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: February 5, 2025

In the matter of:	)	
	)	
-----	)	ISCR Case No. 24-00121
	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Andrea M. Corrales, Esq., Deputy Chief Department Counsel

FOR APPLICANT
Dan Meyer, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On March 11, 2024, DoD issued a Statement of Reasons (SOR) advising Applicant of the basis of that decision – security concerns raised under Guidelines E (Personal Conduct) and H (Drug Involvement and Substance Misuse) of the National Security Adjudicative Guidelines (AG) in Appendix A 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 but subsequently asked that the matter be decided based upon the written record, without a hearing. The Government submitted a File of Relevant Material (FORM) containing the Government's evidence and arguments. Applicant, who was represented by counsel, provided a 282-page response to the FORM. On December 12, 2024, Defense Office of Hearings and Appeals Administrative Judge Jennifer I. Goldstein found in Applicant's favor regarding the Guideline H allegations and against him under Guideline E. She denied Applicant security clearance eligibility. Applicant appealed pursuant to Directive ¶ ¶ E3.1.28 and E3.1.30.

Applicant asserts on appeal a broad range of errors, to include that the Judge erred both in her findings of fact and in her conclusions of law; that the Government failed to carry its burden

of proof; and that the Judge's credibility determination was inaccurate. He also contests the Judge's whole person analysis. For the reasons detailed below, we affirm the Judge's decision.

Background

Applicant is in his early thirties and is an honorably discharged military veteran. Under Guideline H, the SOR alleged that he had used marijuana and tetrahydrocannabinol (THC) gummies. Under Guideline E, the SOR alleged that he falsified his responses to questions regarding his drug use on security clearance applications (SCA) in 2012 and 2022. In his 132-page SOR answer, applicant admitted the drug use and one of the falsifications but denied the other falsification. He explained that the 2012 falsification was because he was concerned a truthful answer would prevent him from enlisting in the military and claimed that the 2022 falsification was the result of mistakenly checking a wrong box on the SCA. The Judge found the drug use to be mitigated but concluded that "Applicant intentionally failed to disclose his marijuana use on his 2012 SCA and his THC gummy use on his 2022 SCA." Decision at 7. She found his explanation for the 2022 falsification to be lacking in credibility.

Discussion

Errors in Findings of Fact and Conclusions of Law

On appeal, Applicant's counsel asserts that the Judge erred both in her findings of fact, making "factual determinations which were wholly inaccurate and are not supported by the record," and in her conclusions of law. Appeal Brief at 9. For both assertions, Counsel states that "[t]hese errors are delineated at [F], infra." *Id*. That section of Applicant's brief is captioned, "The Failure to Consider Significant Evidence" and does not identify any errors of fact or law. Instead, it argues that certain evidence was "incompletely analyzed." *Id.* at 11. Similar arguments are made in the "Personal Conduct" section of Applicant's brief. *Id.* at 19-20.

Applicant's challenge largely conflates "facts" with "conclusions." Regardless, however, of whether considered to be facts or conclusions, the allegations of error are without merit because the Judge's factual findings and conclusions are amply supported by the record. Applicant merely is advocating for an alternative weighing of the evidence. An applicant's disagreement with a judge's weighing of the evidence or an ability to argue for a different interpretation of the evidence is not sufficient to demonstrate that the judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *E.g.*, ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007). Moreover, Applicant's arguments fail to rebut the presumption that the Judge considered all of the record evidence. The mere presence of some favorable or mitigating evidence does not require the Judge to make an overall favorable determination in the face of disqualifying conduct such as Applicant's.

Burden of Proof, Credibility Assessment, and Whole Person Analysis

Next, Applicant's counsel challenges whether the Government met its burden of proof, arguing that there is no proof of intent. He also argues that the Judge's credibility determination and whole person analysis are flawed. Appeal Brief at 9-10. In support of each of these assertions

Applicant, again, relies upon section "[F], *infra*" of his appeal brief. However, as discussed regarding Applicant's claimed errors of fact and law, section [F] does not support any of these contentions and Applicant's arguments regarding credibility and whole person amount to a mere disagreement with the Judge's weighing of the evidence.

Upon her review of the evidence in this case the Judge made several conclusions that reflected adversely on Applicant's credibility. Specifically, she concluded that "[h]is claim that he miss-clicked on 'No' in 2022 lacks credibility, given his intentional falsification of the same question in the past and his subsequent positive drug test." Decision at 7. She also noted that "[w]hile Applicant voluntarily disclosed his drug use to the investigator, his disclosure was only after his positive urinalysis." *Id*. The Directive requires the Appeal Board to give deference to a judge's credibility determinations. Directive ¶ E3.1.32.1. Given the Judge's specific explanation for why she found Applicant to be lacking in credibility, we find no reason to disturb her adverse credibility assessment.

Applicant's argument that there is no proof of intent appears to be rooted in the erroneous position that intent "can not be inferred." Appeal Brief at 6, n.2. However, it is not mere speculation or surmise for a judge to make a finding of fact about an applicant's intent or state of mind based on circumstantial evidence. "As a practical matter, when an applicant denies that he or she engaged in a falsification, proof of the applicant's intent or state of mind is rarely based on direct evidence, but rather often must rely on circumstantial evidence." ISCR Case No. 02-15935 at 4 (App. Bd. Oct. 15, 2003). In this instance, the Judge's conclusion that the Government carried its burden of proof is well-supported by the record.

Hearing Office Cases

In his brief, Applicant's counsel cites to and summarizes 24 hearing-level decisions in prior Guideline E cases, including five Department of Energy Personnel Security Hearing cases. Appeal Brief at 21-35. Counsel's reliance on hearing-level decisions is misplaced because each case must be judged on its own merits. AG ¶ 2(b). As the Board has frequently stated, how particular fact scenarios were decided at the hearing level in other cases is generally not a relevant consideration in our review of a case. Only in rare situations – such as separate cases involving spouses, cohabitants, or partners in which the debts and the financial circumstances surrounding them are the same – would the adjudication outcome in another case have any meaningful relevance in our review of a case. The decisions that Applicant's counsel recites have no direct relationship or unique link to Applicant's case that would make them relevant here.

In conclusion, Applicant has failed to identify any harmful error in the Judge's handling of this case or in her decision. The record supports a conclusion that the Judge examined the relevant data and articulated a satisfactory explanation for the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). "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). The Judge's adverse decision is sustainable on this record.

Order

The decision in ISCR Case No. 24-00121 is **AFFIRMED**.

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

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

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