DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
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Date: March 12, 2024

In the matter of:	)	
	)	
-----	)	ISCR Case No. 22-00381
	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Julie R. Mendez, Esq., Deputy Chief Department Counsel
Nicholas T. Temple, Esq., Department Counsel

FOR APPLICANT
Pro Se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On April 26, 2022, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision – security concerns raised under Guideline D (Sexual Behavior) and Guideline E (Personal Conduct) of the National Security Adjudicative Guidelines (AG) of Security Executive Agent Directive 4 (effective June 8, 2017) (SEAD 4) and DoD Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). On December 1, 2023, after conducting a hearing, Defense Office of Hearings and Appeals Administrative Judge Candace Le'i Garcia granted Applicant's security clearance eligibility. The Government, through Department Counsel, appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30. For the reasons stated below, we affirm the decision.

Under Guideline D, the SOR alleges that Applicant was accused of sexual harassment in May 2019, resulting in substantiated allegations and being indefinitely barred from access to certain overseas military locations. SOR ¶ 1.a. Under Guideline E, the SOR alleges that Applicant was terminated from contractor employment in September 2019 for sexual harassment and is

ineligible for rehire. SOR ¶ 2.a. Additionally, the SOR alleges that Applicant falsified his February 2020 security clearance application (SCA) for not accurately reporting the reason for his 2020 termination from contract employment. SOR ¶ 2.b. In finding favorably for Applicant, the Judge concluded that the Government had failed to establish the falsification of the SOR (SOR ¶ 2.b.) and that Applicant had mitigated the security concerns established under SOR ¶¶ 1.a and 2.a. (the sexual harassment conduct and the termination for the same).

On appeal, the Government contends that the Judge erred in her conclusion that falsification was not established and erred in her mitigation analysis under Guidelines D and E, rendering her decisions arbitrary, capricious, and contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact: The Judge's findings are summarized below.

Applicant is in his mid-30s. Divorced from his first wife, he remarried in 2019. He has one child. He is a high school graduate and received a vocational school degree in 2008. He served in the National Guard from 2011 to 2017 but was separated with a general discharge under honorable conditions because he missed drills while deployed overseas as a civilian contractor. He was employed as a defense contractor at a U.S. military installation overseas from January 2016 to September 2019, when he was terminated for cause. He was reemployed in October 2022 with a defense contractor who is sponsoring him for renewal of his security clearance. Decision at 2.

In May 2019, while assigned overseas, Applicant was accused of sexual harassment by a female soldier with whom he worked. The woman alleged three incidents. First, she alleged that he saw her at the post exchange, walked up to her, ran his fingers through her hair, and asked if he could remover her hair bun. Second, she accused him of asking her what she had purchased from a women's lingerie, clothing, and beauty store. Finally, she alleged he walked up behind her while at work, touched her shoulder, and started to give her a massage. *Id*.

On August 21, 2019, Applicant was placed on paid administrative leave, which he did not view as a suspension. While on administrative leave, he was "brought into the captain's office due to an investigation regarding the soldier's claims," and he provided a written statement in response to the allegations. On September 21, 2019, he was placed on unpaid administrative leave prior to termination on September 23, 2019. He is not eligible for rehire. *Id.* at 3. In October 2019, he received a letter from the installation commanding officer indefinitely barring him from access to the job site and certain military installations because of substantiated sexual harassment allegations.

In his Answer to the SOR, Applicant said, "I was unaware of being terminated/fired and not eligible for rehire as I was only told that I was released from contract. So therefore[,] I deny knowing that I was terminated/fired prior to my video interview." He reiterated these sentiments during his July 2020 personal subject interview (PSI) and at the hearing. Applicant admitted that sexual harassment allegations were made against him and that, as a result, he was barred from the access to certain military installations. Although he generally denied the allegations, Applicant

acknowledged that, in the third instance, he walked up behind the soldier at work and touched her shoulder. He was never formally given any evidence regarding the allegations, it was the only time he had been in trouble, and similar conduct has not happened since. *Id*. at 2-3.

Applicant stated that no one informed him that he was suspended and that he was only asked to turn his DOD Common Access Card into his site lead. He was not required to formally out-process and return to the United States, and he was not barred from all installations around other command locations. He remained in-country until early 2020, when he returned to the United States to seek employment. *Id*. at 3.

When Applicant completed his 2020 SCA, he listed his employment with the contractor from January 2016 to September 2019 in Section 13A - Employment Activities. In response to the question that asked why he left the employment, he stated that he had been "released from contract." Applicant checked "No" in response to the question whether he left under any of the following circumstances: fired; quit after being told he would be fired; left by mutual agreement following charges or allegations of misconduct; or, left by mutual agreement following notice of unsatisfactory performance for his listed employer. Applicant also checked "No" in response to the question whether, in the prior seven years in this employment, he had "received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace, such as a violation of security policy?"

In his Answer to the SOR, Applicant stated "I admit to choosing No on this question due to not knowing that I was fired from [this employment]. I was only told I was released from contract. This was an honest mistake and was not intentional." Applicant also maintained during his July 2020 PSI and at the hearing that he did not view his placement on administrative leave as a suspension. Applicant had no previous unfavorable incidents, and he has not had any since. He was not arrested or charged with any offense. He expressed remorse for his actions and stated that he learned his lesson. His spouse is aware of the allegations. *Id*. at 4.

The Judge's Analysis: The Judge's analysis is summarized below.

Under Guideline D, the Judge found that disqualifying condition AG ¶ 13(d)[1] applied to the substantiated sexual harassment allegations, but that the security concern was mitigated under AG ¶ 14(b)[2], as the incident was isolated and occurred over four years ago, Applicant was not arrested or charged with any offense, and he was remorseful and had learned his lesson. *Id.* at 6.

[1] Sexual behavior of a public nature or that reflects lack of discretion or judgment. AG ¶ 13(d).

[2] The sexual behavior happed so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or judgment. AG ¶ 14(b).

Under Guideline E, the Judge found that disqualifying condition AG ¶ 16(e)(1)[3] was established for SOR ¶ 2.a, based on the substantiated allegations of sexual harassment and his ineligibility for rehire, but concluded that mitigating conditions AG ¶¶ 17(c)[4] and 17(e)[5] applied. Similar to her findings under Guideline D, the Judge held that Applicant's termination in 2019 due to substantiated allegations of sexual harassment was an isolated incident that occurred over four years ago. In addition, Applicant had no previous unfavorable incidents, nor any incidents since, including with his current employer. He was not arrested or charged with any offense, he expressed remorse for his actions and stated that he learned his lesson, and his spouse is aware of the allegations.

The Judge found that disqualifying condition AG ¶ 16(a)[6] was not established for SOR ¶ 2.b (falsification of his SCA) because Applicant "credibly testified" that he did not deliberately falsify his responses to the questions that inquired about his "Reasons for Leaving" employment with the overseas contractor. She highlighted that Applicant disclosed his employment with the contractor from January 2016 to September 2019 and that he disclosed that he had been released from the contract by his employer in September 2019. She found Applicant to be credible in his assertion that he did not believe that he had been fired or disciplined. *Id.* at 6–7.

Discussion

There is no presumption of error. The appealing party has the burden of raising and establishing that the Judge committed factual or legal error that is prejudicial. *See, e.g.*, ISCR Case No.19-01689 at 3 (App. Bd. Jun. 8, 2020). In deciding whether the Judge's rulings or conclusions are erroneous, we will review the decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it

[3] Personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing. AG ¶ 16 (e)(1).

[4] The offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not case doubt on the individual's reliability, trustworthiness, or good judgment. AG ¶ 17(c).

[5] The individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress. AG ¶ 17(e).

[6] Deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities. ¶ 16 (a).

cannot be ascribed to a mere difference of opinion. *See, e.g.*, ISCR Case No. 97-0435 at 3 (App. Bd. Jul. 14, 1998).

Application of Mitigating Conditions

On appeal, the Government first argues that the Judge's application of mitigating conditions to Applicant's sexual harassment conduct under Guidelines D and E was unsupported by the evidence. In particular, the Government challenges the Judge's finding that Applicant "expressed remorse for his actions and stated that he learned his lesson." Decision at 7. The Government argues that "Applicant does not use the words 'regret' or 'remorse' anywhere in this record" and that the Judge erred as a matter of law in finding Applicant remorseful and his misconduct unlikely to recur. Appeal Brief (AB) at 16–17. Using specific language is not, however, required to express remorse or regret. Here, Applicant admitted to touching the complainant and having conversations that she considered offensive, but he denied that they amounted to or were intended as sexual harassment. Applicant testified that he learned a lesson, including "[d]on't touch anybody, whether it's just a friendly touch, or anything else, because anything can be construed more than what you believe it is. Whether it's verbal, touching or anything of the sort." Tr. at 47. The Judge found that Applicant expressed his intent to change the behavior that the complainant found to be offensive, to include, not "touching" anyone (physically or verbally), even if the touching is intended to be friendly or playful. This is a positive step demonstrating a change in attitude and behavior and relevant mitigating evidence. We find the Judge's credibility determination in this regard to be adequately based on "objective testimonial evidence." *See, e.g.*, ISCR Case No. 05-07983 at 7 (App. Bd. Oct. 1, 2007).

To the extent that Department Counsel is asserting that the Judge improperly substituted a favorable credibility determination for record evidence in concluding that the mitigating conditions applied, we disagree. The Judge had the opportunity to assess Applicant's demeanor when he testified at the hearing, and the opportunity to consider whether Applicant's explanations were credible in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 02-19479 at 3–4 (App. Bd. June 22, 2004). We have held that a judge cannot rely on a credibility determination as a substitute for record evidence and that a judge's assessment of the evidence should not suggest that the judge is using her authority to render an improper credibility determination. *See, e.g.*, ISCR Case No. 10-07794 at 3 (App. Bd. Oct. 4, 2011). Here, as in the cited case, the Judge's decision indicates that—in addition to any reliance on credibility alone—she relied on objective evidence in applying the mitigating conditions in question. *Id.* Although Department Counsel may disagree with the Judge's weighing of the evidence, we find no reason to conclude that the Judge erred in her mitigation analysis under Guidelines D and E.

Intentional Omissions

In their second argument, Department Counsel challenges the Judge's conclusion that the Government failed to prove that Applicant deliberately falsified his 2020 SCA. Here again, the Government challenges the Judge's credibility determination, arguing that the Judge's conclusion that Applicant "credibly testified" that he committed no deliberate falsification "was erroneous

and . . . must be reversed." AB at 19. Although the Government acknowledges the deference typically given to a judge on questions of credibility, Department Counsel argues that this is a case in which no deference is due because Applicant's testimony is "so internally inconsistent or implausible" that a reasonable factfinder could not accept it. AB at 20 (citations omitted).

In his Answer to the SOR, Applicant denied that he intentionally falsified his SCA by not disclosing that he had been fired or disciplined. Therefore, the burden of proving falsification shifted to the Government. Directive ¶ E3.1.14. Proof of an omission, standing alone, does not establish or prove Applicant's intent or state of mind when he completed the SCA. *See* ISCR Case No. 02-23133, 2004 WL 2152744 at *4 (App. Bd. Jun. 9, 2004). *See also* ISCR Case No. 14-05005, 2017 WL 4476434 at *4, n.3 (App. Bd. Sep. 15, 2017) (to establish a falsification, an applicant's answers must have been deliberately false, not simply untrue). Rather, the Judge had to consider whether, viewing the record evidence as a whole, there is direct or circumstantial evidence concerning Applicant's intent or state of mind when he completed the SCA.

The Board's deference to an Administrative Judge's credibility determination is, of course, not absolute. For instance, a credibility determination may be set aside or reversed if it is unreasonable, contradicts other findings, is based on an inadequate reason, is patently without basis in the record, or is inherently improbable or discredited by undisputed fact. *See* ISCR Case No. 97-0184 at 5 (App. Bd. June 16, 1998) (internal citations omitted). "When a witness's story is contradicted by other evidence or is so internally inconsistent or implausible that a reasonable fact finder would not credit it, we can find error despite the deference owed a Judge's credibility determination." ISCR Case No. 10-03886 at 3 (App. Bd. Apr 26, 2012), citing *Anderson v. Bessemer City*, 470 U.S. 564 at 575 (1985). A Judge's credibility determination can be rejected if it is "unreasonable, contradicts other findings of fact, or is 'based on an inadequate reason or no reason at all.'" ISCR Case No. 16-03763 (App. Bd. Nov. 20. 2018), *citing Fieldcrest Cannon, Inc. v. NLRB*., 97 F.3d. 65 at 69 - 70 (4th Cir. 1996).

Notably, the Government's case regarding intent was purely circumstantial. The Government's exhibits confirm that Applicant was placed on paid administrative leave on August 21, 2019, that he was placed on unpaid administrative leave on September 21, 2019, and that two days later—on September 23, 2019—Applicant was terminated for cause. Government Exhibit (GE) 3 at 7–10. What the Government's exhibits lack is proof that any of those facts were communicated to Applicant. The Government did not submit the Army's investigation of the sexual harassment complaint or any other evidence that reflects what Applicant was told regarding his paid and unpaid administrative leave periods or his termination. That lack of Government evidence left an ambiguous void that was filled by Applicant's testimony. Under cross-examination and the Judge's examination at hearing, Applicant testified that this employment was his first job as a contractor, that he was told by text message that he was released from the contract, that he was never advised by his employer that he was terminated or fired, and that he only later received a letter from a local commander barring him from certain installations. Consistent with his Answer to the SOR, Applicant testified at hearing that he understood he was released from his contract but did not understand that he was fired. The Government presented neither documentary nor testimonial evidence contradicting Applicant's consistent assertion that, as a first-time

contractor, he did not recognize that his release from contract was equivalent to being fired and thus required to be reported as the same in Section 13A of his SCA.

In addition to arguing that Applicant should have recognized that he was fired and disclosed the same, the Government repeatedly argues that Applicant should have recognized his period of administrative leave to be a "suspension" requiring disclosure under Section 13A.6, which reads: "For this employment in the last seven (7) years have you received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace such as a violation of security policy?" Department Counsel argues that a person placed on administrative leave due to the allegations of sexual harassment in the workplace has "obviously been 'suspended.'" AB at 22. The Government cites to no authority for the assumption that underlies much of their brief—that being placed on paid administrative leave pending an investigation is per se a disciplinary action equivalent to a suspension—and we are aware of none. Whether or not administrative leave – paid or unpaid – is a disciplinary action is a question of fact that is dependent upon the circumstances. In this case, although the administrative leave was tied to the sexual harassment complaint, the Government did not present evidence explaining whether this was considered a disciplinary action and, if so, why. Even when administrative leave is associated with an investigation, it cannot be assumed that it is a disciplinary action, particularly when the administrative leave is paid. At risk of stating the obvious, had the investigation cleared Applicant, that period of time would clearly not fall within Section 13A.6's definition of a disciplinary action or warning. Department Counsel's argument that the plain meaning of "administrative leave" in this context logically leads any "reasonable person" to conclude they are "suspended" is without merit. *Id.*

In this case, Applicant steadfastly maintained that he did not understand himself to be under a suspension when he was on paid administrative leave. Regarding his period of unpaid administrative leave, Applicant testified that he was in that status for "only like a day," and Department Counsel did not inquire into or establish when Applicant was advised of that status—whether it was on September 21st when he went into an unpaid status, on September 23rd when he was terminated, or at some later date when he received his final pay. Tr. at 39. To the extent that Applicant was on unpaid leave for either one or two days prior to being advised that he was released from the contract, the record does not support the Government's argument that Applicant knew of this fleeting status at the time, recognized it to be a disciplinary measure, and intentionally failed to disclose the same.

Because Applicant's version of what he was told is consistent and uncontroverted, there was no direct factual conflict for the Judge to resolve. *Cf.* ISCR Case No. 10-03886 (App. Bd. Apr. 26, 2012) (in which the Judge chose to believe Applicant's testimony regarding alleged timecard fraud rather than the employer's findings) and ISCR Case No. 19-02304 (App. Bd. Feb. 23, 2022) (in which the Judge accepted Applicant's in-hearing denials regarding receipt of child pornography and disregarded Applicant's prior admissions). Thus, the remaining issue was the reasonableness of Applicant's professed belief that, under the circumstances, he had not been fired or suspended. While the Government asserts that it is "obvious" from the overall circumstances that Applicant was fired, that is not the only conclusion that can be reached under these facts. Having had the

opportunity to observe and assess Applicant's testimony and demeanor at the hearing, it is not unreasonable for the Judge to have found otherwise. It is not inconsistent for there to be evidence that Applicant was, indeed, fired (GE 3) but for the Judge to reasonably conclude that he honestly believed he was not. The record adequately supports the Judge's favorable credibility determination with respect to Applicant's intent when completing the SCA, her finding that Applicant did not "deliberately falsify" his answers, and her conclusion that the Government failed to prove intentional falsification. Department Counsel in this case has failed to carry the heavy burden required for the Board to challenge the Judge's credibility determination and has failed to establish that the Judge's findings in this regard are erroneous, arbitrary, or capricious.

Additionally, Department Counsel argues "in the alternative," Applicant's lack of candor in completing an SCA presents an independent Guideline E concern, "even if that intent [to falsify] were not clear," as "candor required that Applicant divulge in his [SCA] that he was released from his contract 'due to allegations' against him." AB at 25. To the extent that we understand this argument, Department Counsel suggests that—when intentional or deliberate falsification of an SCA is not proven—we may disregard the clearly defined "conditions that could raise a security concern" and instead rely on "lack of candor" as "a broader and more flexible concept than falsification" to establish an allegation under Guideline E. *Id*. We are not persuaded. Although Guideline E references "lack of candor" in its introductory section, it goes on to expressly delineate the types of conduct that raise security concerns, including "**deliberate** omission, concealment, or falsification of relevant facts." We are unwilling to interpret the AG beyond its clear language to find unintentional omissions as disqualifying conduct.

Moreover, we note with concern that Department Counsel implies here, for the second time in their brief, that Applicant deliberately failed to disclose the circumstances surrounding his release from contract during his first investigative interview and that they characterize that omission as evidencing "a lack of candor that would establish a Guideline E concern, even if the record did not so clearly establish his deceptive intent on his [SCA] alone." *Id.* at 8, 25. The summary of the first investigative interview states clearly on its face that it was "conducted to discuss [Applicant's] military discharge and foreign spouse/in-laws," and it is abundantly clear from review of the summary that the interview was confined to those two topics. GE 2 at 4. Department Counsel's over-reaching argument with regard to this interview misrepresents the evidence of record. In sum, Department Counsel's argument that mitigating conditions are unavailable if Applicant's "overall lack of candor" were proven is without merit, unsupported by the AG, and otherwise moot given our discussion above.

Department Counsel failed to establish the Judge committed harmful error. None of their arguments are enough to rebut the presumption that the Judge considered all of the record evidence or sufficient to demonstrate the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. The Judge's decision is sustainable on the record.

ORDER

The decision is **AFFIRMED**.

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

Signed: James B. Norman
James B. Norman
Administrative Judge
Member, Appeal Board

Signed: Gregg A. Cervi
Gregg A. Cervi
Administrative Judge
Member, Appeal Board