KEYWORD: Guideline E; Guideline H

DIGEST: Applicant admitted with explanations each of the falsification allegations that the Judge found against him. After retiring from the military, Applicant used marijuana with friends on about seven occasions between 2009 and 2014. He purchased marijuana once in mid-2014. In submitting a security clearance application (SCA) in August 2014, he did not disclose his use or purchase of marijuana as required by questions. At that time, he also signed an acknowledgment that he understood a Federal agency's policy that illegal drug use was prohibited. In October 2014, Applicant submitted another SCA in which he again failed to disclose his use and purchase of marijuana. In November 2014, he again used marijuana. Adverse decision affirmed.

CASENO: 18-02181.a1

DATE: 08/19/2019

DATE: August 19, 2019

In Re:	)	
	)	
----------	)	ISCR Case No. 18-02181
	)	
	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

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

FOR APPLICANT
Danel A. Dufresne, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 9, 2018, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under Guideline H (Drug Involvement and Substance Abuse) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 7, 2019, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Braden M. Murphy denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant's Counsel raised the following issues on appeal: whether Applicant was denied due process because of the Judge's factual and legal errors and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. The Judge found in favor of Applicant on the Guideline H allegations and on three Guideline E allegations. Those favorable findings have not been raised as issues on appeal and are not discussed directly below. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant, who is 47 years old, has been working for his current employer since 2014. He retired from the U.S. Navy in 2009 and held a security clearance in the Navy. Since his retirement, he has periodically worked in Afghanistan supporting U.S. military forces.

Applicant admitted with explanations each of the falsification allegations that the Judge found against him. After retiring from the military, Applicant used marijuana with friends on about seven occasions between 2009 and 2014. He purchased marijuana once in mid-2014. In submitting a security clearance application (SCA) in August 2014, he did not disclose his use or purchase of marijuana as required by questions. At that time, he also signed an acknowledgment that he understood a Federal agency's policy that illegal drug use was prohibited. In October 2014, Applicant submitted another SCA in which he again failed to disclose his use and purchase of marijuana. In November 2014, he again used marijuana.

In a background interview in December 2014, Applicant initially denied any involvement with illegal drugs. Upon further questioning, he admitted using marijuana six or seven times between 2009 and 2014 and purchasing it once. Four days later, he underwent another interview in which he disclosed only two uses of marijuana and denied further drug involvement. Due to his drug involvement and false statements, a Federal agency denied him clearance eligibility in 2015. Following a hearing, the denial was upheld on appeal.

In 2016, Applicant submitted another SCA in which he disclosed his drug involvement. In a follow-on background interview, he stated that he did not disclose his marijuana use in the prior applications out of fear that it would impact his clearance eligibility. In addition to the above, the Judge made the following findings:

> In 2007, Applicant was a petty officer first class (E-6) and a leading petty officer (LPO) in charge of about 17 other sailors on his ship. In applying for chief petty officer (E-7), Applicant submitted documentation falsely representing that he had obtained certain qualifications necessary for promotion. On the documentation, he forged or falsified his senior chief petty officer's signature. He submitted the documentation to the very [same] senior chief whose signature he had forged, and she noticed the discrepancy right away. Applicant was charged under the Uniform Code of Military Justice (UCMJ) with making a false statement. He received non-judicial punishment (NJP) and was reduced in rank to E-5. He was allowed to remain in the Navy so he could retire after 20 years. . . . This incident is not alleged in the SOR. [Decision at 4-5.]

A former coworker attested to Applicant's honesty and integrity. Company executives praised Applicant's performance, noted he is remorseful for his misconduct, and recommended him for a security clearance.

The Judge's Analysis

Applicant deliberately failed to disclose his use and purchase of marijuana in two SCAs in 2014. He deliberately under-reported his drug use in a background interview in 2014. At that time, he knew his recent marijuana involvement might affect his clearance eligibility. Applicant's subsequent disclosure of his drug involvement in his 2016 SCA was not a prompt, good-faith effort to correct the falsifications before being confronted with the facts. His falsifications are not isolated or minor. Although they are several years old, they represent a pattern of poor judgment and lack of candor.

While Applicant's prior incident of falsification in the Navy cannot be considered as disqualifying conduct, it could be considered in assessing such matters as mitigation, changed circumstances, or rehabilitation. "Applicant's falsification in the Navy is now many years old, but, coupled with his falsifications on his 2014 SCAs and during his 2014 interview, it weighs heavily against mitigation." Decision at 11. None of the Guideline E mitigating conditions fully apply to the allegations for which the Judge found against Applicant.

Discussion

1. Department Counsel misled Applicant before the hearing

Applicant represented himself at the hearing below. On appeal, Applicant's Counsel contends that Applicant was denied due process because Department Counsel misled him prior to the hearing. His attorney argues that Department Counsel confronted Applicant shortly before the

hearing and asked him questions about his military service and an alleged employment incident.[1] His attorney asserts Department Counsel "engaged in forbidden ambush tactics by badgering Applicant minutes before the hearing" and "weaponized the pre-[h]earing information she gathered." Appeal Brief at 6. His attorney quotes from portions of the transcript in support of his argument (Tr. at 77-78 and 81) and claims Department Counsel obtained "ill-gotten information [that] wasn't in the record or alleged in the SOR." Appeal Brief at 6-8. This "ill-gotten information" apparently pertains to a NJP awarded to Applicant in 2007 and his retirement from the Navy in pay grade E-5 in 2009. We do not find this assignment of error persuasive.

In his 2016 SCA, Applicant disclosed that he went to NJP, also called "Captain's Mast," twice in 2007. In early 2007, he went to Captain's Mast for a Communications Security Material System (CMS) violation. Later in 2007, he went to Captains Mast for "gun decking" a Chemical, Biological, and Radiation Personal Qualification Standards (PQS) document.[2] Government Exhibit (GE) 1 at 21. He provided additional information about both incidents in background interviews. He noted that he was first awarded NJP in 2007 for falsely signing a document that reported he destroyed communications security (COMSEC) material. For this offense, he received restriction and extra duty as punishment. Later that year, he was awarded NJP for "plagiarism." "[H]e used another person's qualification [PQS] to take the board to get qualified. When [he] turned in the papers, [a senior chief] recognized the papers to be hers." For this second offense, he received a reduction in pay grade to E-5, restriction, and extra duty. GE 3 at 12-13 and GE 6. Furthermore, Applicant's certificate of discharge from active duty (DD 214) is in the record and reflects he retired in pay grade E-5 in 2009. GE 9.

Contrary to the contentions of Applicant's Counsel, the record contains information regarding Applicant's NJPs in 2007 and his retirement in pay grade E-5 in 2009. The record evidence, including the quoted portions of the transcript in the appeal brief, does not support his argument that Department Counsel misled Applicant prior to the hearing or that she obtained "ill-gotten information." Applicant's Counsel has failed to establish that Department Counsel engaged in any conduct that denied Applicant the due process afforded him under the Directive.

2. The Judge erred in a finding of fact

Applicant's Counsel challenges the following finding of fact: "In applying for chief petty officer (E-7), Applicant submitted documentation falsely representing that he had obtained certain qualifications necessary for promotion." Appeal Brief at 4, quoting from Decision at 4. He notes

[1] The Judge found in favor of Applicant on the alleged employment incident. Applicant's arguments concerning this assignment of error refer to matters that are not in the record. Normally, we are prohibited from considering new evidence on appeal. Directive ¶ E3.1.29. However, we will consider new evidence when threshold issues such as jurisdiction or due process are raised. *See, e.g.*, ISCR Case No. 14-00812 at 2 (App. Bd. Jul. 8, 2015). Regarding this assignment of error, we are cognizant that Directive ¶ E3.1.10 provides that hearings shall be conducted in a fair manner.

[2] "Gun decking" is Navy slang for falsifying information, especially in official reports.

that Applicant admits to falsifying the document, but disputes he falsified any documents while applying for promotion to chief petty officer. He also argues the Judge characterized this single document falsification as the equivalent of numerous documents and heavily relied on this error in assessing Applicant's case in mitigation. We resolve this issue adversely to Applicant.

Applicant testified that he was up for promotion to chief petty officer just before one of his NJP proceedings. Tr. at 80. It was not unreasonable for the Judge to have inferred that Applicant submitted the falsified Chemical, Biological, and Radiation PQS document for promotion purposes. While the Judge may have erred regarding the reason why the falsified document was submitted, it was a harmless error because it did not likely affect the outcome of the case. *See, e.g.*, ISCR Case No. 12-00678 at 2 (App. Bd. Jun. 13, 2014). The key point is not the specific reason why the document was submitted, but rather that Applicant knowingly submitted a false document for an official purpose that resulted in him receiving NJP.

Additionally, the Judge's use of the term "documentation" was also harmless error. When reviewing a Judge's decision, we do not consider individual words or sentences in isolation. Rather, we consider them in light of the decision in its entirety. *See, e.g.,* ISCR Case No. 11-13664 at 5 (App. Bd. Aug. 15, 2013). When viewed in its proper context, the Judge's use of the term "documentation" was referring to Applicant's submission of a false PQS document as opposed to him falsifying "numerous documents" as Applicant's Counsel contends. Furthermore, we find no error in the Judge considering this unalleged misconduct to evaluate Applicant's case in extenuation or mitigation; to determine the extent to which Applicant has demonstrated rehabilitation; or to conduct a whole-person analysis. *See, e.g.,* ISCR Case No. 15-07369 at 3 (App. Bd. Aug. 16, 2017).

3. The Judge incorrectly instructed Applicant to refrain from making objections

Applicant's Counsel contends the Judge denied Applicant due process by instructing him to refrain from making objections. In support of his argument, he points to the following exchange:

> [Department Counsel]: . . . Let's talk about your service to [an employer], from --
>
> [Applicant]: **Can I -- can I object to, or can I say something to your last statements? That was over 11 years ago, and I –**
>
> [Department Counsel]: You will have a chance to -- right now -- right now this is my –
>
> [Applicant]: I got you.
>
> [Department Counsel]: -- question.
>
> [Judge]: [Department Counsel] is right.
>
> [Applicant]: I'm sorry.

[Judge]: **[Applicant], you are on cross, you are being cross-examined right now.**

[Applicant]: Yes.

[Judge]: **You will have plenty of opportunity to go back and address something.**

[Applicant]: Yes, sir. My apologies. [Appeal Brief at 9, quoting from Tr. at 88-89. Emphasis in the Appeal Brief quotation.]

This assignment of error lacks merit. First, Applicant's request was unclear. He first asked if he could object without stating a basis for any objection and then asked if he could say something during Department Counsel's cross examination. As he started to make a statement, he was informed that he would have an opportunity to address matters later. The main thrust of Applicant's request appears to have been a plea for him to be able to say something at that stage of the proceeding, instead of an objection. Second, it is not uncommon for participants to talk over each other at a hearing resulting in some confusion. Third, and most importantly, the Judge never prevented Applicant from making any objections. Nor did he say anything that could be interpreted in that manner. The above exchange does not reflect the Judge committed any harmful error.

4. The Judge denied Applicant due process by failing to follow provisions of the Directive

Applicant's Counsel contends that Judge failed to follow the procedures in Directive ¶ E3.1.18 by having the Applicant testify without first warning him of the applicability of 18 U.S.C. § 1001.[3] In support of this argument, he refers to questions the Judge asked Applicant on pages 55-56 of the transcript. However, the Judge warned Applicant of the applicability of 18 U.S.C. § 1001 at the beginning of the hearing, and Applicant acknowledged that warning. Tr. at 14. This assignment of error is frivolous.

5. The Judge's conclusions are so implausible that they cannot be ascribed to a mere difference of opinion

Applicant's Counsel argues that the Judge's findings reflect an unreasonable interpretation of the evidence as a whole and the Judge misapplied the mitigating conditions and whole-person concept. Applicant's Counsel, for example, points out that Applicant was allowed to retain his security clearance following his 2007 NJPs; that he received several military awards, including four good conduct medals; that he freely admitted being dishonest and has been in counseling for years; and that he received several recommendations from peers and supervisors. He argues that Applicant has eliminated all negative aspects in his life and his misconduct amounted to isolated incidents that are unlikely to recur. His arguments are neither enough to rebut the presumption that the Judge

[3] The purpose of ¶ E3.1.18 is to advise Applicant and witnesses of potential criminal penalties for knowingly and willfully providing false information at the hearing and not to provide Applicant a procedural due process right.

considered all of the evidence in the record nor sufficient to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 17-02488 at 3 (App. Bd. Aug. 30, 2018). The evidence shows that Applicant deliberately submitted false information in documents in 2007 and 2014 and during a security interview in 2014. Falsification raises serious questions about an applicant's judgment, reliability and trustworthiness, and provides a rational basis for an unfavorable security clearance decision. Under the Adjudicative Guidelines, the failure to provide truthful and candid answers during the national security investigative or adjudicative processes is a matter of special interest. Directive, Encl. 2, App. A ¶ 15. Once the Judge found that Applicant deliberately falsified security clearance applications and deliberately provided false information in a security interview, a favorable security clearance decision could not be rendered without the Judge articulating a rational basis for why it would be clearly consistent with the national interest to grant or continue a security clearance for Applicant despite the falsifications. *See, e.g.,* ISCR Case No. 02-12329 at 3-4 (App. Bd. Dec. 18, 2003).

The record supports a conclusion that the Judge examined the relevant data and articulated a satisfactory explanation for the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Judge's adverse decision 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). *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 the national security."

Order

The Decision is **AFFIRMED**.

Signed: Michael Ra'anan
Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

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