



DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
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Date: April 20, 2022

In the matter of:)	
)	
)	
-----)	ISCR Case No. 20-02699
)	
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 February 15, 2021, DoD issued a statement of reasons (SOR) advising Applicant of the basis of that decision—a security concern raised under Guideline H (Drug Involvement and Substance Misuse) of DoD Directive 5220.6 (January 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 14, 2022, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert E. Coacher 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 used marijuana between May 2014 and October 2020, including while holding a security clearance, and the Judge found against Applicant on the sole allegation. On appeal, Applicant alleges that the Judge erred in his findings of fact.

Judge's Findings of Fact: The Judge's findings of fact are summarized in pertinent part:

Applicant is 28 years old and has a bachelor's degree. In 2017, he began working as a systems engineer for a defense contractor. That contractor was subsequently acquired by his current employer, another defense contractor. In approximately June 2018, Applicant received an interim security clearance. The allegation is established by Applicant's admissions on his security clearance application (SCA) and during his security clearance background interview and by his response to his SOR.

Applicant described his marijuana use as beginning in about 2012, while he was in college, in a jurisdiction in which use was illegal. His more recent use took place in a state where marijuana use is legal under state law and while Applicant possessed a security clearance. He used about four to six times per year. He continued his use through March 2021, after the SOR was issued.

In his September 2019 SCA and his October 2019 interview, Applicant stated his intent to continue to use marijuana. At hearing, Applicant acknowledged that he was probably briefed by his employer when he was hired that marijuana use was prohibited. However, he claims that he did not fully understand the implications of that information until sometime in early 2021, when he attended a training class concerning the employer's drug-use policy. At that time, he revised his intentions and committed to not using marijuana in the future. In Applicant's written statement of intent not to use drugs in the future, he stated that his full recognition of the legal implications of his employer's drug policy became clear to him when he reviewed new employee training materials in early 2020. He admitted marijuana use after that date.

Discussion

Applicant argues that the Judge erred in finding that he received training on his employer's drug policy in early 2020, asserting instead that he received the training in early 2021. He highlights that the mistake is prejudicial, as the earlier date would mean that he continued to use marijuana after being fully advised as to the consequences.

Our review of the record confirms not that the Judge erred, but that Applicant submitted contradictory evidence regarding when he received the drug policy training. In his April 2021 statement of intent, Applicant wrote: "During early 2020, I reviewed training material for new [defense contractor] employees . . . and this policy was made very clear." Applicant's Exhibit B at 1. However, during his November 2021 hearing, Applicant testified that he received the drug policy briefing from his employer in early 2021, and the apparent contradiction was not addressed or corrected at the hearing. Tr. at 27.

A Judge is tasked to resolve apparent conflicts in the evidence. *See, e.g.*, ISCR Case No. 14-00281 at 4 (App. Bd. Dec. 30, 2014.) While the Judge could have discussed and resolved the contradiction more explicitly, he is presumed to have considered all of the evidence in the record. *Id.* Moreover, a reasonable person could find Applicant's written statement of intent to be worthy of belief and to find it more credible than his hearing testimony. Even assuming *arguendo* that the Judge erred in failing to resolve the contradiction and in adopting the training date of early 2020, this was a harmless error as it did not likely have an impact on the outcome of the case. *See, e.g.*,

ISCR Case No. 19-01220 at 3 (App. Bd. Jun. 1, 2020). The Judge’s ultimate decision rested firmly on the recency of Applicant’s drug use and his use while holding a clearance:

Applicant’s marijuana use was not infrequent and was as recent as March 2021, after the issuance of his SOR, and while holding a security clearance. . . . Applicant admitted that he was briefed by his employer on its drug-use policy when he was hired, but claims he failed to understand its implications. Given his recent marijuana use, including after his SOR was issued, while holding a security clearance, and his vacillation regarding his future intent to use marijuana, his current reliability, trustworthiness, and good judgment are called into question. [Decision at 5.]¹

Applicant has failed to establish that the Judge committed any harmful error or that he should be granted any relief on appeal. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The decision is sustainable on the record. “The general standard is that a clearance may be granted only when ‘clearly consistent with 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 national security.” The Judge’s adverse findings under Guideline H are affirmed.

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

¹ Applicant testified that, to the best of his recollection, he last used marijuana in March 2021. Tr. at 27.