DATE: October 24, 2023

In the matter of:	)	
-----	)	ISCR Case No. 22-01176
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Christopher Snowden, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On July 11, 2022, DoD issued a Statement of Reasons (SOR) advising Applicant of the basis of 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 June 8, 2017) and DoD Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). On August 16, 2023, Defense Office of Hearings and Appeals Administrative Judge Roger C. Wesley denied Applicant's security clearance eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

The SOR alleged two financial concerns, both of which were found favorably for Applicant. Under Guideline H, the SOR also alleged that Applicant used marijuana from April to June 2021, at which time he tested positive for marijuana during a routine employer drug screening, and that the foregoing conduct occurred after Applicant was last granted access to classified information in about 2020. The Judge found against Applicant on all Guideline H concerns.

Background

Following a random drug test administered on June 15, 2021, Applicant tested positive for marijuana. Government Exhibit (GE) 5. The amount of THC in his system at the time of the test was not recorded. *Id.* at 2. In his October 2021 security clearance application, Applicant disclosed that he was fired from his job as a defense contractor in June 2021 because he tested positive for cannabidiol (CBD) oil. GE 1 at 18. He denied having used any illegal drugs in the prior seven years or while possessing a security clearance. *Id*. at 41. In response to the SOR, Applicant admitted testing positive for tetrahydrocannabinol (THC) in June 2021, but he denied both allegations regarding marijuana use, including that he used marijuana from April to June 2021 and that he used marijuana after being granted access to classified information. He reiterated that the positive drug test resulted from using a CBD product that he did not realize contained THC.

In explanation for his CBD use, Applicant testified that, after 18 years of military service, he was medically retired because he suffered from a heart condition and underwent double bypass surgery. Tr. at 28-29, 33. He subsequently experienced pain throughout his body and was introduced to CBD as an alternative to medications to ease inflammation and used the substance topically before sleep. *Id*. at 23-24. Applicant testified that, in total, he purchased CBD products twice from a gas station and was given a different CBD product a third time by a friend from Colorado. *Id*. at 37. Applicant was unaware that the product he used contained THC until after receiving his positive drug test result. *Id*. at 24.

Applicant testified that he could not provide evidence of the specific CBD product that he used before his positive test result because, after he received the result, he threw the product away and cut all ties with it and the person who provided it to him. Tr. at 34, 36-38. That was two years prior to the hearing. Applicant further testified that he has never used illegal drugs and that this was an isolated event, which has significantly impacted his life and integrity. *Id*. at 24.

Citing the Agricultural Improvement Act of 2018, the Judge acknowledged that "licensed sales of hemp-derived CBD oil is not prohibited . . . provided that the hemp-related CBD product contains less than 0.3 percent of THC content." Decision at 8. The Judge noted, however, the "generally recognized fact that broad spectrum CBD oil can be expected to contain almost no THC, while full spectrum CBD products can [contain] up to 0.3 percent of the ingredient,"[1] and therefore questioned Applicant's explanation that it was his ingesting CBD oil that produced the positive drug test result. *Id*.

The Judge also acknowledged that Applicant was supported by two colleagues, both of whom attested to his dedication, sound judgment, leadership qualities, and overall good character, although neither acknowledged knowing of Applicant's June 2021 positive drug test or his claimed use of CBD oil. The Judge found that Applicant had "committed to abandoning all involvement with CBD and any other substances that could potentially place him at risk to testing positive for marijuana," but concluded that the passage of only two years since Applicant's positive drug test and his inability to document the type of CBD oil he claimed to use rendered it "too soon to absolve Applicant of risks of recurrence." *Id*. at 8-9.

[1] The Judge cited no authority for this finding.

Discussion

On appeal, Applicant asserts that the Judge both failed to properly consider all available evidence and applied facts not supported by the record, rendering his adverse decision arbitrary, capricious, or contrary to law, and failed to properly apply the mitigating conditions and whole-person analysis. Consistent with the following, we remand.

Due Process Concerns

In reaching his adverse conclusion, the Judge *sua sponte* researched and cited to various general sources including the Mayo Foundation for Medical Education and Research, the Centers for Disease Control and Prevention (CDC), and the University of Rochester, and to a publication by L. Hellicar, *Does cannabidiol (CBDZ) contain THC?* Decision at 4. None of the cited materials, however, were actually included in the record. Rather, the record contains three undated emails from the Judge to Department Counsel and Applicant, wherein he indicates his intention to "cite several articles covering CBD oil and THC content levels in marketed CBD products," including "Mayo Foundation for Medical Education and Research (2023); Data compiled by the [CDC], https://.cdc.gov; and L. Hellicar in her titled article, Does Cannabidiol (CBDZ) Contain THC in https://www.medicalnewstoday.com/articles/does-cbd-have-thc." The Judge did not attach any of the referenced materials to the emails. Additionally, he requested that parties respond within five calendar days with any objection or comment, but the record contains no information regarding responses from either party.

Several problems arise from the Judge's handling of these sources. First, there is no evidence that Applicant or the Government received any notice of the Judge's intention to rely on material from the University of Rochester, as cited in the decision; that they received sufficiently specific notice of the materials relied upon from the Mayo Foundation or the CDC; that they received copies of any of the relied-upon materials; or whether either party objected to or commented on the sources or the Judge's intention to rely upon them.

While a judge may *sua sponte* take administrative notice of facts pertinent to a case, such action generally requires prior, specific notice to the parties and an opportunity to respond. *See, e.g.*, DISCR OSD Case No. 90-1550 at 4 (App. Bd. Mar. 25, 1992). *Compare* ISCR Case No. 08-09480 at 3 (App. Bd. Mar. 17, 2010) (Judge's reliance on statute, without quoting it verbatim or otherwise identifying it with sufficient specificity to determine its content, was an error), *and* ISCR Case No. 99-0511 at 6 (App. Bd. Dec. 19, 2000) (administrative notice of foreign law would require prior, specific notice to the parties), *with* ISCR Case No. 02-29739 at 5 (App. Bd. Oct. 13, 2005) (Judge's introduction of a definition into factual findings did not require prior notice to the parties). Here, the Judge technically informed the parties of his intention to take administrative notice of three of the four referenced materials; however, the vague and general nature of that notification was insufficient to provide the parties with notice of the facts on which the Judge planned to rely and an opportunity to meaningfully respond.

The Judge also erred in failing to include copies of the materials in the record. No retrieval location was provided at all for two of the four sources, and the Judge merely cited to a Uniform Resource Locator (URL) for the remaining two sources, one of which was the CDC's main

website. A URL is not sufficient to preserve an issue for appellate review. *See, e.g.*, ISCR Case No. 00-0628 at 3-4 (App. Bd. Apr. 26, 2002). Rather, a copy of the material or reliable retrieval location must be included in the record in order to allow the parties to argue and, if necessary, the Appeal Board to assess the reliability, accuracy, relevance, and appropriateness of any administratively noticed fact. *See* ISCR Case No. 02-06478 at 6-7 (App. Bd. Dec. 15, 2003). Here, the Judge's reliance on information of which the parties were not sufficiently made aware denied them the ability to make reasoned arguments about whether the material was appropriate for taking administrative notice and whether the inferences and conclusions drawn therefrom were reasonable, and now precludes the Board from assessing the same.

The Judge's handling of the administratively noticed materials was in error. We are remanding the case so that Judge may reopen the record, provide the parties with the specific administrative notice documents upon which he will rely, and give them an opportunity to respond to those documents and submit additional evidence or argument.

Adjudicative Desk Reference

In his brief, Applicant incorrectly refers to the Adjudicative Desk Reference (Version 4, March 2014) (ADR) as the "Adjudicative Guidelines" and cites ADR provisions in support of his arguments. Appeal Brief at 15. Applicant's reliance upon the ADR is misplaced. DOHA judges are required to decide cases by using the Adjudicative Guidelines, not the ADR. The ADR itself contains language indicating that it may not be cited as authority for denial or suspension of access. *See* ADR at 2. *See also* ISCR Case No. 07-02253 at 3 (App. Bd. Mar. 28, 2008).

CBD Products

A Judge is tasked to resolve apparent conflicts in the evidence. *See, e.g.*, ISCR Case No. 14-00281 at 4 (App. Bd. Dec. 30, 2014). In this case, the record evidence presents a conflict regarding a critical issue (*i.e.*, whether Applicant knowingly used or consumed an illegal drug). In this regard, the Board has previously stated that a judge's decision must be written in a manner that allows the parties and the Board to discern what conclusions he is reaching. *See, e.g.*, ISCR Case No. 16-02536 at 5 (App. Bd. Aug. 23, 2018). Based on our reading of the decision, we are unable to discern whether the Judge concluded Applicant unknowingly used or consumed an illegal drug.

The *innocent* consumption or use of an illegal drug or of a prescription medication without a prescription does not raise security concerns under Guideline H. For example, if an applicant consumes brownies laced with marijuana at a party without knowing or suspecting they contained marijuana, such consumption does not raise concerns about his or her reliability, trustworthiness, judgment, or willingness to comply with laws and regulations and does not establish disqualifying conditions under Guideline H. Generally, to establish Guideline H disqualifying conditions regarding the use or consumption of an illegal drug, the evidence must show that an applicant either knew or reasonably should have known or suspected under the circumstances that the substance used was an illegal drug. In most Guideline H cases, an applicant's knowledge about the nature of the alleged substance is not an issue; however, it is more likely to become an issue when the only evidence establishing the alleged use is a positive drug test.

In positive drug test cases, the burden of establishing innocent consumption will be on the applicant. An applicant's positive test for an illegal drug is sufficient to establish various Guideline H disqualifying conditions, *e.g.*, AG ¶¶ 25(a), "any substance misuse;" 25(b), "testing positive for an illegal drug;" and possibly others depending on the circumstances. Once a positive drug test is proven, an applicant has the burden to rebut, explain, extenuate, or mitigate the security concerns arising from that positive test. Directive ¶ E3.1.15. When an applicant claims the positive drug test was the result of innocent use or consumption, the key issue will likely be whether he or she presented sufficient evidence to prove that claim[2] and thereby refute the pertinent SOR allegations. Such a determination may hinge on an assessment of the applicant's credibility. If an applicant successfully refutes the pertinent SOR allegations, those allegations should be resolved in favor of the applicant, and the Judge does not need to conduct a mitigation analysis regarding them.

A positive drug test resulting from CDB products presents further complexities because some of those products are legal under Federal law while others are illegal. In December 2021, the Security Executive Agent issued Clarifying Guidance Concerning Marijuana for Agencies Conducting Adjudications of Persons Proposed for Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position (SecEA Clarifying Guidance). This guidance discusses the impact of the Agricultural Improvement Act of 2018 on CBD products and advises that

> agencies should be aware that the Federal Drug Administration does not certify levels of THC in CBD products, so the percentage of THC cannot be guaranteed, thus posing a concern pertaining to the use of a CBD product under federal law. Studies have shown that some CBD products exceed the 0.3 percent THC threshold for hemp, notwithstanding advertising labels . . . . Therefore, there is a risk that using these products may nonetheless cause sufficiently high levels of THC to result in a positive marijuana test under agency-administered employment or random drug testing programs. [SecEA Clarifying Guidance at 3.]

This Guidance should be considered in assessing the merits of an applicant's claim that his or her positive drug test for THC was the result of innocent use of CBD products.

In the present case, Applicant has consistently claimed that he did not use marijuana. He claims that his positive drug test for marijuana resulted from his use of CBD products and that he was not aware those products were enhanced with THC. Consequently, the Judge was presented with conflicting evidence. On the one hand, Applicant had a positive drug test for "marijuana" (presumably THC) in June 2021. GE 5 at 2. On the other, Applicant claims that the positive drug test was the result of his innocent use or consumption of CBD products, which he had the burden of proving. This was a critical issue in the case that should have been resolved because the result

[2] In the context of a positive drug test, the Government argues that the standard should be whether the applicant can convincingly show "that the usage occurred under a reasonable, good-faith belief that the product was legal." Reply Brief at 6. We do not disagree with the use of that standard to aid in evaluating an applicant's claim of innocent use. When use of CBD is an issue, the Government understandably argues "the manner and circumstances under [which] the illegal CBD [*i.e.*, above the Federal law 0.3 % THC limit] was obtained is a significant additional consideration in addressing the reasonableness of the use of the product." *Id*.

would likely affect the outcome of the case. The Judge erred in failing to conclude whether Applicant sufficiently established his innocent use or consumption claim to refute the Guideline H SOR allegations before conducting a mitigation analysis of those allegations.

Conclusion

Pursuant to Directive ¶ E3.1.33.2, the Board remands the case to the Judge with instruction to issue a new decision, consistent with the requirements of Directive ¶ E3.1.35, after correction of the errors identified, above, and reconsideration of the record as a whole.

Order

The decision is **REMANDED**.

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