

Date: September 13, 2023

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In the matter of:))
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Applicant for Security Clearance))
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ISCR Case No. 22-01236

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 November 18, 2022, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) and Guideline H (Drug Involvement and Substance Misuse) of the National Security Adjudicative Guidelines (AG) in Appendix A of Security Executive Agent Directive 4 (effective Jun. 8, 2017) and DoD Directive 5220.6 (January 2, 1992, as amended) (Directive). Applicant requested a hearing. On July 18, 2023, Defense Office of Hearings and Appeals Administrative Judge Robert E. Coacher denied Applicant’s security clearance eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Under Guideline F, the SOR alleged Applicant failed to file his 2014 to 2020 federal and state income tax returns, as required, and owed the federal government approximately \$24,700 in delinquent taxes for tax year 2012. Under Guideline H, the SOR alleged that Applicant used marijuana with varying frequency from about 2010 to 2022.

The Judge noted that Applicant is in his mid-fifties and worked for his current employer since March 2021. He holds two master's degrees. He gave conflicting information regarding his marital status. He stated in his security clearance application (SCA) that he first married in 1994 and divorced in 1999. In testimony, Applicant stated his first marriage was from 2000 to 2014. On his SCA, he stated his second marriage began in June 2016, but in testimony said he was married for the second time in May 2022.

Applicant's tax difficulties began while he took deductions for a family business on his 2012 federal income tax return that were disallowed by the Internal Revenue Service (IRS), resulting in a large tax debt. Thereafter, Applicant did not file federal and state tax returns for tax years 2014 to 2020, based on personal circumstances and not knowing how to proceed in light of the 2012 federal tax debt. Although Applicant filed his federal and state tax returns in 2022, he had not satisfied his 2012 federal tax debt. Applicant began the process to arrange a payment plan with the IRS and made one payment in 2023. He did not submit into evidence a final payment plan.

The Judge found that Applicant's delinquent federal tax debt and failure to timely file his 2014 to 2020 federal and state income tax returns established disqualifying conditions under Guideline F. He considered Applicant's apparent payment plan with the IRS and credited him with filing all of his tax returns. Additionally, the Judge found that personal circumstances and business losses were circumstances outside of Applicant's control. However, he noted that Applicant did not document details of the plan with the IRS and determined that the IRS's disallowance of Applicant's 2012 deductions was not a circumstance outside of his control. The Judge concluded that Applicant's delay in filing tax returns and in entering into an agreement with the IRS were not mitigated.

Under Guideline H, the Judge noted that Applicant admitted using marijuana from about 2010 to 2022, including after he completed his 2021 SCA. Applicant used marijuana to alleviate back pain but stopped between 2019 and 2020 because it made him sleepy. He resumed using marijuana in February and June 2022, when his pain worsened. Applicant claimed he was unaware of his employer's prohibition on drug use, even when permitted under state law, but he did not inform his employer of his drug use. He submitted an April 2023 negative drug test and prescription for medication to relieve his back pain.

The Judge found Applicant's use of marijuana from 2010 to June 2022 to be disqualifying. He found that, despite the negative drug test and 2023 prescription to address his reoccurring back pain, it was too soon to determine that Applicant will discontinue his marijuana use to manage his back pain. The Judge held that, based on Applicant's pattern of use, his abstinence beginning in 2022 is not sufficient to overcome his prolonged use of marijuana or to convince him that

recurrence is unlikely. In addition, the frequency of use and uses after completing his SCA cast doubt on his current reliability, trustworthiness, and good judgment.

On appeal, Applicant asserts that the Judge incorrectly stated his degrees and marriages, failed to properly apply the mitigating conditions, provides new evidence, and reargues his case for clearance eligibility. Applicant's arguments, as discussed below, amount to a disagreement with the Judge's weighing of the evidence, which is not sufficient to demonstrate that 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. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

Based on Applicant's confused presentation of his marriages in both his SCA and subsequent interview, including testimony of a common law marriage that was later formally documented, the Judge did not fully and accurately account for all of his marriages. In addition, Applicant asserts that he has only one master's degree. These errors are not likely to have affected the outcome of the Judge's decision and are therefore harmless.

Next, Applicant asserts that he should have been credited with mitigating condition AG ¶ 20(g), "the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements." He argues for greater mitigation credit for filing his back tax returns and making payment arrangements with the IRS. He also argues that the IRS's acceptance of his suggested payment amounts to a "defacto payment agreement." Appeal at 1-2. Applicant's arguments are without merit.

The plain language of mitigating condition AG ¶ 20(g) requires compliance with repayment arrangements that have *actually* been established, not just attempts. Neither a documented repayment arrangement nor history of compliance therewith were satisfactorily established. Applicant was responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate the security concerns arising from the admitted SOR allegations and he had the ultimate burden of persuasion in obtaining a favorable clearance decision. Directive ¶ E3.1.15. Even if such payment arrangement were properly established, application of AG ¶ 20(g) to Applicant's case is not dispositive of the overall Guideline F determination. The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. *See, e.g.*, ISCR Case No. 06-17409 at 3. The Judge addressed Applicant's apparent payment plan with the IRS and the filing of his overdue tax returns but concluded that his delay in filing those returns and in reaching an agreement with the IRS was not mitigated.

Applicant further asserts that he had to use marijuana to address his back condition until he found a doctor to treat him. He said he stopped using marijuana "a number of years ago" except for "isolated incidents." He asserts that extreme pain "left him with no choice but to use the only pain reliever he had at his disposal," and that the Judge would have preferred that he remain

incapacitated and suffer. Appeal at 3. As the Appeal Board has previously stated, after applying for a security clearance and being adequately placed on notice that such conduct was inconsistent with holding a security clearance, an applicant who continues to use marijuana demonstrates a disregard for security clearance eligibility standards, and such behavior raises substantial questions about the applicant's judgment, reliability, and willingness to comply with laws, rules, and regulations. *See, e.g.*, ISCR Case No. 20-02974 at 6 (App. Bd. Feb. 1, 2022). Based on our review of the record, the Judge's conclusions regarding Applicant's marijuana use in the past and since applying for a security clearance are sustainable and sufficient to support denial of his security eligibility.

Finally, to the extent Applicant asserts new information with regard to his finances and drug use, the Appeal Board is prohibited from considering new evidence on appeal. Directive ¶ E3.1.29. Regarding his apparent contention that the Judge mis-weighed or did not consider record evidence, we find no merit in those assertions. None of his arguments are enough to rebut the presumption that the Judge considered all of the record evidence or to demonstrate the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 22-01631 at 2 (App. Bd. Feb. 16, 2023).

Applicant failed to establish that 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 the interests of the national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). *See also*, AG ¶ 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
Chair, Appeal Board

Signed: Gregg A. Cervi
Gregg A. Cervi
Administrative Judge
Member, Appeal Board

Signed: Allison Marie
Allison Marie
Administrative Judge
Member, Appeal Board