

Applicant raised the following issues on appeal: whether the Judge erred in failing to consider a mitigating condition and whether the Judge's decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm the Judge's unfavorable decision.

The Judge's Findings of Fact

Unmarried and 31-years-old, Applicant is an employee of a defense contractor. In 2010, he worked at a pharmacy as a photo technician. At that time, he experienced a toothache for which a friend gave him a prescription pain medication. He took about 10 pills during a one-week period before he was informed that he and other pharmacy employees were required to take a random drug test. Even though he was ready to end his work shift and go home, he was told to wait until the drug testing materials arrived, and he was informed he would not be paid during the delay. Annoyed and tired, he quit the job. He did not know whether he would have passed or failed the test, but did not want a positive drug test on his employment record.

In 2011, Applicant submitted a security clearance application (SCA) in which he negatively answered the question whether he illegally used any controlled substance in the past seven years. In March 2014, he submitted another SCA in which he again did not disclose his illegal controlled substance use in 2010. In April 2014, he did not tell an investigator during an interview that he quit his pharmacy job to avoid testing positive for illegal use of a prescription drug.

In May 2014, Applicant told an investigator about his illegal use of the prescription pain medication and the real reason he left the pharmacy. He claims that he initially filled out the 2011 SCA with full disclosure of his voluntary resignation from the pharmacy, his illegal use of prescription medication, and his earlier marijuana use, but his recruiter at the company returned the SCA to him with instructions to delete the illegal drug disclosures. While he has identified the recruiter's name, he submitted no documentation confirming his version of the events. In submitting his 2014 SCA, he decided for reasons of consistency to continue to deny illegal drug use. A character letter described him as helpful, honest, and hardworking.

The Judge's Analysis

Applicant deliberately failed to disclose required information about his illegal use of a prescription drug on two SCAs. He also deliberately failed to tell an investigator that he quit the pharmacy job because he feared testing positive on the random drug test. His falsifications were repeated over a three-year period, are not unique, and are recent. Discovery of the truth was delayed because of his deliberate falsifications, although he acknowledged his falsifications when interviewed a second time in 2014. He has not sought counseling for his falsifications. His motivation for falsification was to obtain a job with a defense contractor. Mitigating conditions

17(c)¹ and 17(d)² are not established.

Discussion

Applicant contends the Judge erred by failing to consider mitigating condition 17(b) that states:

the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully[.]

Citing ISCR Case No. 01-05593 at 3 (App. Bd. Aug. 5, 2002) for the proposition that “authorized personnel” includes “authorized agents . . . of the Executive Branch of the federal government or duly authorized officers or employees of defense contractors[.]” he argues that mitigating condition 17(b) applies in his case because he initially disclosed his use of illegal drugs on his 2011 SCA and a recruiter of a defense contractor advised him to delete that information.³ He deleted the information because he thought he would not have been hired for the job if he left the illegal drug use information in the SCA. He further argues that he was still acting under the recruiter’s improper advice when he submitted his 2014 SCA and underwent a background interview in April 2014 because the recruiter’s “improper advice . . . put him in this situation of having to be consistent with his 2011 answers.” Appeal Brief at 3.

This case does not involve a circumstance in which plausible, but improper or inadequate, advice was relied upon in good-faith. Applicant testified that the recruiter told him to falsify answers on his 2011 SCA and that he knew at that time he was required to provide full, complete, and honest information on that document. Tr. at 24, 34-35. Without deciding whether mitigating condition 17(b) applies in this case, we note an interpretation of this mitigating condition that would permit an applicant to rely on advice that he or she realizes is improper to justify the knowing submission of false information on a SCA would not be consistent the spirit and intent of the Directive.⁴ *See, e.g.*, Directive, Enclosure 2 ¶ 15 (“Of special interest is any failure to provide

¹ Directive, Enclosure 2 ¶ 17(c) states: “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 judgement[.]”

² Directive, Enclosure 2 ¶ 17 (d) states: “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 caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur[.]”

³ At the hearing, Applicant Counsel cited this case in his closing argument. Tr. at 71.

⁴ ISCR Case No. 01-24356 at 4-5 (App. Bd. Feb. 26, 2003) (“The Board will not interpret provisions of the Directive in a manner that renders meaningless other parts of the Directive or in a manner that would undermine the effectiveness of the industrial security program in protecting the national security.”) and ISCR Case No. 02-02195 at 5 (App. Bd. Apr. 9, 2004) (“Provisions of the Directive should not be construed in a narrow or artificial manner that does not adequately take into account the compelling interest of the United States in protecting and safeguarding classified

truthful and candid answers during the security clearance process . . .”) and ¶ 15 (b) (“refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination” . . . “will normally result in an unfavorable clearance action . . .”).

When Applicant submitted his 2014 SCA, he was working for a new employer and about three years had elapsed since he received the improper advice from the recruiter. No evidence was presented that he received improper or inadequate advice from “authorized personnel or legal counsel” in 2014. In his May 2014 interview, Applicant acknowledged that he answered “No” to the questions regarding illegal drug use in his 2014 SCA knowing those answers were not truthful, but did so to make his answers consistent with his 2011 SCA. Government Exhibit (GE) 3. “Consistency” is not mentioned in any of the mitigating conditions that pertain to falsifications. We find unpersuasive Applicant’s argument that the recruiter’s improper advice in 2011 had any applicability to the 2014 falsifications. Such an argument would lead to the untenable proposition that the recruiter’s improper advice could shield future falsifications for an indefinite period. Applicant’s change of employment and the intervening years, along with his knowledge that he was submitting false information, sufficiently attenuated whatever mitigative value may have arisen originally from the recruiter’s improper advice. The Judge did not err in not addressing mitigating condition 17(b) with regard to the 2014 alleged falsifications. Even if the recruiter served in an “authorized personnel” role for a defense contractor and the Judge erred in failing to address mitigation condition 17(b) in regards to the alleged 2011 SCA falsification, we find the error was harmless because it did not likely affect the outcome of the case given Applicant’s 2014 falsifications. *See, e.g.*, ISCR Case No. 08-07528 at 2 (App. Bd. Dec. 29, 2009).

Applicant also contends the Judge erred in concluding that he “deliberately omitted” information about his prescription drug use from his 2011 SCA, 2014 SCA, and April 2014 interview.⁵ He argues that, in his May 2014 interview, he stated “he did not disclose the illegal prescription drug use because he did not think of it as illegal drug use.”⁶ Appeal Brief at 4. We do not find this argument persuasive. First, due to our discussion above of potential error regarding 2011 SCA falsification, we have effectively dealt with that allegation and need not address it further in this context. Second, Applicant has made inconsistent statements about whether he thought taking the prescription drug was illegal. During the May 2014 interview, he stated that the friend who gave him the pills did not identify what they were, but he assumed they were a narcotic and knew that it was illegal to take prescription medicine that was not prescribed to him, but he took the pills anyway. He further stated that, when he decided not to take the pharmacy drug test, he did not

information and the basic objectives of the industrial security program. Consistent with that principle, the thirteen Guidelines should not be construed or applied in a narrow or artificial manner that does not adequately address the security concerns implicated by them.”).

⁵ In the Appeal Brief, Applicant does not challenge the Judge’s conclusion that Applicant deliberately omitted the information alleged in SOR ¶ 1.c (*i.e.*, he failed to disclose he left employment at the pharmacy to avoid testing positive for illegal prescription drug use during the April 2013 interview).

⁶ In the May 2014 interview, Applicant also stated he did not list the taking the pain medicine without a prescription on the 2011 SCA because he did not think about it at the time.

want to take a chance that the pills were in fact a narcotic and would result in a positive drug test. Such statements contradict his claim that he did not think taking the prescription medicine was illegal. Third, he stated during the May 2014 interview that he knew it was wrong to not be truthful about his illegal drug use on the 2014 SCA. Fourth, he admitted each falsification allegation in his SOR response. While his SOR response indicated that he did not “disclose everything” because of the recruiter’s advice, it makes no mention of him failing to disclose the prescription drug use due to a belief that such drug use was lawful. Fifth, he testified that he did not disclose the prescription drug use on his 2014 SCA because he was trying to be consistent with his 2011 SCA and that he knew he should have disclosed that information. Tr. at 41. He also testified that in his April 2014 interview that he told the investigator his quitting the pharmacy job had nothing to do with avoiding the drug test and that he made a mistake by not being completely forthright on that occasion. Tr. at 42-43. From our review of the record, the Board concludes that substantial evidence exists to support the Judge’s conclusion that Applicant deliberately omitted information about his 2010 prescription drug use in his 2014 SCA and April 2014 interview. *See, e.g.*, ISCR Case No. 12-03420 at 3 (App. Bd. Jul. 25, 2014).

Applicant further argues the Judge erred in his mitigation and whole-person analysis. In doing so, he claims, for example, his illegal use of prescription drug was minor, infrequent and unlikely to recur. He also claimed “[t]he false information wasn’t extensive and was insignificant.” Appeal Brief at 5. These arguments are neither enough to rebut the presumption that the Judge considered all of the evidence in the record nor sufficient to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 15-04856 at 2-3 (App. Bd. Mar. 9, 2017). Additionally, we find no basis for concluding the Judge erred in his whole-person analysis.

The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. Applicant has not identified any harmful error likely to change the outcome of the case. 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). *See also* Directive, Enclosure 2 ¶ 2(b): “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.”

Order

The Decision is **AFFIRMED**.

Signed: Michael Ra'anan
Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board