record and the Judge's decision in its entirety, we conclude the Judge's error regarding Applicant hiring an attorney in 2011 was a typographical error. Applicant's request to reinstate his security clearance contains a letter from his attorney that is dated August 11, 1999. GE 7. In drafting the decision, the Judge appears to have mistakenly shortened this date to "August 2011." An error of that nature was harmless. *See, e.g.*, ISCR Case No.00-0250 at 2 (App. Bd. Feb. 13, 2001).

We further conclude the Judge's erroneous finding that the SOR did not allege Applicant falsified his 2007 SCA by failing to disclose his prior security clearance suspension is "an unexplained anomaly" and "not an integral part of the Judge's analysis." ISCR Case No. 00-0104

at 3 (App. Bd. Mar. 21, 2001). The Judge's formal finding against Applicant on that falsification (SOR ¶ 2.f) is well-supported by his findings of fact and by those portions of the record to which he cites, which confirm that Applicant knew his clearance was suspended in 1998, that he acknowledged the same in correspondence seeking reinstatement in 1999, and that he hired an attorney in 1999 to aid in that endeavor. GE 7. Moreover, the Judge's adverse findings on the 2014 and 2018 falsifications (SOR ¶¶ 2.g, 2.a) are equally well-supported, as he properly relies upon Applicant's retention of counsel prior to submission of those SCAs to demonstrate *mens rea*. Contrary to Applicant's argument, the fact that he hired counsel in 1999 vice 2011 in no way undermines the Judge's analysis of these two allegations. Under the particular facts of this case, the anomaly highlighted by Applicant constitutes harmless error that does not warrant either remand or reversal as there is not a significant chance that, but for this error, the Judge would have reached a different result. *See, e.g.*, ISCR Case No. 00-0104 at 3–4.

Applicant cites to several other minor errors in the Judge's findings (*e.g.*, Applicant's contention that the woman whom he evicted topless from his apartment was not a "stripper," but instead a "college-aged individual"), but cites to no error in the Judge's findings that likely affected the outcome of the case. Appeal Brief at 16.

Misweighing the Evidence and Misapplying the Mitigating Conditions

In a broader argument, Applicant contends that the Judge failed to give appropriate weight to his evidence in mitigation and misapplied the mitigation conditions. For example, Applicant repeatedly highlights as mitigating evidence both his "faulty memory from his military service injuries" in Iraq in the 2003 to 2004 timeframe and the fact that he made an "unprompted" and "voluntary" disclosure of his clearance suspension in his second supplemental answer to the SOR, submitted in January 2022. Appeal Brief at 4, 5, 7, 12, 14, 16, 19.

Turning to the first assertion, the record does not support that Applicant was in military service in Iraq, but instead that he was a self-employed contractor and independent consultant for the oil industry. GE 2 at 18; GE 10 at 14; GE 3 at 30. Additionally, the record does not support that any alleged memory issues arose from that time period, but that they instead possibly arose from a stroke that may have occurred at any time during the last several decades. Applicant Exhibit (AE) X.

Turning to the second assertion, Applicant's disclosure in his second supplemental answer to the SOR appears not "unprompted," as it was made—by his own admission—after receipt of an SOR that alleged the same and after Applicant was confronted, via his FOIA request, with the Government's evidence that supported the allegation. GE 1 at 3; AE AA. Applicant further repeatedly asserts in his brief that he fully discussed his 2003 charges with an investigator during a 2008 interview. However, the results of that interview were not admitted into evidence. We find no reason to conclude that the Judge erred in his weighing the evidence that Applicant cites.

Putting aside the various issues with the "mitigating" evidence to which Applicant cites, these portions of Applicant's brief argue for an alternative interpretation of the record evidence, which is not sufficient to demonstrate the Judge's findings and conclusions are erroneous. Applicant has not rebutted the presumption that the Judge considered all the evidence in the record,

nor has he shown the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to the law. *See, e.g.*, ISCR Case No. 19-01400 at 2 (App. Bd. Jun. 3, 2020).

Applicant failed to establish the Judge committed any harmful errors. 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 national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). *See also*, AG ¶ 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: James F. Duffy
James F. Duffy
Administrative Judge
Chair, Appeal Board

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

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