

DATE: October 26, 2022

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In the matter of:)	
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-----)	ISCR Case No. 19-01476
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

F. Kevin Bond, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On July 26, 2019, 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. On July 15, 2022, after close of the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Roger C. Wesley denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

In his appeal brief, Applicant raised the following issues: whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law due to errors in applying the mitigating conditions and whole-person concept. For the reasons stated below, the Judge’s decision is affirmed.

The Judge's Findings of Fact and Analysis

Applicant is in his mid-forties, is married, and has three children. He has worked for his current employer since 2006 and was granted a security clearance in late 2011.

The SOR alleged that Applicant used marijuana with varying frequency from 1991 to late 2018, including while holding a security clearance, and that he falsified responses in security clearance applications (SCAs) in 2011 and 2017 by failing to disclose his use of marijuana. In responding to the SOR, Applicant admitted the alleged marijuana use, but “claimed to have incorrectly omitted his use of marijuana in both [SCAs.]” Decision at 2. The Judge found against Applicant on the three allegations.

Applicant began using marijuana in high school, used it about three times a month in college, ceased using it for a number of years, and again used it once or twice a month from 2007 to 2018. He used it to reduce anxiety and relieve upset stomach symptoms, and typically smoked it with his spouse or a friend. He was aware that his use of marijuana violated DoD regulations. In late 2018, he ceased using it due to concerns about the safety of his children. Between 2019 and 2022, he took voluntary drug tests that had negative results. After referring himself to substance abuse counseling in 2019, a counselor determined he did not meet the criteria for a substance use disorder and entered “no diagnosis” as formal diagnostic impressions in the categories of behavioral, medical, and psychological. Decision at 4. “Applicant has committed to abandoning all involvement with marijuana” and “exhibits no visible signs or indications of [returning] to illegal drug use in the foreseeable future.” Decision at 8. However, given his 27-year history of marijuana use and “his persistent withholding of information about his involvement with the drug, it is still too soon to absolve Applicant of risks of recurrence.” *Id.*

Applicant's omissions of his marijuana use on his 2011 and 2017 SCAs “were made knowingly and willfully and reflected a lack of candor.” Decision at 4. When asked during a 2018 background interview if he had any illegal drug involvement in the last seven years, Applicant initially told the investigator he had not, but later in the interview disclosed his past drug use without any prodding. “He acknowledged in his hearing testimony that he could have come clean about his past marijuana use much earlier when he completed his [SCAs], but did not.” Decision at 4, citing Tr. at 49-50.

In the face of proven acts of falsification by Applicant over a seven-year period spanning two [SCAs] and an initial [background interview] before opening up about his marijuana use, his disclosures, although voluntary when offered, come too late to meet the mitigating requirements of [Mitigating Condition] ¶ 17(a). His laudatory endorsements from coworkers, friends, and family members, while commendable, are not enough to counter his material omissions of his past marijuana use. [Decision at 10.]

Discussion

Applicant's appeal brief does not challenge any of the Judge's specific findings of fact. Rather, it challenges the Judge's analysis of the mitigating conditions¹ and whole-person concept. In this regard, for example, he contends his drug involvement is not recent, pointing out he last used marijuana in 2018, emphasizing he had seven clean drug tests since then, and highlighting the Judge stated there were no visible signs he might return to illegal drug use. On the other hand, the Judge noted Applicant's "persistent withholding of information about his involvement with the drug" in his Guideline H analysis, which was an appropriate factor for him to consider in determining how much weight should be given to Applicant's testimony regarding his intention to cease using marijuana in the future. Concerning the falsification allegations, Applicant argues that he voluntarily corrected his SCA during his background investigation and his latest omission occurred almost four years ago. He further notes the Judge stated that "he has shown marked improvement in his judgment and maturity level in the three-plus years that he has avoided marijuana use." Appeal Brief at 8, quoting from Decision at 8. Applicant's arguments are not persuasive.

We find no error in the Judge's analysis. The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. A party's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 19-01431 at 4 (App. Bd. Mar. 31, 2020).

Applicant failed to establish the Judge committed any harmful error. 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."

¹ Applicant's brief cites to outdated mitigating conditions. The Appeal Board must apply the current version of the adjudicative guidelines. *See, e.g.*, ISCR Case No. 17-01193 at 3 (App. Bd. Jan. 22, 2019). The current version of the adjudicative guidelines (Senior Executive Agency Directive 4, National Security Adjudicative Guidelines, effective June 8, 2017) is reprinted in Enclosure 2 of the current version of the Directive. It may be downloaded by clicking on the Directive link at <https://doha.ogc.osd.mil/Industrial-Security-Program/>. The Board has interpreted Applicant's arguments under the current guidelines.

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