



DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
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Date: May 29, 2025

In the matter of:)	
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-----)	ISCR Case No. 23-02709
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Andrea M. Corrales, Esq., Deputy Chief Department Counsel
 Cindy Ruckno, Esq., Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On December 21, 2023, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision – security concerns raised under Guideline E (Personal 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). On March 18, 2025, after conducting a hearing, Defense Office of Hearings and Appeals Administrative Judge Erin C. Hogan granted Applicant national security eligibility. The Government appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Under Guideline E, the SOR alleges that Applicant was terminated from contractor employment in May 2020 for misuse of his corporate fuel card. SOR ¶ 1.b. Additionally, the SOR alleges that Applicant falsified his June 8, 2023 security clearance application (SCA) for not reporting his 2020 termination. SOR ¶ 1.a. In finding favorably for Applicant, the Judge concluded that the Government had established both allegations, but that Applicant had mitigated the security

concerns established under SOR ¶¶ 1.a and 1.b. She also found that, under the Whole-Person Concept, Applicant should be granted eligibility.

On appeal, the Government contends that the Judge erred in her mitigation analysis under Guideline E and in her Whole-Person analysis. The Government asserts the analysis of both were arbitrary, capricious, and contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact and Analysis.

Applicant, in his late 30s, is an employee of a defense contractor, where he has worked since August 2023. This is his first time applying for a security clearance. He is married and has one minor child and an adult stepdaughter. He completed high school. He has no military experience or further educational training.

From July 2017 to May 2020, Applicant was employed as a driver with Company A. He asked for a raise and was denied. He decided to use the company fuel card to purchase gas for his personal vehicle over a span of a couple months during the last year of his employment with Company A. Company A discovered this was happening and terminated him on May 28, 2020.

On the day he was terminated, Company A had Applicant sign a document acknowledging he misappropriated the use of his company fuel card in the sum of \$1,620. Applicant agreed to repay the \$1,620 plus an administrative fee of \$380 for a total amount of \$2,000. Company A withheld his paychecks for the last two weeks that he worked, and he also forfeited any compensation for unused vacation time. Applicant paid the remaining balance through an agreed-upon payment schedule until the debt was paid in full on September 25, 2020.

Applicant admits that, when he completed the June 2023 SCA, he intentionally failed to disclose his termination by Company A because he thought it would make him look bad and he did not want it to have a negative impact on his new job. On September 13, 2023, he was interviewed by an authorized investigator conducting his security clearance background investigation. During the interview, the investigator confronted him about his termination. Applicant admitted he intentionally omitted the information. He then told the investigator about using the company gas card to pay for gas for his personal car. He mentioned that he repaid Company A in full for the amount of gas that he purchased for his personal use.

During the hearing, Applicant testified that he learned from this experience. He has changed and intends to be completely honest about everything moving forward. He also presented two reference letters from women that know him personally and professionally. Both find Applicant to be honest. One noted that Applicant has learned from his experience and has become a more responsible and trustworthy individual. He shares his experiences about his personal growth and professional challenges with others.

The Judge found that disqualifying condition AG ¶ 16(a)¹ applied because Applicant failed to disclose his termination on his June 2023 SCA and that AG ¶ 16(e)² applied both because Applicant concealed his termination and because he used the company fuel card to fuel his personal vehicle. The Judge then concluded that mitigating conditions AG ¶¶ 17(c)³, 17(d)⁴ and 17(e)⁵ applied.

Discussion

There is no presumption of error below, and the appealing party has the burden of raising and establishing that the judge committed factual or legal error that is prejudicial. Directive ¶ E3. *See* DISCR OSD Case No. 90-1524, 1993 WL 185187 at *3 (App. Bd. Feb. 17, 1993). In deciding whether the Judge’s rulings or conclusions are arbitrary or capricious, 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 cannot be ascribed to a mere difference of opinion. *See* ISCR Case No. 97-0435 at 3 (App. Bd. Jul. 14, 1998) (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

On appeal, the Government argues that the Judge’s application of mitigating conditions under Guideline E was unsupported by the evidence. In particular, the Government asserts that the Judge failed to consider “multiple incidents of falsifying information to the Government and the fact that both the underlying misconduct and the falsifications themselves are demonstrative of his lack of candor and honesty.” Appeal Brief at 6-7.

First, the Government challenges the Judge’s application of the mitigating condition in AG ¶ 17(c) and correctly notes that this mitigating condition has two parts. The Government argues that the decision does not reasonably explain why the conduct in question occurred under unique circumstances or why it was minor or infrequent, and as a result did not satisfy the first part of the mitigating condition. However, the Judge’s analysis cites six reasons that cumulatively support her finding that the underlying conduct and subsequent falsifications are “unlikely to recur and does not cast doubt on his current reliability, trustworthiness, and good judgment” thereby

¹ 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. AG ¶ 16(a).

² 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. AG ¶ 16(e).

³ 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 cast doubt on the individual’s reliability, trustworthiness, or good judgment. AG ¶ 17(c).

⁴ The individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur. AG ¶ 17(d).

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

incorporating both requirements of AG ¶ 17(c). Decision at 6. While the Judge only explicitly noted the “unlikely to recur” language, it is clear from her analysis that she found the circumstances to be old, infrequent, and unique.

Next, the Government asserts that the Judge conducted an improper piecemeal analysis that “focused on the incidents in isolation, rather than the concerning pattern they establish.” Appeal Brief at 9-10. To support this argument, the Government argues that the Judge failed to consider “(1) that Applicant deliberately falsified his e-QIP and continued to deceive the Government during his enhanced subject interview when he failed to proactively correct the information he had previously provided and (2) that, taken together, both the underlying misconduct and the deliberate falsification are incidents that call into question Applicant’s trustworthiness.” *Id.* at 8-9. However, the decision explicitly contradicts the first point. The Judge noted in her discussion of AG ¶ 17(c) that “the investigator confronted him about his termination” before he disclosed the basis for the termination. Decision at 6. Further, the Judge’s analyses under both AG ¶ 16 and AG ¶ 17 discuss Applicant’s underlying misconduct and his deliberate falsification together but finds after considering the totality of the circumstances that similar conduct is unlikely to recur and does not cast doubt on his current reliability, trustworthiness, or judgment.

The Government also asserts that the Judge’s credibility determination was unreasonable when viewed in the entirety of the record. However, the underlying facts are not in controversy. The only credibility finding in controversy is the weight that the Judge gave Applicant’s expressions of remorse and her conclusion that Applicant learned his lesson from this experience. 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* ISCR Case No. 02-19479 at 3 (App. Bd. Jun. 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, the Judge’s decision indicates that — in addition to her reliance on credibility — she also considered objective evidence in applying the mitigating conditions in question. For example, she considered that it was his first time applying for a clearance and that he reimbursed Company A for the fuel. She also acknowledged the timing of his admissions in her mitigation analysis. Although the Government may disagree with the Judge’s weighing of the evidence, that is insufficient to demonstrate that the Judge weighed the evidence in an arbitrary or capricious manner, and we find no reason to conclude that the Judge erred in her mitigation analysis under Guideline E. *See* ISCR Case No. 04-08975 at 1 (App. Bd. Aug. 4, 2006).

With respect to the Whole-Person Concept, the Judge found that Applicant “learned from his mistakes and is unlikely to repeat the conduct in the future.” Decision at 7. We find the Judge’s Whole-Person determination in this regard to be adequately based on both objective and subjective evidence that the Judge clearly articulated in her list of considered facts when examining the nine adjudicative process factors in AG ¶ 2(d). The Judge’s analysis explicitly enumerated the evidence that she used to support her Whole-Person assessment including the disqualifying conduct, his recent employment history, and his letters of recommendation, among other considerations. Again,

while the Government may disagree with the Judge's weighing of the evidence, the Judge's analysis was reasonable and supported by the record.

The Government failed to establish the Judge committed harmful error. None of the 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 in ISCR Case No. 23-02709 is **AFFIRMED**.

Signed: Moira Modzelewski

Moira Modzelewski
Administrative Judge
Chair, Appeal Board

Signed: Allison Marie

Allison Marie
Administrative Judge
Member, Appeal Board

Signed: Jennifer Goldstein

Jennifer Goldstein
Administrative Judge
Member, Appeal Board