United States Court of Appeals for the Federal Circuit

GEORGE JADUE,
Petitioner

v.

DEPARTMENT OF HOMELAND SECURITY,
Respondent

2024-2144

Petition for review of the Merit Systems Protection Board in No. DE-0752-21-0062-I-2.

Decided: August 31, 2026

JAMES MATTHEW EISENMANN, Alden Law Group, PLLC, Washington, DC, argued for petitioner. Also represented by KRISTIN D. ALDEN, ROSS E. FISHBEIN.

GALINA I. FOMENKOVA, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent. Also represented by TARA K. HOGAN, PATRICIA M. MCCARTHY, BRETT SHUMATE.

Before PROST, CLEVENGER, and STARK, *Circuit Judges*.

STARK, *Circuit Judge*.

George Jadue appeals from a final decision of the Merit Systems Protection Board ("Board") affirming his removal by the Department of Homeland Security ("DHS") from his position as an Immigration and Customs Enforcement ("ICE") criminal investigator. Mr. Jadue requests that we reverse an administrative judge's ("AJ") denial of sanctions he sought on DHS due to the agency's failure to meet certain deadlines governing the handling of his "mixed case." We agree with the government that we must dismiss this component of his appeal for lack of jurisdiction. Mr. Jadue also asks that we reverse the finding that he exhibited "lack of candor" and vacate the penalty of removal. We are not persuaded by these contentions. Hence, as to these aspects of the appeal, we affirm the Board.

I

A

Mr. Jadue began working at ICE in December 2016, following an application process that included a background investigation. This was neither his first federal employment nor first background investigation. From 2002 until 2015, he had served as a Special Agent with the United States Department of State ("State"). As part of the hiring process leading to that position, Mr. Jadue completed a Standard Form 86: Questionnaire for National Security ("SF-86") and State conducted a background investigation. Mr. Jadue was required to periodically update his SF-86 and be further investigated, including in 2011.

The SF-86 includes questions about applicants' citizenship. Mr. Jadue stated on his 2002 SF-86 that he was a citizen of the United States and of no other country. Then, in 2005, Mr. Jadue was issued a Chilean passport. In his 2011 SF-86, Mr. Jadue did not indicate he was a dual citizen, but when he was interviewed as part of a 2011 periodic background investigation, he did acknowledge that he

might be a dual citizen and was in the process of researching his citizenship status.

In May 2013, State notified Mr. Jadue that his security clearance was being suspended pending an investigation into the citizenship issue. Seven months later, in December 2013, Mr. Jadue was indicted in the Eastern District of Virginia on charges relating to the inaccurate citizenship responses in his 2011 SF-86. A superseding indictment returned in January 2014 charged him with two counts of making false statements and one count of obstruction of justice.

In June 2014, while the criminal charges were pending, Mr. Jadue filed an application for disability retirement, which, if granted, would have allowed him to care for his wife (who had cancer) and his three children (one of whom has autism). State denied the benefits claim in December 2014.

Meanwhile, in July 2014, Mr. Jadue had a criminal trial. The presiding judge dismissed two counts of the indictment with prejudice in response to Mr. Jadue's motion for judgment of acquittal. The jury was unable to reach a unanimous verdict on the remaining count. Thereafter, the U.S. Attorney's Office ("USAO") and Mr. Jadue reached an agreement ("Agreement"), whereby the USAO would not re-try Mr. Jadue on the remaining count, and he would voluntarily resign from his position with State. As required by the USAO Agreement, Mr. Jadue resigned from State effective January 23, 2015. The court then dismissed the final count against him with prejudice.

B

In June 2015, Mr. Jadue applied to DHS to become a criminal investigator with ICE. As part of that application process, he completed an electronic version of the SF-86, called the Electronic Questionnaire for Investigations Processing or "EQIP." Mr. Jadue also twice answered follow-

up questions from DHS' Personnel Security Unit ("PSU"), which performs background investigations into new employees, and he was interviewed by a PSU investigator in May 2016.

DHS completed its investigation in September 2016 and decided to hire Mr. Jadue; it also granted him access to classified information. Mr. Jadue began his tenure with DHS on December 11, 2016. About a month later, another DHS employee reported suspicions that Mr. Jadue was a terrorist sympathizer and had posted troubling comments on social media. In April 2017, DHS' Office of Professional Responsibility interviewed Mr. Jadue and concluded that these allegations were unfounded.

Nonetheless, on September 7, 2017, DHS proposed removing Mr. Jadue, based on lack of candor, a charge that stemmed from Mr. Jadue's responses on the 2015 EQIP and to DHS investigators. In an amended proposal, DHS again charged Mr. Jadue with lack of candor, and supported the charge with 11 specifications. Each specification related to allegedly incorrect statements or omissions on Mr. Jadue's 2015 EQIP, responses to follow-up questions from PSU, or answers during his pre-employment interview with a PSU investigator.

In April 2017, PSU revoked Mr. Jadue's security clearance and began a reinvestigation related to Mr. Jadue's delayed disclosure of his Chilean citizenship while employed by State. On February 9, 2018, DHS concluded that Mr. Jadue's security clearance should be reinstated. It did so based on PSU's determination that Mr. Jadue did not, during his security clearance investigations, "willfully intend to deceive or conceal" or provide false information relating to his reasons for leaving State.

Proceedings on the agency's proposal to remove Mr. Jadue continued on their own track. They concluded on April 11, 2018, when the deciding official, Jack Staton, sustained each of the 11 specifications underlying the lack of

candor charge. He also found a balance of the *Douglas* factors justified removal. *See Douglas v. Veterans Admin.*, 5 M.S.P.B. 313, 5 M.S.P.R. 280, 307-08 (1981). Mr. Jadue was removed from his position with DHS effective April 14, 2018.

C

On August 3, 2018, Mr. Jadue filed a complaint with DHS' Office of Diversity and Civil Rights ("ODCR"). Mr. Jadue alleged that his termination was due in part to discrimination based on race, color, religion, national origin, and/or retaliation, and was unlawful for additional reasons not pertaining to discrimination. Thus, his was a "mixed case" complaint, as it contains allegations based on discrimination and on non-discrimination grounds.[1]

DHS, through the ODCR, was required to handle Mr. Jadue's complaint in accordance with equal employment statutes and regulations, including regulations issued by the Equal Employment Opportunity Commission ("EEOC"). In particular, DHS was required to conduct its investigation and provide Mr. Jadue a Return of Investigation ("ROI") within 180 days (i.e., by January 30, 2019) and to issue a final decision within 45 days later (i.e., by March 18, 2019). *See* 29 C.F.R. § 1614.108(f) (requiring ROI within 180 days after complaint is filed); *id.*

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[1] Mr. Jadue had the option to instead file his mixed case directly with the Board, where he could have raised discrimination as an affirmative defense to the lack of candor charge against him. *See* 29 C.F.R. §1614.302(b) ("An aggrieved person may initially file a mixed case complaint with an agency . . . or an appeal on the same matter with the [Board] pursuant to 5 C.F.R. § 1201.151, but not both.").

§ 1614.302(d)(2) (requiring final decision within 45 days after ROI deadline). DHS missed these deadlines. It did not provide a copy of the ROI to Mr. Jadue until April 6, 2020 – more than 433 days late – and did not give him a final decision until over 200 days later, on October 30, 2020.

On November 30, 2020, Mr. Jadue appealed the agency's final decision to the Board, where he continued to press both discrimination and non-discrimination claims. On January 7, 2021, he filed a motion for sanctions based on DHS' failure to meet the deadlines for handling his complaint. *See* 5 C.F.R. § 1201.43 ("The judge may impose sanctions upon the parties as necessary to serve the ends of justice.").[2] He asked the Board to grant him a default judgment or, in the alternative, apply adverse inferences against DHS. After a telephone conference, the administrative judge ("AJ") denied what he described as "a novel sanctions motion." J.A. 89. In doing so, the AJ pointed to 5 C.F.R. § 1201.154(b)(2), which allows an appellant to "appeal the matter directly to the Board at any time after the expiration of 120 calendar days" if the agency has not, within that timeframe, "resolved the matter or issued a final decision on the formal complaint." He "decline[d] the

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[2] The sole basis for Mr. Jadue's sanction motions was DHS' failure to meet the ROI and Final Investigation deadlines set by EEOC regulations. *See Jadue v. Dep't of Homeland Sec.*, No. DE-0752-21-0062-I-1. On appeal, Mr. Jadue also cites to 5 U.S.C. § 7702(a)(2)(B), which requires that agencies investigating a mixed case "shall resolve such a matter within 120 days" after the filing of the complaint. But because Mr. Jadue did not cite this statute as a basis for sanctions before the Board, he has forfeited any reliance on it in this appeal. *See Sistek v. Dep't of Veterans Affs.*, 955 F.3d 948, 958 n.2 (Fed. Cir. 2020) (argument not presented to AJ is forfeited).

invitation to fashion an additional remedy, particularly in the absence of supporting precedent." J.A. 89.

The AJ conducted a two-day evidentiary hearing in January 2022, at which multiple witnesses testified, including Mr. Jadue and deciding official Staton. In July 2022, the AJ issued an Initial Decision sustaining four of the 11 specifications. The AJ also accepted the deciding official's penalty analysis, finding removal to be reasonable.

Mr. Jadue petitioned for review by the full Board. The then-two-member Board issued a split decision, rendering the AJ's Initial Decision final and appealable. Chair Harris would have remanded the case to the AJ to assess Mr. Jadue's motion for sanctions under the "*Royal* factors," which the EEOC uses to evaluate sanctions requests based on agency untimeliness. Vice Chair Limon did not believe the Board had authority to impose sanctions based on failure to comply with EEOC regulations and would have affirmed.

Mr. Jadue then timely appealed. After filing his notice of appeal, Mr. Jadue also submitted Federal Circuit Form 10, by which he formally abandoned his discrimination claims.

II

Our jurisdiction over appeals from the Board is limited by statute. *See Esparraguera v. Dep't of the Army*, 981 F.3d 1328, 1337 (Fed. Cir. 2020). We have no jurisdiction over "mixed cases," that is, cases involving *both* a severe adverse employment action *and* an allegation that a federal employer discriminated against a petitioner based on a protected characteristic. *See* 5 U.S.C. §§ 7702-03; *see also Kloeckner v. Solis*, 568 U.S. 41, 56 (2012). Where, however, a petitioner explicitly waives his discrimination claims, we

may exercise jurisdiction over the non-discrimination adverse employment claims. *See Harris v. Secs. Exch. Comm'n*, 972 F.3d 1307, 1319 (Fed. Cir. 2020).

Where we have jurisdiction, we must affirm the Board unless its decision is "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c). The burden is on the agency to show the charged conduct occurred, that it affected the efficiency of service (i.e., nexus), and that the penalty imposed was reasonable in light of the factors set forth in *Douglas*. *Malloy v. U.S. Postal Serv.*, 578 F.3d 1351, 1356 (Fed. Cir. 2009).

III

Mr. Jadue first asks that we reverse the AJ's denial of sanctions. The government responds that we lack jurisdiction over this part of his appeal because the sanctions request is predicated on the agency's handling of Mr. Jadue's "mixed case," which includes, obviously, his discrimination claims. We agree with the government.

A

Pursuant to 5 U.S.C. § 7703(b)(1), petitions for review of Board decisions involving a serious adverse personnel action such as Mr. Jadue's "shall be filed in the . . . Federal Circuit," *except* as provided by § 7703(b)(2). Section 7703(b)(2), in turn, provides that "[c]ases of discrimination subject to the provisions of [§ 7702] shall be filed under [the applicable antidiscrimination statutes]" and are judicially reviewable only in district court. Construing these provisions, the Supreme Court has explained: "A federal employee who claims that an agency action appealable to the [Board] violates an antidiscrimination statute listed in § 7702(a)(1) should seek judicial review in district court, *not in the Federal Circuit*. That is so whether the [Board]

decided her case on procedural grounds or instead on the merits." *Kloeckner*, 568 U.S. at 56 (emphasis added); *see also Perry v. Merit Sys. Prot. Bd.*, 582 U.S. 420, 437 (2017) ("[I]n mixed cases . . . in which the employee (or former employee) complains of serious adverse action prompted, in whole or in part, by the employing agency's violation of federal antidiscrimination laws, the district court is the proper forum for judicial review.").

B

Notwithstanding these authorities, Mr. Jadue contends that we have jurisdiction to review the sanctions issue. His justification for this position begins with the fact that he has explicitly abandoned his discrimination claims. He did so by executing our court's Form 10, in which he stated:

> Although I did claim that I was discriminated against before the [Board] . . . , I wish to abandon those discrimination claims . . . in the Federal Circuit rather than pursuing discrimination claims and civil-service claims in district court. *I understand that this means I will not be able to raise the discrimination claims at any later point*.

ECF No. 5 at 3 (emphasis added). In Mr. Jadue's view, we may exercise jurisdiction because no discrimination claim is before us now; and, were his appeal to result in a remand, no discrimination claim would proceed at the Board. Hence, he continues, any sanctions that might be imposed (such as a default judgment or adverse inferences) would not apply to his (now abandoned) discrimination claims.

The principal problem with Mr. Jadue's position is that it ignores the fact that his sanctions motion was based entirely on the *discrimination* components of his mixed case claims. Mr. Jadue moved for sanctions based on DHS' untimely handling of his *discrimination* claims. The EEOC

regulations DHS undisputedly violated govern its processing of *discrimination* claims. *See, e.g.*, Open. Br. at 4 ("The Agency [DHS] violated its statutory and regulatory mandates to timely investigate and issue its Decision on Petitioner's *discrimination* claims, delaying the Board proceedings . . . and Petitioner's ability to obtain evidence.") (emphasis added). The only reason these regulatory deadlines applied was because he filed a "mixed case" complaint; i.e., one containing allegations of discrimination.

This reality is in no way altered by the fact that we have obtained jurisdiction over the non-discrimination portions of Mr. Jadue's appeal by his execution of Form 10. As we previously explained, "a petitioner's explicit waiver of her discrimination claims in such a [mixed] case effectively *converts* the case to a standard appeal of the adverse personnel action – providing th[is] court with jurisdiction to review the Board's decision (*without considering* any discrimination claims)." *Harris*, 972 F.3d at 1318 (emphasis added). Mr. Jadue's case, therefore, has been "converted" to a pure adverse action case, and we may not "consider[]" his discrimination claims. The discrimination claims are not before us in any form or fashion, including their procedural aspects and sanctions. *See Kloeckner*, 568 U.S. at 56 (holding Federal Circuit lacks appellate jurisdiction over Board handling of discrimination claim "whether the [Board] decided [the] case on procedural grounds or instead on the merits").

Thus, we lack jurisdiction and may not "consider[] any discrimination claims." *Harris*, 972 F.3d at 1318.[3] For the same reason, we likewise cannot consider a sanctions issue that arises solely because of its relationship with the discrimination claims over which we lack jurisdiction (and which Mr. Jadue has abandoned). We agree with the government that "[b]y explicitly abandoning a discrimination claim, a petitioner also abandons arguments related to that claim, which would otherwise be part of a mixed case beyond this Court's jurisdiction." Resp. Br. at 19; *see also Pettus v. Dep't of the Navy*, 2023 WL 4503188, at *4 (Fed. Cir. July 13, 2023) (nonprecedential) ("By choosing to abandon her disability discrimination claim [using Form 10] for this court to have jurisdiction, Ms. Pettus chose to abandon not only the merits of her disability discrimination claim but the *related procedural arguments as well*.") (emphasis added).

C

Following the Supreme Court's decisions in *Kloeckner* and *Perry*, we addressed the scope of our jurisdiction over Board appeals in *Harris v. Securities & Exchange Commission*, 972 F.3d 1307 (Fed. Cir. 2020). There the petitioner, Ms. Harris, was placed on a performance improvement plan ("PIP"). Ms. Harris argued that the agency had not given her a meaningful opportunity to demonstrate adequate performance under the PIP, in part because of discrimination. *See id.* at 1314-15. After the Board ruled

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[3] Whatever force there may be to Mr. Jadue's lengthy discussion in his briefs about the importance of the Board's role as a forum for evidentiary proceedings in mixed cases, and the related need for sanctions power to effectuate Congress' vision for the Board, is immaterial to the issue before us, which is simply whether we have appellate jurisdiction over the denial of sanctions.

against her, Ms. Harris appealed to us. She completed Form 10, waiving her discrimination claims. *See id.* at 1318.

Over the government's objection, we held that we "retain[ed] jurisdiction" over "Ms. Harris's non-discrimination/retaliation-based pretext arguments," explaining that while "Ms. Harris cabined her pretext and predetermination arguments within her discrimination and retaliation affirmative defenses before the Board . . . [this was] not a reason to view this petition as a mixed case." *Id.* at 1319 & n.6. We went on to evaluate the non-discrimination arguments and affirmed. *See id.* at 1319-22.

Harris stands for the proposition that once a petitioner seeking review of a Board judgment waives all current and potential future discrimination claims by executing Form 10, we may exercise jurisdiction to review all properly presented issues that are *independent of* the discrimination claim. Ms. Harris's non-discrimination-based allegations for why she was deprived of an opportunity to perform under the PIP were independent of the discrimination-based allegations. In Mr. Jadue's case, however, his sanctions request is intertwined with his discrimination claims. As we have explained, the entire predicate for his sanctions motion was the agency's failure to comply with EEOC regulations that would have been inapplicable but for Mr. Jadue's *discrimination* claims.

Mr. Jadue's insistence that he is not seeking remand for entry of sanctions as to his now-abandoned discrimination claims, but is instead making a narrow request for sanctions pertaining to his non-discrimination arguments, does not alter our conclusion. Unlike Ms. Harris's challenges to the Board's removal analysis, Mr. Jadue's appeal asks that we review a decision on sanctions that would never have been issued – because he never could have requested the sanctions – had it not been for him making a

discrimination claim (in the form of a mixed case complaint). The sanctions issue he asks us to review, then, is not independent of his discrimination claims, and we lack jurisdiction to review it.

Largely relying on nonprecedential opinions, which of course do not bind us, Mr. Jadue advocates for a much narrower reading of *Harris*. He asks us to hold that *Harris* means we "will consider procedural and other arguments in a *formerly* mixed case (*i.e.*, where the appellant withdraws his discrimination claims) so long as the procedural or other argument does not require a determination of the merits of the discrimination claims." Reply Br. at 1-2. As is evident from our discussion here, this is not the proper understanding of *Harris*.[4]

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[4] Mr. Jadue devotes significant attention to *Smets v. Department of the Navy*, 498 F. App'x 1 (Fed. Cir. 2012). There, an AJ sanctioned Ms. Smets for being dilatory in pursuing her case, prohibiting her from "supplementing the written record with any further evidence regarding her disability discrimination defense." *Id.* at 2. Ms. Smets appealed to us, seeking to press both discrimination and non-discrimination claims. *See id.* at 3. We exercised jurisdiction and evaluated Ms. Smets' allegations, ultimately finding they did not adequately allege a discrimination claim – and, thus, her case was not a mixed case. *See id.* (citing *Dedrick v. Berry*, 573 F.3d 1278, 1280 (Fed. Cir. 2009)).After the Supreme Court's decision in *Perry*, 582 U.S. at 420, we lack authority to evaluate the merits of a discrimination claim.

Mr. Jadue also argues that in *Pettus* we considered a procedural issue that arises only in mixed cases. In fact, the issue we confronted in *Pettus* related to an extension of time that was pertinent to the appellant's still-live non-dis-

D

In sum, we hold that by abandoning his discrimination claims, Mr. Jadue likewise abandoned all requests for relief based on his discrimination claims, which here includes his request for sanctions, which is based on the agency's handling of his discrimination claims. Otherwise, he would fail to "convert" his mixed case to a pure adverse action claim, and we would lack jurisdiction over any part of his appeal. *See Harris,* 972 F.3d at 1378. Consequently, we dismiss for lack of jurisdiction the portion of Mr. Jadue's appeal challenging the denial of his request for sanctions.

IV

We have jurisdiction to review the Board's evaluation of the lack of candor charge DHS brought against Mr. Jadue, including the individual specifications supporting it, as well as the agency's penalty of removal. *See* 5 U.S.C. § 7702; *Harris*, 972 F.3d at 1318. We turn to these issues now.[5]

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crimination claims. *See* 2023 WL 4503188, at *3. Consistent with our approach in *Pettus*, the government acknowledges that if the procedural rule the Board was accused of violating applied equally to mixed cases and pure adverse action cases, then an appeal from resolution of a sanctions motion relating to such a rule could be within our jurisdiction.

[5] In a footnote, Mr. Jadue also purports to challenge the AJ's finding of nexus. *See* Open. Br. at 62 n.17. "[A]rguments raised in footnotes are not preserved" but, instead, are forfeited. *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006). For this reason, we do not address the issue of nexus.

A

A lack of candor charge requires the agency to demonstrate that the charged employee made a statement or omission containing an element of deception; the agency need not prove that the employee acted with intent to deceive. *See Ludlum v. Dep't of Just.*, 278 F.3d 1281, 1284-85 (Fed. Cir. 2002). A lack of candor charge can be sustained based on a finding that an employee "did not respond fully and truthfully to the questions he was asked." *Id.* at 1284-85 (internal quotation marks omitted). An omission is sufficient to sustain a charge where (1) "the employee failed to be fully forthright" and (2) "did so knowingly." *Parkinson v. Dep't of Just.*, 815 F.3d 757, 766 (Fed. Cir. 2016), *abrogated on other grounds by* 874 F.3d 710 (Fed. Cir. 2017) (en banc).

Mr. Jadue contests the AJ's judgment sustaining specifications 1, 2, 4, and 6. We conclude that the AJ's assessments are supported by substantial evidence and free of legal error.

1

We begin with specifications 1 and 6.[6] Specification 1 is based on Mr. Jadue's response of "no" to the question "[h]ave you left a job by mutual agreement following charges or allegations of misconduct," and his corresponding failure to disclose the USAO Agreement in his DHS EQIP. J.A. 42-44. Specification 6 alleges that Mr. Jadue neglected to mention the USAO Agreement in written responses to DHS PSU follow-up questionnaires after he submitted his 2015 SF-86. The inquiries underlying specification 6 are: (a) "Provide a signed statement disclosing why you left [State];" and (b) "Was your departure from

[6] Although the AJ did not address specifications 1 and 6 together, Mr. Jadue does so in his briefing to us. We follow suit.

[State] due to unfavorable circumstances? If so, provide a signed detailed statement regarding your departure from [State]." J.A. 55-58. Mr. Jadue responded that he resigned from State to care for his wife, who was ill at the time, and his three children, one of whom has special needs, and because his commute "became too difficult to manage." J.A. 56.

Mr. Jadue's primary contention on appeal is that the AJ's findings regarding specifications 1 and 6 were "utterly inconsistent with his later findings on specifications 7, 8, 9, and 11," which also related to the circumstances under which he left State. Open. Br. at 49-55. He further contends that the AJ "did not consider vital context" and "evidence." *Id.* We disagree.

While specifications 7, 8, 9, and 11, which the AJ rejected, pertain to Mr. Jadue's responses relating to his resignation from State, they are readily distinguishable from specifications 1 and 6, which the AJ sustained. Specifications 1 and 6 are based on documents prepared and submitted by Mr. Jadue himself. By contrast, specifications 8, 9, and 11 involve representations Mr. Jadue made during a live interview with a PSU investigator, an interview the AJ deemed to be "a rambling affair," from which he could not make a finding of deception. J.A. 59-66. Specification 7 was based on a DHS-prepared post-interview report, which the AJ was not persuaded contained all material information. Understanding these differing contexts confirms there is no inconsistency between sustaining specifications 1 and 6 and rejecting specifications 7, 8, 9, and 11.

Nor did the AJ ignore "vital context" or "evidence." The AJ recognized that Mr. Jadue may have thought, in his own mind, that his resignation from State was for family reasons, and may have, thus, believed he was accurately responding to the EQIP. But, even with an appreciation of this possibility, the AJ made a finding that Mr. Jadue

knowingly concealed material, responsive information, which rendered his answers about his departure from State inaccurate. Substantial evidence supports the AJ's finding that Mr. Jadue certainly knew about the USAO Agreement he himself had signed, and it is undisputed he failed to disclose it. *See, e.g.*, J.A. 3795 (deciding official Staton testifying: "I believe [Mr. Jadue] left for family reasons. I do believe that. But I also believe that he knows he entered into an agreement with the Eastern District of Virginia . . . He obviously knew about the document. He signed the document.").

Mr. Jadue has not demonstrated any reversible error with respect to the AJ's assessment of specifications 1 and 6.

2

Mr. Jadue also challenges specification 2, which is based on the "yes" answer he gave on the EQIP to the question "have you been issued a summons, citation, or ticket to appear in court in a criminal proceeding against you?" J.A. 45-50. His affirmative response generated a further request from the EQIP that he "[p]rovide a description of the specific nature of the offense," in response to which Mr. Jadue answered: "failure to show dual cit on equip." J.A. 47. DHS alleged that this response was insufficient because Mr. Jadue withheld the details that he was charged with two counts of making false statements and one count of obstruction of justice.

The AJ concluded that Mr. Jadue's "responses, under the circumstances, involved an 'element of deception' because he knowingly failed to disclose something that should have been disclosed." J.A. 48. This finding is supported by substantial evidence. The question asked for the "*specific* nature of the offense" and Mr. Jadue's response ("failure to show dual cit on equip.") could reasonably be viewed as deceptively general and underinclusive. J.A. 47-48 (emphasis added).

The AJ also rejected Mr. Jadue's "planting the flag argument." This is his argument that his responses were not deceptive because he was providing limited information with the intent of providing more fulsome responses later. The AJ pointed out that Mr. Jadue certified, as the EQIP required him to do, that his responses were "true, *complete*, and correct." J.A. 49. The AJ's conclusions were legally sound and supported by the substantial evidence summarized above. Accordingly, we affirm as to specification 2.[7]

3

The final specification at issue is specification 4. It relates to Mr. Jadue's EQIP response to the question: "Have you EVER had a security clearance eligibility/access authorization denied, suspended, or revoked? (Note: An administrative downgrade or administrative termination of a security clearance is not a revocation.)" J.A. 51-53. Mr. Jadue checked the "No" box and added the optional comment "Not sure." J.A. 52.

The AJ, pointing to the undisputed fact that Mr. Jadue's security clearance had been suspended on May 16, 2013, concluded "[i]t would be implausible for [Mr. Jadue] to suggest he forgot an important event like his Top Secret security clearance suspension." *Id.* The AJ further found that the response demonstrated an "element of deception," explaining that Mr. Jadue never said "he forgot about his security clearance suspension" but, instead, "testified he didn't recall what happened *after* his security clearance was suspended." J.A. 52-53.

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[7] Mr. Jadue cites no legal authority for his contention that "the AJ needed to articulate how much more detail Petitioner should have provided for his answer to be considered complete – and thus not lack candor." Open. Br. at 57 (internal footnote omitted).

The AJ's finding of deception is supported by substantial evidence, as a reasonable mind could have been persuaded that Mr. Jadue was knowingly not forthright. The AJ's conclusion was also legally sound, as the deception element of a lack of candor charge can be supported by evidence showing a respondent withheld relevant information he "must have known." *Ludlum*, 278 F.3d at 1286.

Mr. Jadue further contends that the AJ's analysis with respect to specification 4 is fatally undermined by the AJ's analysis of specification 3, which the AJ found not proven. We disagree. Specification 3 is based on Mr. Jadue's contradictory responses to two questions. Mr. Jadue responded "no" when asked if he had been arrested, summoned, cited, or ordered to appear as the result of a criminal offense. But when asked if he had been "charged, convicted . . . and/or ordered to appear in court in a criminal proceeding against [him]," Mr. Jadue responded "yes" and added "charges dismissed." J.A. 50-51, 495. The AJ found that the conflicting yes/no responses, as supplemented by the optional "charges dismissed" comment, demonstrated that Mr. Jadue "made a simple mistake by answering 'yes' to one and 'no' to the other." J.A. 51. This reasoning is not inconsistent with the AJ's treatment of specification 4, where, as we have already discussed, the AJ found that Mr. Jadue's "not sure" response was itself untrue.

We affirm as to specification 4.

4

Lastly, we reject Mr. Jadue's argument that because the AJ did not find all 11 specifications were proven, he should have found *all* of them unproven, as the specifications purportedly rise and fall together. Mr. Jadue seems to base this contention on his reading of deciding official Staton's testimony, in which he stated that, rather than go "specification-by-specification" he "had to look at every-

thing," and made his decision to sustain all 11 specifications on "one fact that kept standing out," which was Mr. Jadue's failure to disclose the USAO Agreement. J.A. 3783. The AJ's individual treatment of the specifications is consistent with the law, *see Chauvin v. Dep't of the Navy*, 38 F.3d 563, 565 (Fed. Cir. 1994), and supported by substantial evidence, as we have explained above.

Nor has Mr. Jadue demonstrated there was any fatal inconsistency between the AJ's findings that specifications 1, 2, 4, and 6 were proven, while specifications 3, 5, and 7-11 were not. We have already discussed specifications 3, 7-9, and 11. As for specifications 5 and 10, the AJ rejected them because they were based on responses from Mr. Jadue to the effect that he had never been arrested, a statement for which the AJ did not find credible evidence of an "element of deception." J.A. 53-55, 65.

Therefore, we affirm the Board's judgment sustaining specifications 1, 2, 4, and 6.

B

Finally, we turn to Mr. Jadue's challenge to the AJ's approval of DHS' decision to remove him from his employment with ICE. Mr. Jadue argues that the AJ failed to independently balance the *Douglas* factors and impermissibly deferred to the deciding official's penalty analysis. We are not persuaded.

1

In *Williams v. Federal Bureau of Prisons*, 72 F.4th 1281 (Fed. Cir. 2023), we explained that when an AJ does not affirm each of the *charges* sustained by the deciding official, the AJ has a duty to independently balance the *Douglas* factors and may not defer to the deciding official. While each charge (such as lack of candor) represents a particular, unseverable legal basis for employee discipline, specifications are separate acts of misconduct in support of a charge (such as lying to a supervisor on a particular date).

See Chauvin, 38 F.3d at 565; *see also Tartaglia v. Dep't of Veterans Affs.*, 858 F.3d 1405, 1407 & n.2 (Fed. Cir. 2017).

While Mr. Jadue insists that the AJ violated the principle identified in *Williams* by failing to independently balance the *Douglas* factors, *Williams* is not applicable here. Mr. Jadue faced only a single charge, lack of candor, and the AJ, like the deciding official, found that charge to be proven. Hence, every charge was sustained, even though not every specification supporting that charge was proven. We have never held that in such circumstances the Board has an obligation to independently evaluate the *Douglas* factors, according no deference to the agency.

Furthermore, "when the agency makes . . . clear before the Board" that "the agency itself would have imposed the same penalty on the basis of the sustained charges that it chose on the basis of the combined charges," the agency's chosen penalty is entitled to deference. *Lachance v. Devall*, 178 F.3d 1246, 1259 (Fed. Cir. 1999). Here, deciding official Staton testified that he would have chosen removal as Mr. Jadue's penalty solely on the basis of specifications 1 or 6 alone, both of which the AJ upheld. This provides a sufficient basis to defer to the agency here.

2

Mr. Jadue additionally argues that we must remand with respect to the penalty imposed because both deciding official Staton and the AJ failed to consider, as a mitigating factor under *Douglas*, that Mr. Jadue's "Top Secret" security clearance was restored in 2018, during the pendency of the charges against him. We are unpersuaded. Deciding official Staton testified that he was aware of the restoration of Mr. Jadue's security clearance, but did not "rely" on it; he did not deny considering it. J.A. 3788. The AJ found this testimony to be credible. J.A. 70-71.

Moreover, the AJ did address the restoration of Mr. Jadue's security clearance, noting "the different standards

and circumstances that apply to security clearance decisions" as compared to employment disciplinary proceedings. J.A. 42 n.16. The AJ, like deciding official Staton, further observed that even with his security clearance, Mr. Jadue still suffered from a "*Giglio*" problem. *Id.* at 69-70; *see also id.* at 3788. That is, Mr. Jadue, as a law enforcement officer, would be expected to testify under oath, which would trigger an obligation to produce evidence tending to impeach his credibility under *Giglio v. United States*, 405 U.S. 150 (1972).

Therefore, we affirm the penalty of removal.

V

We have considered Mr. Jadue's remaining arguments and find them unpersuasive. Accordingly, for the foregoing reasons, we (i) dismiss Mr. Jadue's appeal to the extent it seeks review of the AJ's denial of sanctions, (ii) affirm the AJ's judgment finding specifications 1, 2, 4, and 6 proven, and (iii) affirm the judgment sustaining the agency's penalty of removal.

DISMISSED-IN-PART AND AFFIRMED-IN-PART

COSTS

Each party to bear its own costs.