



DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
POST OFFICE BOX 3656
ARLINGTON, VIRGINIA 22203
(703) 696-4759

Date: February 28, 2024

In the matter of:)	
)	
)	
-----)	ISCR Case No. 22-01625
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Julie R. Mendez, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On December 5, 2022, 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 the National Security Adjudicative Guidelines (AG) in Appendix A of Security Executive Agent Directive 4 (effective June 8, 2017) and DoD Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). On January 12, 2024, Defense Office of Hearings and Appeals Administrative Judge Marc E. Curry denied Applicant’s security clearance eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Under Guideline H, the SOR alleged that Applicant used marijuana with varying frequency between January 2020 and April 2020 while granted access to classified information. The SOR further alleged under Guideline E that Applicant deliberately failed to disclose the foregoing marijuana use, including his use while holding a security clearance, on his November 2021 security clearance application. The Judge found against Applicant on both allegations.

On appeal, Applicant asserts that evidence was omitted from the decision, namely additional material he submitted in response to the Government's File of Relevant Material (FORM), including an update to his SOR response and two reference letters. He notes that the evidence in his case should consist of his original SOR response and the additional material. Applicant believes that this information was excluded from the record because the Judge found that Applicant's last known drug use was in April 2020, as reported during his 2022 security clearance interview, even though Applicant amended the date to April 2019 in his FORM response.

The record reflects that Applicant's SOR response was included as an attachment to the Government's FORM. *See* FORM Item 2. Additionally, Applicant's FORM response, dated March 23, 2023, and received April 5, 2023, included his two-page narrative and two letters of support, and was included in the case file without objection from the Government. We find no basis to conclude that the Judge failed to receive any of the evidence that Applicant submitted.

With respect to the Judge's finding that Applicant last used marijuana in 2020 instead of 2019, we conclude that this difference either represents the Judge's weighing of conflicting evidence or was harmless error, neither of which warrants disturbing the decision. During his follow-up security clearance interview, Applicant initially reported using marijuana twice between January and April 2020. Government Exhibit 4 at 4. Upon confrontation by the investigator with information that Applicant used marijuana in 2019, Applicant agreed that the 2019 timeframe was more likely accurate. *Id.* at 5. In his FORM response, Applicant reiterated that his marijuana use occurred in 2019, not 2020. FORM Response at 1. Contrary to his position on appeal that an additional letter submitted from his witness "confirmed the listed date," neither of the reference letters mentions any particular date for Applicant's last marijuana use. *Id.* at 1, 3-5.¹

The Judge was not bound to disregard the date that Applicant initially reported in favor of the second, conflicting date provided after confrontation during his interview or in his FORM response. Rather, a judge is required to weigh and resolve evidentiary conflicts. *See* ISCR Case No. 05-06723, 2007 WL 4379274 at *3 (App. Bd. Nov. 14, 2007). Assuming first that the date finding represents such a weighing and resolution, and acknowledging that it would have been preferable for the Judge to identify the conflicting evidence and explain why he found one date more credible than the other, we find no reason not to give deference to the Judge's weighing of this particular evidence.

Assuming next that the date finding was erroneous, the Judge's ultimate adverse decision was based on sustainable Guideline E grounds, rendering that finding harmless as it was used in his Guideline H analysis. *See* ISCR Case No. 02-17276, 2005 WL 1381891 at *2 (App. Bd. Mar. 15, 2005). To the extent that the finding constitutes error, typographical or otherwise, remand to the Judge for clarification of his conclusions with respect to the Guideline H evidence has no significant chance of changing the outcome of the case and is therefore unnecessary.

¹ Applicant submitted two additional reference letters, including from 1) S.W., dated March 28, 2023; and 2) L.W., undated.

Applicant has not established that the Judge committed harmful error. Our review of the record reflects that the Judge examined the relevant evidence and articulated a satisfactory explanation for the decision, which is sustainable on this 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). “Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” AG ¶ 2(b).

Order

The decision is **AFFIRMED**.

Signed: Moira Modzelewski

Moira Modzelewski
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