DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
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Date: March 18, 2022

In the matter of:	)	
---	)	ISCR Case No. 19-03795
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On March 12, 2020, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline H (Drug Involvement and Substance Misuse) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing, which was held on March 23, 2021. On January 11, 2022, Administrative Judge Robert Tuider denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Under Guideline H, the SOR alleged that Applicant purchased and used marijuana from June 2003 through December 2018 and separately alleged that Applicant purchased and used marijuana after he was granted a security clearance in 2009. These same behaviors were cross-alleged under Guideline E. Under Guideline E, Applicant was also alleged to have falsified his 2008 security clearance application (SCA) by failing to fully disclose his marijuana use. The Judge found favorably for Applicant on the falsification allegation, but adversely on the other allegations.

On appeal, Applicant asserts that the Judge made a factual error and that the Judge's delay in issuing the decision prejudiced him. Consistent with the following, we affirm.

Judge's Findings of Fact: The Judge's pertinent findings are summarized below:

Applicant is in his late thirties and has been employed by a defense contractor since 2006. During a security clearance interview in 2009, Applicant told the investigator that he stopped using marijuana in 2007 because the drug no longer appealed to him and because he wanted to start a career. He was subsequently granted a security clearance in March 2009.

In his January 2019 SCA, he disclosed past marijuana use, which he elaborated on in his April 2020 answer to the SOR and in his hearing testimony. Applicant estimated that he first used marijuana sometime between 2003 and 2005. He used approximately two or three times per year until 2018, when recreational marijuana use became legal in his state. At that time, his use increased to approximately one to two times per month for a short period. He acknowledged that his use was a mistake and stated his intent not to use marijuana again.

Applicant estimated that he used marijuana approximately 20 times after being granted a clearance in March 2009 until he stopped in December 2018. He acknowledged that his marijuana use was a violation of state and federal law, as well as his employer's drug use policy.

In December 2018, Applicant was preparing to submit a new SCA for his periodic renewal and decided to quit using marijuana, recognizing that "I shouldn't have done it, and it was a poor choice." Decision at 3. Applicant used marijuana with his wife in the past, and his wife still uses marijuana, but Applicant stated that he is no longer tempted to use it.

Applicant called a co-worker as a character witness. She provided a favorable professional and personal assessment of Applicant, testifying to his trustworthiness and loyalty and highlighting the fact that he self-reported the marijuana use.

Judge's Analysis: The Judge's analysis is quoted below, in pertinent part:

Guideline H

> Applicant's marijuana use occurred after Applicant completed his December 2008 [SCA], after his March 2009 OPM interview, and after being granted a security clearance in March 2009. "An applicant who uses marijuana after having been placed on notice of its security significance, such as using after having completed a clearance application, may be lacking in the qualities expected of those with access to national secrets." ISCR Case No. 17-03191 at 3 (App. Bd. Mar. 26, 2019) (citing ISCR Case No. 17-04198 at 2 (App. Bd. Jan. 15, 2019) ("An applicant's misuse of drugs after having been placed on notice of the incompatibility of drug abuse with clearance eligibility raises questions about his or her judgment and reliability").) Applicant's spouse and some of his friends are marijuana users, and it is likely that he will be in the vicinity of marijuana in the

future. It is too soon after his abstinence from marijuana use beginning in December 2018, to rule out the likelihood of his future marijuana use. Guideline H security concerns are not mitigated at this time. [Decision at 7.]

Guideline E

Applicant continued to use marijuana after his initial disclosure of marijuana use on his December 2008 [SCA], followed by his assurances to an OPM investigator in March 2009 that he stopped using marijuana in 2007 and wanted to pursue his career. Following these representations, he was granted a security clearance in March 2009 and used marijuana intermittently for a ten-year period while hold (sic) a security clearance. He used marijuana knowing that it violated state and Federal law as well as company policy. Applicant is to be commended for self-reporting his past marijuana use and his assurances that he stopped using marijuana in December 2018. However, those assurances ring hollow after ten years of infrequent recreational marijuana use while holding a security clearance. [Decision at 9.]

Whole-Person Concept

[T]he mitigating weight of Applicant's disclosure is undermined by his marijuana use after his March 2009 OPM interview. A 15-month period of abstinence from December 2018 to March 2021, the date of his hearing, is insufficient to overcome a ten-year period of marijuana use while holding a security clearance and continued his ongoing exposure to marijuana. [Decision at 10.]

Discussion

Factual Error

Applicant challenges the Judge's reference to his "15-month period of abstinence" from December 2018 to his hearing in March 2021. Decision at 10. Applicant correctly states that the period from December 2018 to March 2021 is 27 months, not 15 months. He argues that the error impaired the Judge's analysis of the recency of Applicant's security-significant conduct and that the error was a "key point that led the Judge to his decision." Appeal Brief at 1.

Applicant is not contending that the Judge's findings of fact are in error. In his findings of fact, the Judge referred consistently to Applicant stopping his marijuana use in December 2018, which Applicant does not contest. Applicant takes issue only with the sentence in the Judge's whole-person analysis, quoted above, in which the Judge miscalculates or misstates the number of months Applicant was abstinent.

Reading the decision in light of the record, we conclude that this error was harmless, as it did not likely affect the outcome of the case. *See, e.g.*, ISCR Case No. 10-01021 at 3 (App. Bd. Nov. 18, 2011). As evident in the analysis sections excerpted above, the Judge focused almost exclusively on the following facts: Applicant assured the government investigator in 2009 that he had ceased using marijuana; Applicant was then granted a security clearance; and Applicant

nevertheless continued to use marijuana for the next ten years. The Judge's adverse decision rests squarely on Applicant's "ten years of infrequent recreational marijuana use while holding a security clearance." Decision at 9. Our review of the record and decision convinces us that the Judge's miscalculation of the months of abstinence did not likely affect his decision.

Delay

At the close of the hearing on March 23, 2021, the Judge stated that he would issue a written decision within "a reasonable period of time after receipt of the transcript." Appeal Brief at 1, citing Tr. at 64. Applicant notes that he did not receive the decision until January 11, 2022, and argues that this delay of 294 days was not "reasonable." Applicant contends that the delay prejudiced him, because the weight of his testimony and his witness's testimony was diminished when the Judge considered the testimony "after such a lengthy period had passed." *Id*. "I do not feel the passion that I conveyed for my work, the trusting manner in which my witness talked about me, nor the sincere remorse for the Marijuana use was considered . . . ." *Id*. at 1-2.

Directive ¶ E3.1.25 requires that the Judge "shall make a written clearance decision in a timely manner[.]" However, the Directive does not define the term "timely manner" and does not impose actual time standards on Judges. Despite his claim that the Judge failed to consider fully the testimony at hearing, Applicant does not point to any testimony that was ignored or given short shrift. As we have previously stated, absent a showing that the Judge's delay in issuing a decision caused an identifiable prejudice, mere proof of a delay is not sufficient to warrant remand or reversal of a Judge's decision. *See, e.g.*, ISCR Case No. 02-32581 at 3 (App. Bd. Jun. 9, 2005). Our review of the transcript and the decision confirms that the Judge captured the gravamen of the testimony offered at hearing. Applicant has not established that any identifiable prejudice arose from the length of time the Judge took to issue the decision.

In conclusion, Applicant has not identified any harmful error in the Judge's handling of his case or in his decision. The Judge examined the relevant evidence and articulated a satisfactory explanation for his 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). *See also* Directive, Encl. 2, App. A ¶ 2(b): "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

Order

The decision is **AFFIRMED**.

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

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

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