DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
POST OFFICE BOX 3656
ARLINGTON, VIRGINIA 22203
(703) 696-4759

Date: December 21, 2022

In the matter of:

Applicant for Security Clearance

ISCR Case No. 21-00835

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 November 30, 2021, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On October 12, 2022, 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.

Under Guideline F, the SOR alleged that Applicant had six delinquent debts. The Judge found in favor of Applicant on three of the debts and against him on the other three totaling over $53,000. Under Guideline E, the SOR contains 14 allegations. The Judge found in favor of Applicant on two of the Guideline E allegations and against him on the remaining twelve. Those unfavorable findings include nine traffic offenses and three security clearance application (SCA) falsifications. Of note, Applicant previously had his security clearance eligibility revoked in a 2014 DOHA proceeding due to financial problems.

In his appeal brief, Applicant's Counsel does not challenge any of the Judge's specific findings of fact. However, he asserts that Applicant did not deliberately or intentionally omit material information from his SCA. The SOR alleges that Applicant falsified his 2020 SCA by failing to disclose (1) his removal from a Federal Government contract in 2017 for misusing government equipment by sending inappropriate emails to a female colleague, (2) the six alleged delinquent debts, and (3) two traffic infractions for which he was fined at least $300. In responding to the SOR, Applicant admitted the falsification allegations but explained he was tired and not feeling well when he completed the SCA. An applicant's state of mind at the time of a purported falsification can be established through circumstantial evidence. *See, e.g.*, ISCR Case No. 18-00428 at 2 (App. Bd. Feb. 14, 2019). In analyzing the falsification allegations, the Judge concluded:

> When a falsification allegation is controverted, as in this case, the Government has the burden of proving it. . . . An administrative judge must consider the record evidence as a whole to determine an applicant's state of mind at the time of the omission. . . . An applicant's experience and level of education are relevant in determining whether a failure to disclose relevant information on a security clearance application was deliberate. . . . Applicant is a mature adult and an experienced federal employee. He has submitted SCAs on several occasions and is familiar with the security clearance process. His testimony at the hearing was replete with efforts to minimize and excuse his culpability for his debts and his personal conduct. His claim that he was too tired and too sick to pay attention to the questions in the SCA is not credible." [Decision at 11, citations omitted].

Directive ¶ E3.1.32.1 provides that the Appeal Board shall give deference to the Judge's credibility determinations. Based on our review of the record, we conclude that Applicant's Counsel failed to establish any basis for why we should not give such deference in this case and failed to prove the Judge committed any error in concluding Applicant's SCA omissions were deliberate. We resolve this assignment of error adversely to Applicant.

In claiming that the Judge's analysis of the falsification allegation in SOR ¶ 2.n is defective, Applicant's Counsel contends:

> It is particularly relevant to note that the Judge found subparagraph 2.n "Against Applicant" for failure to disclose several traffic violations depicted in subparagraphs 2.e through 2.k yet completely overlooked that fact that many of these traffic violations had fines below $300 and were not reportable on the [SCA]. [Appeal Brief at 4.]

This argument, repeated multiple times in Counsel's brief in various contexts, lacks merit. Contrary to Counsel's claim, SOR ¶ 2.n does not assert that Applicant failed to disclose the traffic violations in "subparagraphs 2.e through 2.k." Rather, it asserts that Applicant failed to disclose the traffic infractions in "subparagraphs 2.e and 2.k." In this regard, the Judge found:

> The evidence reflects that he was fined $500 for the offense alleged in SOR ¶ 2.e. However, the court records do not reflect the amount of the fine imposed for the

> offense alleged in SOR ¶ 2.k, and Applicant testified that he was fined $250 for that offense. . . . I conclude that SOR ¶ 2.n is partially established for the traffic offense alleged in SOR ¶ 2.e but not for the traffic offense alleged in SOR ¶ 2.k. [Decision at 6.]

A review of the decision reveals no logical basis for asserting the Judge overlooked in his analysis of SOR ¶ 2.n that the traffic infractions alleged in SOR ¶¶ 2.f through 2.j resulted in fines imposed of less than $300.[1] Those traffic infractions were not alleged in SOR ¶ 2.n. From a plain reading of the decision, it is clear the Judge found against Applicant on SOR ¶ 2.n for failing to disclose only one traffic infraction (SOR ¶ 2.e) that the SCA required him to report. This assertion of error is frivolous.

Applicant's Counsel also claims:

> Although, the [Applicant] admitted to some of the debts depicted in the SOR, the evidence in the record shows that he settled the two (2) highest debts as described in the [SOR ¶¶ 1.a and 1.b], a fact that was overlooked by the Administrative Judge in his analysis of the [Applicant's] financial plan forward and in fact determined that those two allegations were "Against Applicant" for some reason, despite the resolution. [Appeal Brief at 3-4.]

This claim is also baseless. In the findings of fact, the Judge noted that Applicant settled the debts in SOR ¶¶ 1.a and 1.b. for less than the full balances in 2022. Decision at 3. In his analysis, the Judge stated:

> AG [Adjudicative Guideline] ¶ 20(d)[2] is established for the debts in SOR ¶¶ 1.d, 1.e, and 1.f, which have been resolved. It is not established for the debts alleged in SOR ¶¶ 1.a and 1.b, which Applicant did not resolve until he received the SOR and realized that his security clearance was in jeopardy. Payment of debts under pressure of obtaining and retaining a security clearance is not "good faith." An applicant who waits until his clearance is in jeopardy before resolving debts may be lacking in the judgment expected of those with access to classified information. [Decision at 9-10, citations omitted.]

We find no basis in the decision for asserting the Judge overlooked the settlement of debts in SOR ¶¶ 1.a and 1.b as he specifically addressed those settlements in both his findings and conclusions. Again, it is evident from a plain reading of the Judge's decision that this assignment of error is frivolous.

---

[1] The Judge noted that the traffic infraction alleged in SOR ¶ 1.m resulted in a fine of more than $300, but, because that infraction was not alleged in the SOR, it could not be considered as a basis for revoking Applicant's security clearance.

[2] *See* Directive, Encl. 2, App. A ¶ 20(d), the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts[.]

Applicant's Counsel further contends that the Judge erred in his analysis by failing to consider all of the record evidence and by misapplying the mitigating conditions and whole-person concept. These arguments fail to raise any material issue that the Board needs to specifically address. *See* Directive ¶ E3.1.32. In general, Counsel's arguments are neither sufficient to rebut the presumption that the Judge considered all of the evidence in the record nor enough to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. Additionally, the Judge complied with the requirements of the Directive in his whole-person analysis by considering the totality of the evidence 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 decisions that Applicant has cited, they are not binding precedent on the Appeal Board, distinguishable from the present case, and insufficient to undermine the Judge's decision. *See, e.g.*, ISCR Case No. 17-02488 at 3-4 (App. Bd. Aug. 30, 2018).

Applicant's Counsel 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 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: 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