



DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
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Date: June 2, 2022

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In the matter of:))
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-----) ISCR Case No. 21-00010
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Applicant for Security Clearance))
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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 April 7, 2021, 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 H (Drug Involvement and Substance Misuse) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On January 20, 2022, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Richard A. Cefola denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Under Guideline H, the SOR alleged that Applicant used both marijuana and cocaine between 2007 and 2009 while holding a security clearance. Under Guideline E, the SOR alleged that Applicant falsified his security clearance applications in 2011 and 2020 regarding his drug use. Applicant admitted all allegations. The Judge found that the Guideline H concerns were mitigated due to the passage of time; those favorable findings are not in issue on appeal. The Judge found adversely on the Guideline E allegations. The Applicant raised the following issues on appeal: whether the Judge failed to properly consider all available evidence, whether he failed

to apply the mitigating conditions, and whether his adverse decision is consequently arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact and Analysis

Applicant is 62 years old and married. He has held a security clearance since 1985 and has been employed by the same defense contractor since 1989. Between January 2007 and December 2009, while granted access to classified information, Applicant used marijuana about once or twice a month and used cocaine twice.

In November 2011, Applicant falsified his SCA by failing to disclose his marijuana and cocaine use. In May 2020, Applicant falsified his SCA by failing to disclose his cocaine use. The Judge found both falsifications to be willful. Decision at 2. "Applicant's willful falsifications cover a decade. He made no prompt, good-faith effort to correct this personal misconduct on either occasion." Decision at 6.

Discussion

Applicant has not challenged any of the Judge's specific findings of fact. Rather, he contends that the Judge erred in two regards: first, he failed to consider all the mitigation evidence submitted; and, second, he failed to properly apply the mitigating conditions. Consequently, Applicant argues, the Judge rendered a decision that was arbitrary, capricious, and contrary to law.

In particular, Applicant argues that the Judge failed in his application of Adjudicative Guideline (AG) ¶ 17(a)—the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts. Directive, Encl. 2., App. A. Applicant contends that, although he failed to disclose his drug use on his 2011 SCA, he reported the marijuana use on his 2020 SCA and volunteered the cocaine use during his subsequent clearance interview, placing him solidly within AG ¶ 17(a). The Board is not persuaded by this argument.

We turn first to the falsification of his SCA in November 2011. The word "prompt" is not defined in the Adjudicative Guidelines or in Appeal Board precedent. *See, e.g.*, ISCR Case No. 98-0809 at 5 (App. Bd. August 19, 1999). Resolution of this appeal does not require the Board to provide a "bright line" definition of the word "prompt," as nine years is inarguably outside the meaning of the word. The Judge properly determined that Applicant's partial correction in 2020—nine years later—failed to mitigate the 2011 falsification.

Turning to the falsification in May 2020, Applicant's argument is facially more persuasive. He contends that he disclosed his marijuana use on the SCA and then volunteered his cocaine use at his clearance interview two months later, in July 2020. However, the security concerns raised by an applicant's falsifications are not necessarily mitigated by the fact that the applicant voluntarily disclosed his falsifications to an investigator upon interview. *See, e.g.*, ISCR Case No. 01-19513 at 5 (App. Bd. Jan. 22, 2004). That is particularly true under the facts of this case. Testimony at hearing established that Applicant failed a polygraph for a new job in 2013. Although he was never advised of the specific reason that he failed the polygraph, Applicant

suspected that it was because he had disclosed his marijuana use, but failed to disclose his cocaine use. Tr. at 19, 21-22. In the wake of that incident, Applicant was “determined not to have anything in [his] life that [he] couldn’t be straightforward about” and that he “didn’t want to hide things anymore because it wasn’t a good feeling.” Tr. at 19, 22.

Following that 2013 epiphany, however, Applicant did not correct his 2011 falsification. Indeed, when it was time for his periodic clearance renewal in 2020, Applicant chose again not to disclose his cocaine use. Said differently, Applicant made the same decision he made at the 2013 polygraph—to report the marijuana use, but not the cocaine use—despite his resolution “not to hide things anymore.” Tr. at 22. The Judge’s determination that this repeated falsification in 2020 was willful and was not mitigated by the subsequent disclosure is amply supported by the evidence of record.

The remainder of Applicant’s brief is fundamentally an argument that the Judge misweighed the evidence. None of Applicant’s arguments, however, are enough to rebut the presumption that the Judge considered all of the record evidence or to demonstrate the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. Moreover, the Judge complied with the requirements of the Directive in his whole-person analysis by considering all evidence of record in reaching his decision. *See, e.g.*, ISCR Case No. 19-01400 at 2 (App. Bd. Jun. 3, 2020). Although we give due consideration to the Hearing Office cases that Applicant’s counsel has cited, they are neither binding precedent on the Appeal Board nor sufficient to undermine the Judge’s decision. *See, e.g.*, ISCR Case No. 17-02488 at 4 (App. Bd. Aug. 30, 2018).

Applicant has failed to establish that the Judge committed any harmful error or that he should be granted any relief on appeal. 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: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

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