Date: December 20, 2022

In the matter of:	)	
-----	)	ISCR Case No. 19-00883
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 June 23, 2021, DoD issued a statement of reasons (SOR) advising Applicant of the basis of that decision—security concerns raised under Guideline H (Drug Involvement and Substance Misuse) and Guideline E (Personal Conduct) of DoD Directive 5220.6 (January 2, 1992, as amended) (Directive). Applicant requested a hearing. On October 4, 2022, after the hearing, DOHA Administrative Judge Edward W. Loughran 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 from about 1978 to at least December 2017, to include after he was granted access to sensitive material in 2004; that he was cited for possession of marijuana or drug paraphernalia in 1979, 2002, 2017, and 2018; and that he purchased marijuana in 2017. Under Guideline E, the SOR alleged that Applicant falsified information during a 2018 security clearance interview regarding both use of marijuana and possession of drug paraphernalia and that Applicant was terminated by his previous employer in

2015 for unauthorized use of a company-issued credit card. The Judge found adversely to Applicant on all allegations.

On appeal, Applicant argues that Department Counsel exhibited bias towards him, that the Judge relied on evidence that was not admitted, and that none of his citations for possession of marijuana and paraphernalia resulted in convictions. Consistent with the following, we affirm.

Judge's Findings of Fact

Applicant is in his early sixties. He earned his bachelor's degree in 1982 and has held a security clearance for more than 35 years.

Applicant has a history of marijuana use: from about 1978 to 1982 while he was in college; once in December 2001 to January 2002 while he held a security clearance; and again in 2017 and 2018, while holding a security clearance. His marijuana and drug paraphernalia possession resulted in several charges. He was cited in 1979 for possession of marijuana; in January 2002 for possession of drug paraphernalia; in September 2017 for possession of marijuana and drug paraphernalia; and in January 2018 for possession of drug paraphernalia.

In September 1989, Applicant made a statement during his background investigation in which he discussed his 1979 citation for possession of marijuana, admitted that he possessed marijuana in 1979, and stated that he smoked marijuana two to three times from April or May 1979 until the June 1979 arrest. He falsely stated that he had not used marijuana after the arrest in June 1979.

In January 2002, Applicant was cited for possession of drug paraphernalia. He denies that he possessed drug paraphernalia, asserting instead that it was a tobacco pipe and that he was found not guilty of the charge.

In May 2002, Applicant signed a statement in which he admitted his marijuana use from 1978 to 1982 while attending college. He also admitted to using marijuana on one occasion in December 2001 or January 2002, while employed by a defense contractor and holding a security clearance. In March 2005, he signed another statement with essentially the same facts. At hearing, however, Applicant testified that he did not recall using marijuana in 2001 to 2002. "I did not find his testimony credible. I find by substantial evidence that he used marijuana while holding a security clearance in about December 2001 or January 2002." Decision at 2.

In September 2015, Applicant submitted a security clearance application (SCA) in which he reported his 1979 citation for possession of marijuana, but not his January 2002 citation for possession of paraphernalia. He denied that he had ever illegally used or otherwise been involved with a controlled substance while possessing a security clearance.

In September 2017, Applicant was stopped for a traffic citation. As events unfolded, the deputy saw a pipe in the passenger compartment and found plastic bags containing just over two grams of marijuana. Applicant admitted to smoking marijuana earlier that day. He was cited with possession and received a deferred adjudication after completing requirements for diversion.

Because Applicant held a security clearance at the time, he reported the charge and its disposition to his security officer in November 2017.

In January 2018, Applicant was going through airport security, and a small knife and a pipe with marijuana residue were detected in his carry-on bag. Applicant admitted to an airport police officer that the carry-on bag and pipe were his. He stated that he had forgotten that the pipe was in his bag and initially asserted that it was for smoking tobacco. After the officer determined that the residue was marijuana, Applicant admitted that he smoked marijuana and had most recently smoked the previous month on Christmas. Applicant was cited with possession of drug paraphernalia but was found not guilty of the charge in April 2019.

At hearing, Applicant testified that he borrowed the carry-on bag from his son and that he was unaware that the pipe was in the bag. He denied telling the police officer that he used the pipe to smoke marijuana. "I did not find his testimony credible. I find that the incident happened substantially as reported in the police report of the incident." Decision at 4.

In October 2018, Applicant was interviewed by a background investigator about the 2017 and 2018 citations and his marijuana use. He admitted that he used marijuana in college from 1978 to 1983 but stated that he did not use it again until he possessed and used marijuana in July 2017. In discussing his September 2017 charge for marijuana possession, Applicant admitted that he used marijuana three or four days while he was on vacation in July 2017 and again in September 2017. He stated those were the only times he used drugs while holding a security clearance.

During his October 2018 interview, Applicant also discussed the January 2018 citation from the airport. He stated that the pipe was not his, that he did not know how it got in his bag, and that it could belong to one of his children.

At hearing and in response to the SOR, Applicant denied that he provided false information during the interview (SOR ¶¶ 2.a and 2.b) and stated again that it was not his pipe that was found at the airport. "As indicated above, I did not find him credible. I find that he lied to the investigator, and he provided additional false statements in the SOR response and during his hearing testimony." *Id*.

Applicant has a history of employment issues concerning unauthorized use of company-issued credit cards. In February 1997, his employer reported that Applicant violated company policy by using his credit card for personal use and failing to pay in a timely manner. Later that year, Applicant went to work for another defense contractor. In 2001, that employer counseled Applicant for charging personal rental cars to the company's corporate credit card, for having an unpaid balance on a corporate credit card, and for not repaying a cash advance from the company. Applicant was suspended without pay for a week, placed on permanent probation, and warned that further violations would result in termination. In May 2015, Applicant was fired for continued misuse of a company credit card.

Applicant asserted that he misunderstood company policy, that he never falsified trip reports, and that he paid the balance of the credit card. Applicant submitted documents and letters attesting to his excellent job performance and ethical standards. He is praised for his work ethic

and sensitive handling of classified information.

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

Guideline H

> There is no evidence of any illegal drug use after January 2018. There are no bright-line rules for when conduct is recent. All of Applicant's illegal drug use might be mitigated if I had found him credible, but I did not. His conduct continues to cast doubt on his current reliability, trustworthiness, good judgment, and willingness to comply with laws, rules, and regulations. The above mitigating conditions, individually or collectively, are insufficient to alleviate those concerns. [Decision at 7.]

Guideline E

> As a preface, I accept the police report as to what occurred in the airport in January 2018, that Applicant admitted that he smoked marijuana, and that the last time he smoked marijuana with the pipe was the previous month on Christmas. I also find that Applicant intentionally provided false information during his background interview in October 2018 when he stated that the pipe was not his; he did not know how it got in his bag; and he had not used marijuana since September 2017.
>
> . . .
>
> Applicant denied that he lied during his background interview. Having determined that he intentionally provided false information about his drug use in an attempt to mislead the government, I have also determined that his testimony at the hearing was also false. It would be inconsistent to find his conduct mitigated (internal citation omitted).
>
> As to the termination in May 2015 for misuse of a company credit card. Had that been the only incident, it would likely be mitigated. However, he engaged in similar conduct at a different company in 1997, and in 2001 at the same company that terminated him. That company placed him "on permanent probation for any similar violations," with the warning that "[s]hould similar violations occur he will be immediately terminated." That history, coupled with the fact that his testimony cannot be trusted, prevents mitigation. [Decision at 9–10.)

Discussion

We turn first to Applicant's assertion of bias. In his appeal brief, Applicant highlights that Department Counsel inquired into military service, despite the fact that he had Applicant's records and security clearance application, which indicated no military service. "I did not understand why

I was asked that question, unless that could set a bias with my not serving in the military." Appeal Brief at 2.

DOHA proceedings are adversarial in nature. *See, e.g.*, ISCR Case No. 03-06174 at 9 (App. Bd. Feb. 28, 2005). Department Counsel represent the Government's interests in these proceedings and are not required to be neutral, impartial, or unbiased. In performing their professional responsibilities, Department Counsel are expected to advocate in a manner that is contrary to an applicant's positions or interests. A claim of bias against a Department Counsel is not an appealable issue.

To the extent that Applicant is claiming Department Counsel acted in an unfair or inappropriate manner, there is a rebuttable presumption that federal officials and employees carry out their duties in good faith. *See, e.g.*, ISCR Case No. 00-0030 at 5 (App. Bd. Sep. 20, 2001). A party seeking to rebut that presumption has a heavy burden of persuasion on appeal. Department Counsel began his cross-examination with a series of background questions to establish Applicant's age, educational background, marital status, and employment history. In the course of that colloquy, Department Counsel asked one question to confirm that Applicant had no military service. Tr. at 17. When Applicant confirmed the same, Department Counsel immediately moved on to the next question. Applicant fails to identify anything in the record below that indicates or suggests a basis for a reasonable person to conclude that Department Counsel acted improperly, unfairly or unprofessionally. *See, e.g.,* ISCR Case No. 06-26704 at 2 (App. Bd. Jun. 19, 2008). This assignment of error is frivolous.

We turn next to Applicant's argument that the Judge improperly considered evidence that was not admitted. Applicant asserts that the Judge should not consider his answer to the SOR, as the Government did not include it on the list of Government exhibits, did not seek its admission, and did not give him notice that it would be considered. Appeal Brief at 2, 3, and 5; Tr. at 27–28. We note that Department Counsel's letter to Applicant of October 5, 2021, explained that the Judge would be provided the SOR and Applicant's answer prior to the hearing. HE 1 at 2. Additionally, as a preliminary matter at hearing, the Judge explained that he had before him the SOR and Applicant's response, "with a lot of documentary evidence . . . that went along with that." Tr. at 7. Applicant was provided ample notice that the Judge would appropriately consider his answer to the SOR as part of the record. Our review of the record indicates Applicant was provided with the procedural rights set forth in Executive Order 10865 and the Directive.

Applicant also complains that Department Counsel was permitted to inquire into matters contained in GE 5—the unauthenticated summary of Applicant's 2010 and 2011 interviews—despite the Judge having sustained his objection to the document. Although GE 5 was not admitted as substantive evidence, Department Counsel was nevertheless entitled to inquire into the matters discussed during that interview, notably Applicant's citation in January 2002 for possession of drug paraphernalia. This SOR allegation was also independently established by Applicant's admission in his answer to the SOR that he received the citation. Answer to SOR at 1. In a related matter, Applicant made written statements in May 2002 and again in March 2005 in which he admitted that he used marijuana on one occasion in December 2001 or January 2002. The Judge relied upon these properly admitted statements, GE 6 and GE 7, in concluding that Applicant "used

marijuana while holding a security clearance in about December 2001 or January 2002." Decision at 2. Our review of the record and decision establishes that the Judge did not consider or rely upon GE 5 in his findings or conclusions.

Finally, Applicant argues that none of his citations for possession of marijuana or drug paraphernalia resulted in convictions. The standard of proof in DOHA proceedings is not proof beyond a reasonable doubt, but instead is substantial evidence, that is, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." Directive E3.1.32.1. "Even if criminal charges are reduced, dropped, or result in an acquittal, the Judge may still consider the underlying conduct in evaluating an applicant's security clearance eligibility." ISCR Case No. 17-00506 at 3 (App. Bd. Aug. 7, 2018). The Judge's adverse conclusions under Guideline H that Applicant possessed marijuana and possessed drug paraphernalia were based on substantial evidence and were well within his authority under the Directive. Moreover, we note the Judge's adverse credibility determination and defer to it. Directive ¶ E3.1.32.1. In arriving at his adverse determination, the Judge concluded that Applicant lied at multiple junctures during the security clearance process, to include in background interviews, to his security officer, in his SOR response, and at hearing. Decision at 2, 3, and 4.

Applicant 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 are affirmed.

Order

The decision is **AFFIRMED**.

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

Signed: Jennifer I. Goldstein
Jennifer I. Goldstein
Administrative Judge
Member, Appeal Board

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