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: May 24, 2023

In the matter of:	)	
-----	)	ISCR Case No. 21-01949
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

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

FOR APPLICANT
Alan V. Edmunds, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On December 20, 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 J (Criminal Conduct) of DoD Directive 5220.6 (Jan. 2, 1992, as amended) (Directive) and the National Security Adjudicative Guidelines (AG) in Appendix A of Security Executive Agent Directive 4, effective June 8, 2017. Applicant requested a hearing. On March 21, 2023, after the record closed, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert E. Coacher denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge erred in a finding of fact and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The SOR contains six allegations—two under Guideline E and four under Guideline J. The Judge found in favor of Applicant on one Guideline E allegation and two Guideline J allegations. These favorable findings were not raised as an issue on appeal and are not discussed below.

The Judge's Findings of Fact and Analysis

Applicant, who is in his late thirties, served on active duty in the military from 2005 to 2013, in the reserve force from 2013 to 2018, and in the National Guard since mid-2022. He served in combat operations and received a 90% disability rating from the Department of Veterans Affairs, primarily for his diagnosis of Post-Traumatic Stress Disorder.

The Judge's three unfavorable SOR findings are related. These asserted that Applicant falsified six reserve military orders by forging the signatures of military officials and submitted those orders to his employers—a county department and a state agency—to receive paid military leave in 2015 and 2016 (a Guideline E allegation); that he was counseled in 2017 for providing false official statements under Article 107 (Uniform Code of Military Justice) (a Guideline J allegation); and that he was charged in 2018 with felony tampering with records, which was dismissed (a Guideline J allegation). In responding to the SOR, Applicant admitted these three SOR allegations with clarifying comments.

In falsifying the orders, Applicant listed his grade as an officer (O-2 or O-3) when he was an E-5 and forged or fraudulently supplied the name of the authorizing military official. Five of the falsified orders were submitted to his state agency employer and the other to his county department employer. He did not perform military duties on the days indicated in the falsified orders and benefitted financially by receiving "miliary leave" from the employers. He did not disclose these offenses until he was caught during an employer's investigation. As a reason for engaging in such misconduct, Applicant claimed that his employers were not properly paying employees for overtime they worked. When his military commander became aware of his falsification of the orders, Applicant was issued a formal letter of counseling for making false official statements. Shortly thereafter, he quit the reserve force.

> [Applicant's] crimes of forging military orders in 2015-2016 were not minor events nor were they infrequent. They involved a calculated plan by Applicant to defraud his civilian employers of military leave benefits, which he did not earn. Although Applicant acknowledged his behavior, he did not come forward on his own, but only disclosed his crimes once he had been caught. He equivocated on whether his [National Guard] unit is aware of his previous crimes forging military orders. His reliability, trustworthiness, and good judgment are still in question. [Decision at 6.]

Discussion

Applicant contends the Judge erred in finding that he did not perform military duties on the days indicated in the falsified orders. Decision at 3. More specifically, Applicant argues:

> [Applicant] testified in his subject matter interview, and hearing, and wrote in his responses that he extended some of the days that he would be drilling with these forgeries; he would drill but not for the full-time period he indicated. While the first drill order was false for three days, and the [Applicant] admitted that in his hearing, the Judge cannot overwrite direct evidence and testimony that [Applicant] did, in fact, drill on some of the other five drill submissions. [Appeal Brief at 9.]

This assignment of error does not merit any relief. Directive ¶ E3.1.30 provides that an appeal brief must cite specific portions of the case record supporting any alleged error. Applicant's brief fails in this regard. It does not identify any specific evidence that supports this purported error, which includes the footnotes in his brief that cite to pages of the hearing transcript. Of note, Applicant's testimony regarding the fraudulent orders does not support his claim of error. At the hearing, the following exchange occurred:

> [Department Counsel]: You were not actually performing drill[s] for the six orders that you submitted?
>
> [Applicant]: I was performing drills. What it was, I extended the dates for the drills.
>
> [Department Counsel]: Okay. Also for the dates that you extended it, you were not performing drills on those dates?
>
> [Applicant]: Correct. [Tr. at 31.]

Department Counsel then proceeded to question Applicant regarding three sets of the fraudulent orders that were admitted into evidence as Government's Exhibit 6. For the first drill (November 13-15, 2015), Applicant initially testified that he could not remember whether he drilled on those days (Tr. at 43-44) but later acknowledged that he did not drill during that period. Tr. at 44, 52. For the second drill (December 14-22, 2015), Applicant testified, "I might have [drilled], I might not. I don't recall," (Tr. at 45) and later stated "it was probably . . . false." Tr. at 52. For the third set of orders (a five-month deployment starting in April 2016), Applicant admitted these orders were fraudulent (Tr. at 46), did not testify that he performed military duties during this period, and apparently left his civilian job at some point while purportedly deployed. Tr. at 46-51. In summary, Applicant failed to establish that the Judge erred in making the challenged finding. Additionally, even if the Judge erred in making that finding, it was a harmless error 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).

Applicant also argues the Judge erred in failing to comply with the provisions in Executive Order 10865 and the Directive by not considering all of the evidence, by not properly weighing

the evidence, and by not correctly applying the mitigating conditions and whole-person concept. In his arguments, for example, he contends that the alleged misconduct is not recent or frequent, that it occurred under unusual circumstances that are unlikely to recur, and that he has rehabilitated himself in the intervening years. In rendering a decision, the Judge was required to consider all the record evidence. Directive ¶ 6.3. Given the nature and seriousness of Applicant's fraudulent conduct, we cannot conclude that the Judge erred in determining that the security concerns arising from such misconduct were not mitigated by the passage of time or by the other evidence of rehabilitation. None of Applicant's arguments 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. *See, e.g.*, ISCR Case No. 19-01400 at 2 (App. Bd. Jun. 3, 2020).

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* AG ¶ 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
Chair, Appeal Board

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

Signed: Allison Marie
Allison Marie
Administrative Judge
Member, Appeal Board