KEYWORD: Guideline E; Guideline F

DIGEST: Applicant argues that the Judge should have sua sponte taken administrative notice of policies and procedures of another Federal agency and then proceeds to provide information about those purported matters. In the past, the Appeal Board has stated a party that does not ask a Judge to take administrative notice of a specific matter at the hearing has a heavy burden on appeal of demonstrating that the Judge's inaction was arbitrary, capricious, or contrary to law. Adverse decision is affirmed.

CASE NO: 19-00337.a1

DATE: 05/06/2020

DATE: May 6, 2020

In Re:	)	
	)	
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	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

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

FOR APPLICANT
Brett John O'Brien, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On June 7, 2019, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under Guideline E (Personal Conduct) and Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On January 31, 2020, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Pamela C. Benson denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. The Judge's favorable findings regarding the Guideline F allegations were not raised as an issue on appeal. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant, who is in his 30s, is married and has three children. He served in the military from 2006 to 2014 and was granted a security clearance. He has earned a bachelor's degree and is pursuing a master's degree. Since 2015, he has worked for a defense contractor. He also is part-owner of a company seeking Government contracts and a DoD facility clearance.

The SOR alleged three falsifications. Applicant admitted that he falsified responses to questions in a security clearance application (SCA) submitted in 2005. In those responses, he denied that, in the past seven years, he illegally used drugs and denied having been involved in the illegal purchase, manufacturing, trafficking, production, sale, etc., of any narcotic, cannabis, or other types of drugs during that period. Applicant indicated that he intentionally falsified those responses because he was concerned that his drug involvement would have precluded him from enlisting in the military.

In 2010, Applicant submitted an SCA in which he denied illegally using any controlled substances in the last seven years. In responding to the SOR, Applicant admitted he falsified this response but claimed his illegal drug activity occurred only in his teenage years. "He intentionally falsified the SCA after he was advised by unnamed individual(s) to never divulge his illegal drug use due to potential negative consequences while he was an enlisted member . . . ." Decision at 3. A Federal agency reported that Applicant used marijuana from 2003 to 2007, sold marijuana from 2003 to 2005, and sold crack cocaine in 2003. He contended that he provided information during a polygraph due to stress and in an attempt to pass the test. At the hearing, Applicant testified that, while in high school, he and friends sold about $2,000 to $3,000 worth of marijuana that he had stolen, and he claimed that he made inaccurate statements to the polygrapher, including that he used illegal drugs in the military and that his last use occurred in 2007. During cross-examination, he also initially denied engaging in certain drug activity that he later admitted engaging in it.

In October 2015, Applicant submitted an SCA in which he denied ever having his security clearance eligibility or access authorization denied, suspended, or revoked. Early that year, a

Government agency revoked his access to sensitive compartmented information (SCI). In his SOR response, he denied falsifying the SCA response, claiming he did not realize his SCI access had been revoked. However, he testified that he answered "No" because he thought the question pertained only to security clearances and believed only his facility access was denied when he escorted from the building after failing a polygraph.

The Judge's Analysis

Appellant admitted he falsified responses in two SCAs. Applicant provided inconsistent statements. His claim that he did not falsify his 2015 SCA was not credible. He has demonstrated a pattern of dishonesty, casting doubt on his reliability, trustworthiness, and good judgment. None of the mitigating conditions apply.

Discussion

Applicant's appeal brief contains assertions that are not included in the record. For example, Applicant argues that the Judge should have *sua sponte* taken administrative notice of policies and procedures of another Federal agency and then proceeds to provide information about those purported matters. In the past, the Appeal Board has stated a party that does not ask a Judge to take administrative notice of a specific matter at the hearing has a heavy burden on appeal of demonstrating that the Judge's inaction was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 02-11570 at 4-5 (App. Bd. May 19, 2004). Applicant has failed to establish that the Judge erred in failing to take administrative notice of the purported matters. Additionally, the appeal brief contains a document that post-dates the Judge's decision. The Appeal Board is prohibited from considering new evidence on appeal. Directive ¶ E3.1.29.[1]

Applicant contends that the Judge did not consider all of the evidence, mis-weighed the evidence, and did not properly apply the mitigating conditions and whole-person concept. For example, he argues "[his] 2010 lie was a continuation of his 2005 SF86 submission and should not be viewed as a separate and distinct issue." Appeal Brief at 3. He cites no authority supporting that proposition. He also asserts that he mis-spoke due to stress when he advised the polygrapher of the year in which he last used marijuana. He further states that the Judge erred in failing to analyze under Mitigating Condition 17(b)[2] his claim that military recruiters told him not to disclose his illegal drug use when he was completing his SCA in 2005. Overarching these arguments is the

[1] The new evidence includes a document described as an expert witness report. That report quotes extensively from guidelines. The quoted guidelines are not those that have been in effect since 2017. Nor are they the guidelines that governed from 2006 to 2017.

[2] Mitigating Condition 17(b) states "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)

requirement that the Appeal Board give deference to a Judge's credibility determination. Directive ¶ E3.1.32.1. Based on our review of the record, Applicant's arguments are neither enough to rebut the presumption that the Judge considered all of the record evidence 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. 15-01717 at 4 (App. Bd. Jul. 3, 2017). We further conclude the Judge considered the totality of the evidence in compliance with the whole-person analysis requirements. *See* Directive, Encl. 2 App. A ¶ 2(a) and (d).

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 the interests of the national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). *See also* Directive, Enclosure 2 ¶ 2(b): "Any doubt concerning personnel being considered for access to classified information 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