

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: July 31, 2024
In the matter of:)	
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Applicant for Security Clearance)	ISCR Case No. 23-00327
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Applicant for Security Clearance))	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Julie R. Mendez, Esq., Chief Department Counsel

FOR APPLICANT

Eric Leckie, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On August 8, 2023, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision – security concerns raised under Guideline J (Criminal Conduct) of the National Security Adjudicative Guidelines (AG) of Security Executive Agent Directive 4 (effective June 8, 2017) and DoD Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 13, 2024, Defense Office of Hearings and Appeals Administrative Judge Charles C. Hale denied Applicant's security clearance eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30. For reasons stated below, we affirm the Judge's decision.

Under Guideline J, the SOR alleged three criminal incidents dating from 2017, 2021, and 2022. Applicant admitted all allegations in his answer to the SOR, and the Judge found adversely to him on all three. On appeal, Applicant highlights that the Judge referred to Guideline E in his whole-person analysis. Through Counsel, Applicant argues that the Judge violated his due process rights in considering Guideline E factors, as the SOR alleged no Guideline E security concerns. In particular, Applicant argues, the Judge improperly considered his lack of candor, as "[t]his

language clearly stems from Guideline E." Appeal Brief (AB) at 5. In addition to raising a due process concern, Applicant argues that the decision is arbitrary and capricious because of the Judge's consideration of Guideline E factors. We find neither of these arguments persuasive.

As Applicant notes, the Judge erroneously mentioned Guideline E in his decision, stating "I have incorporated my comments under Guidelines J and E in my whole-person analysis." Decision at 6. As Applicant also notes, this "is the only mention of Guideline E in the entire decision." AB at 4. The Judge's findings of fact and mitigation analysis are exclusively focused on Guideline J. We do not evaluate a Judge's decision based on isolated words or sentences but instead on the decision viewed as a whole. ISCR Case No. 20-00204 at 4 (App. Bd. Feb. 2, 2022). Our review of the entire decision confirms that the Judge's reference to Guideline E was a typographical error and a harmless one, as it did not likely affect the outcome of the case. E.g., ISCR Case No. 95-0495 at 4 (App. Bd. Mar. 22, 1996). Contrary to Applicant's argument, we discern no due process issue, as the decision gives us no reason to believe that the Judge somehow conflated the Guideline J allegations with Guideline E issues or that he improperly applied the whole-person factors. Applicant has not established that he was denied the due process afforded by the Directive. Finally, Applicant's contention that a lack of candor may only be considered in the context of Guideline E is wholly without foundation in the Directive or our precedent. Indeed, the Directive requires us to give deference to a judge's credibility determination regardless of the Guideline at issue. Directive ¶ E3.1.32.1.

Applicant's Counsel has failed to establish any harmful error below. None of Applicant's arguments are sufficient to demonstrate the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. The record supports a conclusion that the Judge examined the relevant evidence, complied with the requirements of the Directive in his mitigation and wholeperson analyses, 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). "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security. AG ¶ 2(b).

ORDER

The decision in ISCR Case No. 23-00327 is **AFFIRMED**.

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

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

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