

Date: December 12, 2022

In the matter of:)
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Applicant for Security Clearance)
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ISCR Case No. 21-01570

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

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 J (Criminal Conduct), Guideline G (Alcohol Consumption), and Guideline E (Personal Conduct) of DoD Directive 5220.6 (January 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On November 10, 2022, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Wilford H. Ross denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30. For reasons stated below, we affirm the decision.

Under Guideline J, the SOR alleged that Applicant was charged with offenses on seven occasions between 2011 and 2021. These offenses include driving under the influence (DUI) on three occasions, including most recently in 2021; disorderly conduct; communicating a threat; violation of a protection order and simple assault; and public intoxication. The alcohol-related offenses were cross-alleged under Guideline G. Under Guideline E, the SOR alleged Applicant falsified responses in his 2020 security clearance application (SCA) questions by failing to disclose

matters from his police record. In responding to the SOR, Applicant admitted the Guideline J allegations; neither admitted nor denied the Guideline G allegation but noted he completed an outpatient, alcohol treatment program; and admitted the Guideline E allegations but indicated he thought the questions asked for unreported arrests and stated he reported those events to his supervisor. The Judge found against Applicant on all of the allegations.

In his appeal brief, Applicant does not dispute any of the Judge's specific findings of facts. Regarding the Guideline J and G allegations, he highlights certain mitigating conditions and argues those conditions apply in his case. None of his arguments, however, are sufficient to rebut the presumption the Judge considered all of the evidence in the record or to demonstrate that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 19-01400 at 2 (App. Bd. Jun. 3, 2020).

Regarding the Guideline E allegations, Applicant contends that he did not intentionally fail to disclose matters from his police record and argues he misread the questions. We note a problematic issue regarding the adverse falsification findings. Both SOR ¶¶ 3.a and 3.b alleged Applicant "deliberately failed to disclose" certain information from his police record. The Judge concluded that Disqualifying Condition 16(a), which requires "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . [,]" was the only disqualifying condition that applied to the falsification allegations. In light of Applicant's assertions that he misread the SCA questions, record evidence was needed to establish the omissions were deliberate to prove the alleged falsifications.

Although the Judge concluded that Applicant "falsified" his SCA responses, he also stated in his analysis that Applicant "knew or should have known about his disclosure obligations." Decision at 9. The "or should have known" part of the standard employed by the Judge falls short of the requirement of proving a deliberate omission. In order to prove a deliberate SCA omission, an applicant must have understood the question at issue and must have knowingly failed to disclose requested information. *See, e.g.*, ISCR Case No. 02-11286 at 4 (App. Bd. Jun. 29, 2004) (an omission, standing alone, is not proof of a deliberate falsification) and ISCR Case No. 05-03472 at 6 (App. Bd. Mar. 12 2007) (the Judge must make findings about Applicant's culpable state of mind that are reasonably supported by the record evidence for an adverse falsification finding to be sustainable). No deliberate falsification occurs when an applicant should have known of his obligation to disclose information but did not know of that obligation. Even though the Judge erred in his analysis of the falsification allegations, this error was harmless because it did not likely affect the outcome of the case. *See, e.g.*, ISCR Case No. 19-01220 at 3 (App. Bd. Jun. 1, 2020). In this regard, the adverse Guideline J and G findings are sufficient to sustain the denial of Applicant's security clearance eligibility.

Applicant failed to establish 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 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: Jennifer I. Goldstein

Jennifer I. Goldstein
Administrative Judge
Member, Appeal Board

Signed: Moira Modzelewski

Moira Modzelewski
Administrative Judge
Member, Appeal Board