

DATE: May 18, 2022

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In the matter of:)	
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-----)	ISCR Case No. 19-01504
)	
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 July 15, 2019, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct), 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). Department Counsel requested a hearing, which was conducted on May 12, 2021. On June 10, 2021, after the close of the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge LeRoy F. Foreman denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

This case was remanded twice to ensure all of the documents that Applicant submitted were contained in the record and appropriately considered. Those issues have been corrected. In his latest decision, the Judge found in favor of Applicant on the Guideline J and H allegations and

found against him on the Guideline E allegations. The Judge's favorable findings were not raised as an issue on appeal.

In his latest appeal, Applicant raised the following issues: whether delays in the processing of the case caused unnecessary stress, whether he was denied due process, and whether the adverse decision was arbitrary, capricious, or contrary to law. For the reasons stated below, the Judge's decision is affirmed.

Under Guideline E, the SOR alleged that Applicant falsified responses in two security clearance applications (SCAs). In a 2007 SCA, Applicant was asked whether he used marijuana since the age of 16 or in the last 7 years, whichever is shorter. He responded "No" to that question and was granted a security clearance shortly thereafter. Government Exhibit (GE) 1 at 23 and GE 2 at 28. In a 2017 SCA, he responded "No" to a question that asked whether he ever illegally used a controlled substance while possessing a security clearance. GE 2 at 26. In the decision, the Judge found that Applicant was arrested and charged with possession of marijuana in 2009, 2010, and 2011 and that "Applicant testified that he began using marijuana in occasional social settings in 2001, when he was 14 years old, and he used it until about 2013 or 2014. He testified he stopped using it because his employer started random drug testing, and he realized it could jeopardize his job." Decision at 4. In his whole-person analysis, the Judge concluded:

Applicant offered considerable evidence in mitigation, but it is offset by his years of deceptive conduct. He used marijuana for many years while holding a security clearance, but he did not disclose his drug-related arrests to his employer. He lied about his drug involvement in his February 2007 SCA and again in his February 2017 SCA. He lied to a security investigator in September 2018, until the investigator confronted him with his arrest record. Even after admitting his drug involvement to the investigator, he gave inconsistent and implausible explanations for his false answers in his SCA. He eventually admitted at the hearing that he did not disclose his drug involvement because he was afraid it might jeopardize his clearance or his job.¹ [Decision at 13.]

Applicant does not challenge any of the Judge's findings of fact. Rather, his brief contains arguments challenging the Judge's analysis of the evidence. For example, Applicant argues the Judge did not consider the time that has elapsed since his falsifications. The Board has not established "bright-line" guidance regarding the concept of recency. Instead, a recency determination must be made based on careful consideration of the totality of the specific record at hand. *See, e.g.*, ISCR Case No. 99-0018 at 4-5 (App. Bd. Apr. 11, 2000). Based on the record evidence in this case, we find no error in the Judge's conclusion that he was not convinced that "Applicant has put his long record of concealment and deception behind him." Decision at 13.

¹ Some of this conduct, such as lying to the investigator, was not alleged in the SOR. In the decision, the Judge noted non-alleged conduct could be considered to assess an applicant's credibility, to evaluate evidence in extenuation, mitigation, and changed circumstances, to consider whether an applicant demonstrated successful rehabilitation, and in conducting a whole-person analysis. Decision at 12, citing ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006).

Applicant also contends the Judge did not consider documents showing his rehabilitation and claims he did not know the reporting requirements upon being granted a security clearance. None of his arguments are sufficient to rebut the presumption that the Judge considered all of the evidence in the record or 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).

Applicant argues “miscommunications [between him and the Judge] has cause[d] this case to be prolonged and has caused unnecessary stress” Appeal Brief at 3. Absent a showing of prejudice to an applicant’s rights, the mere passage of time in the processing of a case does not constitute error that warrants any form of corrective action. *See, e.g.*, ISCR Case No. 00-0030 at 3-4 (App. Bd. Sep. 20, 2001). We recognize that security clearance adjudications can be stressful for applicants, and a mere claim of “unnecessary stress” resulting from previous remands is insufficient to establish prejudice meriting relief. Applicant fails to articulate any plausible argument about how his rights were prejudiced because the adjudication was prolonged due to the remands.

In his brief, Applicant describes the Judge’s comments and actions regarding his post-hearing submissions as “deceiving.” Appeal Brief at 6. To the extent he is contending that his security clearance adjudication was unfair or that the Judge engaged in misconduct or lacked impartiality, we do not find that argument persuasive. From our review of the record, there is no basis to conclude that the Judge did anything improper. Applicant failed to rebut the presumption that a Judge was impartial, failed to establish his proceeding was conducted in an unfair manner, and failed to show he was denied due process. *See, e.g.*, ISCR Case No. 18-02722 at 5 (App. Bd. Jan. 30, 2020).

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.”

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