



**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: October 17, 2024

In the matter of:)	
)	
)	
-----)	ISCR Case No. 21-00164
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

John C. Lynch, Esq., Department Counsel
 Julie R. Mendez, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On September 19, 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 July 19, 2024, Defense Office of Hearings and Appeals Administrative Judge Stephanie C. Hess denied Applicant security clearance eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Background

Applicant is in his mid-thirties. In March 2008, when he was twenty years old, he completed a security clearance application (SCA) and disclosed no illegal drug activity since the age of sixteen. Government Exhibit (GE) 3 at 8. He was subsequently granted a security clearance

in 2008. Applicant completed a new SCA in May 2015 and again disclosed no illegal drug activity within the prior seven years or ever while holding a security clearance. GE 2 at 24-25.

In October 2018, Applicant participated in a polygraph examination and interviews with another government agency and initially reported no illegal drug use. GE 4 at 5, 11. During a first follow-up interview and in response to why he was unable to “resolve the previous examination,” Applicant stated that he had been “thinking about a party” and described a 2013 incident where he was driving to a party with his brother and friends who were smoking marijuana in the vehicle and he may have gotten a contact high. *Id.* at 4-5. Physiological responses were detected, and Applicant then disclosed an incident in 2016 where he advised his visiting cousins on how to obtain marijuana, which they did, and he intentionally entered a vehicle where they were smoking with the windows rolled up. When questioned about why he had not previously disclosed the 2016 incident, Applicant explained that he “thought mentioning the party in summer 2013 would be enough information to ‘get him through’ the polygraph.” *Id.* After physiological responses were again observed and he was questioned further, Applicant revealed that, from 2005 to 2011, he used marijuana between 150 and 300 times and purchased marijuana regularly. He acknowledged that he did not disclose any illegal drug involvement on his prior security clearance forms because it was “only” marijuana. *Id.* at 11.

Applicant was referred for a new security clearance investigation and, in the ensuing September 2019 SCA and December 2019 security clearance interview, he once again disclosed no illegal drug activity within the prior seven years or ever while holding a security clearance. GE 1 at 35-36; GE 5 at 11. Applicant participated in another clearance interview in October 2020, wherein he asserted that: 1) he had never used or purchased any drugs; 2) he did not use marijuana from 2005 until 2011; and 3) he was not asked about alcohol or drugs during his polygraph examination. GE 5 at 6-7. He volunteered only that he used marijuana once in 2004. *Id.* at 7.

Based on the foregoing, the SOR alleged under Guideline H that Applicant used marijuana from 2004 until at least 2016, including while granted access to classified information beginning in 2008, and that he purchased marijuana on various occasions between 2005 and 2011. The SOR cross-alleged those allegations under Guideline E and further alleged that Applicant deliberately failed to disclose his marijuana use on his March 2008 SCA, and that he deliberately failed to disclose his marijuana use, including while holding a security clearance, on his 2015 and 2019 SCAs and during his 2020 security clearance interview.

In response to the SOR, Applicant denied all allegations, asserting that he had not used or purchased marijuana since 2004, that he never used marijuana while holding a security clearance, and that any reporting errors during his clearance investigations were not deliberate. At hearing, Applicant testified that he did not remember telling the polygrapher that he used marijuana 150 to 300 times between 2005 and 2011 and maintained that he last used marijuana in about 2004. Tr. at 22-23, 27.

The Judge noted that “Applicant was unable to offer a plausible explanation for why his version of his past conduct, specifically his use and purchase of marijuana, cannot be reconciled with the recorded statements he made during the two polygraph examinations.” Decision at 9-10. She found adversely on all allegations, concluding that Applicant’s “questionable judgment, lack

of candor, dishonesty, and unwillingness to comply with rules and regulations raise questions about his reliability, trustworthiness, and ability to protect classified or sensitive information” and that “Applicant’s repeated failure to provide truthful and candid answers during national security investigative and adjudicative processes” was particularly concerning. *Id.* at 10.

Discussion

On appeal, Applicant raises various due process issues stemming from his receipt of two SORs in this matter. He contends that he was initially issued an SOR, “which was dismissed because [the Government] withdrew their SOR,” and that, “[a]lmost immediately [the Government] opened a second case ISCR Case No. 21-00164 without proper[ly] notifying me that this was a separate case altogether, and that I needed to provide new evidence for the SOR that was given to me.” Appeal Brief. He goes on to allege that he “did not have a chance to gather evidence or seek legal counsel in this new case.” *Id.* Applicant’s arguments can be summarized as challenges to his 1) receipt of proper notice and 2) ability to present evidence in support of his case for mitigation.

In its reply, the Government provides new documentation addressing Applicant’s due process claims and the case’s procedural history. The Appeal Board is generally prohibited from considering new evidence. Directive ¶ E3.1.29. We may, however, consider new evidence insofar as it bears upon threshold issues of due process or jurisdiction. *See* ISCR Case No. 08-07664, 2009 WL 5323078 at *2 (App. Bd. Dec. 29, 2009).

Notice and Opportunity to Respond

Applicant contends that the two SORs were issued in different cases, asserting that the first case was “dismissed because DOHA withdrew their SOR” and that a second case was opened “almost immediately.” Appeal Brief. Contrary to Applicant’s assertion, however, both SORs were issued to Applicant in the same, above-captioned case – ISCR Case No. 21-00164.¹ While the record reflects that the original SOR was *withdrawn* before an updated SOR could be issued, nothing in the record supports that Applicant’s case was ever *dismissed*.²

To the extent that Applicant’s appeal challenges his receipt of proper notice of the allegations against him, this argument is unpersuasive. Our review of the record reflects the following facts relevant to Applicant’s notice of the SOR allegations. The decision to issue an SOR followed from Applicant’s unsuccessful 2018 polygraph and triggered 2019 security clearance reinvestigation. On January 25, 2022, the original SOR was issued in this case and alleged concerns under both Guidelines H and E based on Applicant’s undisclosed marijuana

¹ The original SOR was issued under the case caption “ISCR Case No. 20-00164”; however, all subsequent correspondence regarding this original SOR refers to ISCR Case No. 21-00164, which indicates that the different year on the SOR itself was merely a typographical error.

² Even if a first case had been dismissed before a new SOR was issued under a second case number, it is unclear how such an action would amount to improper notice or otherwise prejudice Applicant’s ability to participate in his case.

involvement. Gov. Reply Brief at Encl. 1.³ On February 2, 2022, Applicant acknowledged receipt of the original SOR, responded by denying all allegations and providing a one-page narrative explanation for his denial, and requested a decision based on the written record. *Id.*; Applicant Exhibit (AE) A; AE E. On July 22, 2022, the original administrative judge notified the Government about various evidentiary issues in its written submission. Gov. Reply Brief at Encl. 2. On August 3, 2022, the Government withdrew the original SOR to address said issues. *Id.*

Less than two months later, on September 19, 2022, the second and current SOR was issued, which expanded the previously alleged conduct to include marijuana involvement through 2016 and falsifications of additional security clearance investigation components. Along with the SOR, Applicant received a letter that encouraged him to review an enclosed copy of the Directive, which describes the DOHA adjudication process in detail and sets forth an applicant's rights regarding representation and obligations regarding the presentation of mitigating evidence. On November 1, 2022, Applicant responded to the current SOR, again denying all allegations and providing a brief explanation for his denial.⁴

No other matters beyond those alleged in the current SOR were addressed at hearing or considered in the Judge's unfavorable security clearance decision. Applicant has failed to demonstrate that the Government's decision to withdraw the original SOR and issue a new SOR, which Applicant received and responded to, deprived him of reasonable notice of the Government's concerns about his security clearance worthiness.

Opportunity to Prepare and Present Case

Applicant's primary argument on appeal appear to be that he "did not have a chance to gather evidence or seek legal counsel" to address the current SOR. Appeal Brief. For the following reasons, this argument is meritless.

On January 26, 2023, after receiving his response to the second SOR, the Government sent Applicant a disclosure package, which contained an informational letter and copies of the Government's proposed exhibits. The letter again referred Applicant to the Directive and encouraged him to review the Guidelines and Mitigating Conditions applicable to his case, noting that, "at your hearing, you may provide additional information, including supporting documentation and testimony, that addresses those Mitigating Conditions." The letter also reiterated Applicant's right to represent himself, retain an attorney, or be assisted by a personal representative at hearing, and advised him that, "If you choose to be represented by an attorney, you should retain one promptly."

On August 22, 2023, Applicant was notified that his hearing was scheduled the following month and he was provided with the Prehearing Guidance for DOHA Industrial Security Clearance

³ The allegations of the original SOR were similar to those in the second SOR, but the drug involvement was alleged only through 2011, and the falsification allegations were limited to Applicant's 2015 SCA and 2020 interview. *Id.*

⁴ The substance of the second narrative response was similar, but not identical, to that included in Applicant's response to the original SOR. The second response was included in the Judge's case file prior to the hearing, and Applicant also provided her with the first response as part of his post-hearing submission.

(ISCR) Hearings, which detailed the basic hearing procedures and directed him, once again, to consult the Directive for further guidance. *Id.* at Encl. 5. The Guidance reiterated Applicant's options to appear with or without an attorney or personal representative, and the expectation that both parties be prepared to present their witnesses and documents at the hearing. *Id.* On August 24, 2023, the Judge sent Applicant a Case Management Order, which established deadlines and procedures for the parties to submit exhibits and witness lists prior to the hearing. *Id.* at Encl. 6.

At the beginning of the hearing, held on September 14, 2023, the Judge detailed the procedures that would be employed and confirmed that Applicant understood his right to be represented by an attorney. Tr. at 5. She noted, "I don't have any exhibits from you yet . . . , but at the end of the proceeding, we will pick a date. I will keep the record open, and you will have the ability to submit whatever you previously submitted and anything else that seems relevant, things that may come up that we talk about during the hearing or after the fact that you're recollecting that the Judge should consider this." *Id.* at 7. Applicant acknowledged, "Okay." *Id.* at 8. At the end of the hearing, the Judge asked, "Do you want to go ahead and get those documents that you previously submitted to me?" and Applicant replied affirmatively. *Id.* at 31. When asked if September 29, 2023, would be sufficient time to provide his post-hearing evidence, Applicant again said "Yes." *Id.* at 32. On September 29, 2023, Applicant submitted several post-hearing exhibits, including his narrative response to the original SOR and various character reference materials. AEs A-E.

In summary, *more than one year* passed between Applicant's receipt of the current SOR in this matter and the close of the record. During that time, he was repeatedly notified of his ability to be represented by an attorney; referred to the Directive; encouraged to review the applicable Guidelines and Mitigating Conditions; and notified of his ability to present evidence pertaining to those Mitigating Conditions at hearing. At hearing, Applicant affirmed awareness of his ability to be represented by counsel. He objected neither to the current SOR nor to proceeding with the hearing, and he made no assertion that he needed additional time to prepare.

All applicants are expected to take timely, reasonable steps to protect their rights during DOHA proceedings and under the Directive, and an applicant's *pro se* status does not excuse him from that obligation. *See* ISCR Case No. 00-0086 at 2 (App. Bd. Dec. 13, 2000). Any failure to take such steps does not constitute denial of those rights. *See* ISCR Case No. 02-19896 at 6 (App. Bd. Dec. 29, 2003). Because Applicant did not object to proceeding or otherwise request additional time to prepare for his case, he cannot fairly claim he was denied due process under the Directive.

The record before us shows that Applicant received adequate notice of his right to representation, which he knowingly declined, and of his right to present evidence on his own behalf. He was provided the requisite time to respond to the current SOR and prepare for his hearing with any documents that he wanted considered in the adjudication of his clearance, and he was explicitly advised that mitigating evidence would be relevant and material to his case. Applicant's decision to represent himself and his decision as to the quantum of evidence to submit were not due to faulty notice as to his rights. Applicant was not denied the due process afforded by the Directive.

Conclusion

An applicant is entitled to receive: (a) adequate notice of the reasons the Government proposed to deny or revoke access to classified information; (b) a reasonable opportunity to respond to those allegations; (c) a reasonable opportunity to respond to the Government's evidence; and (d) a reasonable opportunity to present evidence on his or her own behalf. *See* ISCR Case No. 02-22163, 2004 WL 794291 at *3 (App. Bd. Mar. 12, 2004). Our review of the case file indicates that Applicant was provided with all of the foregoing procedural rights afforded by the Directive and Executive Order 10865.

Order

The decision in ISCR Case No. 21-00164 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