



**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 1, 2022

\_\_\_\_\_  
In the matter of: )  
 )  
 )  
----- )  
 )  
Applicant for Security Clearance )  
\_\_\_\_\_ )

ISCR Case No. 20-02974

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Andrea M. Corrales, Esq., Department Counsel

**FOR APPLICANT**

Mark S. Zaid, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On December 2, 2020, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline H (Drug Involvement and Substance Misuse) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On October 13, 2021, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Edward W. Loughran granted Applicant’s request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

The SOR alleged that Applicant used marijuana with varying frequency from about 2014 to at least October 2020, that he purchased marijuana from about May 2014 to approximately mid-2020, and that he intends to continue to use marijuana in the future. In responding to the SOR on January 21, 2021, Applicant admitted each SOR allegation with comments, including that, upon learning the seriousness with which the Federal Government views marijuana, he has decided to discontinue using or purchasing marijuana in the future. The Judge found in favor of Applicant on all of the allegations.

Department Counsel raised the following issue on appeal: whether the Judge's decision is arbitrary, capricious, and contrary to law. Consistent with the following discussion, we reverse the Judge's decision.

### **The Judge's Findings of Fact**

Applicant is in his forties and has been working for a defense contractor for about 14 years. He is married with children. He has earned an associate's degree and has taken additional college courses. This is his first request for a security clearance. Witnesses and documents attest to his excellent work performance and character. Among other favorable personal traits, he is praised for his reliability, trustworthiness, and honesty.

During the alleged period, Applicant lived in two states. In the first state, marijuana use was legal under state law. While living there, Applicant's wife successfully used marijuana to treat an illness. On a doctor's recommendation, Applicant used marijuana in the forms of edibles, rubs, and vapes for insomnia and pain management. At that time, he knew marijuana was an illegal controlled substance under Federal law. In the second state, marijuana use was permitted for medicinal purposes. After moving there, he initially used rubs, but not edibles or vapes. Upon receiving a card from the state's cannabis commission, he vaped marijuana. When the second state made recreational use of marijuana legal, he no longer needed a card to purchase or use marijuana in that state.

In his April 2020 security clearance application (SCA), Applicant disclosed his marijuana use and noted he intended to continue to use it, as necessary, for insomnia and pain management. About a month later, he fully discussed his marijuana use in a background interview. He indicated that, although he was aware marijuana was illegal under Federal law, he was following the state's approach. In responding to interrogatories, he again indicated he planned to use marijuana for medicinal purposes. He did not understand the full ramifications of his use of marijuana until he received the SOR and discussed it with his attorney. He last purchased marijuana in December 2020 and last used it in January 2021. Applicant is now aware that individuals eligible for security clearances cannot engage in such conduct.

Applicant credibly testified that he does not intend to use marijuana in the future. His wife has also stopped using marijuana for medicinal purposes to support him. Both are pursuing other treatments for their health issues that do not involve marijuana. In August 2021, a licensed clinical social worker evaluated Applicant and concluded he did not meet the criteria for cannabis use disorder. He signed a statement of intent to abstain from all illegal drug use, acknowledging any future use would be grounds for revoking his security clearance.

### **The Judge's Analysis**

Marijuana use is prevalent and accepted in significant segments of our society. "I do not cite these facts because I condone marijuana use; I do not. I cite them to provide context to the world Applicant lived in when he made the decision to use marijuana for medicinal purposes, and why it took so long for him to stop." Decision at 5-6. Applicant now understands that marijuana use is inconsistent with holding a security clearance and credibly testified he will not use illegal

drug in the future. “There are no bright-line rules for how long an applicant must go without problematic conduct. Under the facts of this case, I find that Applicant has abstained from illegal drug use for an appropriate period, and that illegal drug use is unlikely to recur. Applicant’s conduct no longer casts doubt on his reliability, trustworthiness, and good judgment.” Decision at 6.

## Discussion

There is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9<sup>th</sup> Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government produces evidence raising security concerns, an applicant bears the burden of persuasion concerning mitigation. *See* Directive ¶ E3.1.15. The standard applicable in security clearance decisions “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.” Directive, Encl 2, App. A ¶ 2(b).

In deciding whether the Judge’s rulings or conclusions are erroneous, we will review the Judge’s decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See, e.g.*, ISCR Case No. 14-02563 at 3-4 (App. Bd. Aug. 28, 2015).

After issuance of the Judge’s decision, the Security Executive Agent (SecEA) promulgated clarifying guidance concerning marijuana-related issues in security clearance adjudications.<sup>1</sup> It states in pertinent part:

[Federal] agencies are instructed that prior recreational marijuana use by an individual may be relevant to adjudications but not determinative. The SecEA has provided direction in [the adjudicative guidelines] to agencies that requires them to use a “whole-person concept.” This requires adjudicators to carefully weigh a number of variables in an individual’s life to determine whether that individual’s behavior raises a security concern, if at all, and whether that concern has been mitigated such that the individual may now receive a favorable adjudicative determination. Relevant mitigations include, but are not limited to, frequency of use and whether the individual can demonstrate that future use is unlikely to recur, including by signing an attestation or other such appropriate mitigation. Additionally, in light of the long-standing federal law and policy prohibiting illegal drug use while occupying a sensitive position or

---

<sup>1</sup> “[A]n applicant’s security eligibility must be adjudicated under current DoD policies and standards, not past ones.” *See, e.g.*, ISCR Case No. 17-01807 at 3, n.2 (App. Bd. Mar. 7, 2018). This principle applies not only to changes to the Directive that occur during an adjudication but also to the issuance of any clarifying guidance by appropriate authorities. Because the recent clarifying guidance does not apply a more restrictive interpretation of the adjudicative guidelines pertinent in this case, there is no need to remand the decision to the Judge to consider the new guidance.

holding a security clearance, agencies are encouraged to advise prospective national security workforce employees that they should refrain from any future marijuana use upon initiation of the national security vetting process, which commences once the individual signs the certification contained in the Standard Form 86 (SF-86), Questionnaire for National Security Positions.<sup>2</sup>

Even under this new clarifying guidance, Applicant's conduct continues to raise security concerns that have not been mitigated. In this regard, we find persuasive Department Counsel's argument that the Judge failed to consider important aspects of the case. We note the following evidence drawn from the record:

1. Before beginning his use of marijuana for medical purposes at the age of 36, Applicant conducted research and learned such use was illegal under Federal law. Tr. at 75, 80-81.
2. Applicant testified that physicians cannot prescribe marijuana because it is illegal under Federal law, but they can recommend its benefits. Tr. at 79 and 84-85.
3. Regarding the security clearance process, Applicant testified that he did not initially believe his marijuana use would be disqualifying. He stated that he talked to friends and coworkers who advised him "as long as you're honest in the process that you could still maintain and achieve a security clearance." Tr. at 76. However, he never talked to a supervisor, facility security officer, or anyone in authority at his company about implications of using marijuana on security clearance eligibility. Tr. at 92-93.
4. In August 2019, Applicant applied for a position of trust at a Federal agency, completed a Standard Form 85, and was required to take a drug test. He could not remember whether that form contained questions about marijuana usage.<sup>3</sup> Tr. at 72 and 94-95.
5. In April 2020, Applicant completed a SCA. Section 23—Illegal Use of Drugs or Drug Activity—of the application states: "The following questions pertain to the illegal use of drugs or controlled substance or drug or controlled substance activity in accordance with Federal laws, even though permissible under state laws." He disclosed he used marijuana from May 2014 to the month of the SCA's submission. GE 1 at 43.

---

<sup>2</sup> Security Executive Agent 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, dated December 21, 2021 (SecEA Clarifying Guidance), at page 2.

<sup>3</sup> Revisions of Standard Form 85 in September 1995, December 2013, and December 2017 contain sections asking applicants if they used illegal drugs, including marijuana, in either the last year or last seven years depending upon the revision used.

6. In May 2020, Applicant participated in a security clearance interview. A major focus of that interview was his drug involvement. During the interview, he stated he knew his conduct was illegal under Federal law, but he had adopted the state's approach. GE 2 at 4 and Tr. at 80-81.

7. Applicant's wife testified that she also was interviewed as part of his background investigation. She stated that "[t]he investigator asked me more than once about his marijuana use, that was one of the first times I realized, that could be an issue." Tr. at 59. On cross-examination, she acknowledged that the investigator's questions about her husband's marijuana use raised "red flags" and that she discussed the matter with her husband. Tr. at 67-68.

8. In October 2020, Applicant responded to DOHA interrogatories. The primary focus of the interrogatories was his drug involvement. It contains five pages of questions asking him about his drug involvement. In responding to those questions, Applicant indicated he used marijuana "[d]aily in the evening as necessary." Government Exhibit 2 at 9.

9. Applicant's wife testified he informed her that he received interrogatories related to his drug usage and, at that time, expressed concern that such conduct might not be consistent with holding a security clearance. After discussing this matter, they decided he should continue to use marijuana. Tr. at 69-70.

10. On December 2, 2020, the SOR was issued. It stated that the Consolidated Adjudications Facility was "unable to find it is clearly consistent with the national interest to grant [Applicant] access to classified information" due to his drug involvement and that his case would be submitted to a Judge for a determination as to whether he should be granted a security clearance. SOR at 1.

11. Applicant testified that he first learned his marijuana use would be a problem when he received the SOR. Tr. at 75-76.

12. Applicant testified that he continued to use marijuana for about six weeks after receiving the SOR. Tr. at 76.

13. Applicant testified that he met with his attorney during a "multi-week period at the end of December, beginning of January timeframe." Tr. at 92.

14. Applicant last purchased marijuana on December 21, 2020, and last used it on January 12, 2021. SOR Response at 2.

Marijuana use, possession, production, and distribution remains prohibited under Federal law. Medical marijuana has no special or preferred status under either the adjudicative guidelines or the new clarifying guidance. "[D]isregard of federal law pertaining to marijuana remains relevant, but not determinative, to adjudications of eligibility for access to classified information . . . ." SecEA Clarifying Guidance at 2.

In this case, the evidence establishes that Applicant knew throughout the period of time he was using marijuana that it was prohibited under Federal law. He continued to purchase and use marijuana after applying for a security clearance and after being adequately placed on notice that such conduct was inconsistent with holding a security clearance. In doing so, Applicant not only knowingly violated Federal drug laws but also disregarded security clearance eligibility standards. This behavior raises substantial questions about Applicant's judgment, reliability, and willingness to comply with laws, rules, and regulations. *See, e.g.*, ISCR Case No. 17-04198 at 2 (App. Bd. Jan. 15, 2019). Viewed as a whole, his conduct raises eligibility concerns, such as poor judgment, that are broader than his marijuana use. Applicant's statement of intent not to use illegal drugs in the future does not fully address the scope of these security concerns. Nor does the passage of a little more than six months between his last use of marijuana and the hearing eliminate those concerns. From our review of the record, security concerns persist regarding Applicant's judgment, reliability, and willingness to comply with security requirements. The Judge erred in failing to address these important aspects of the case.

Considering the record as a whole, we conclude that the Judge's decision is arbitrary and capricious. It is not sustainable as it fails to consider important aspects of the case and runs contrary to the weight of the record evidence. Furthermore, we conclude that the record evidence, viewed as a whole, is not sufficient to mitigate the Government's security concerns under the *Egan* standard.

### Order

The decision is **REVERSED**.

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

Signed: James E. Moody  
James E. Moody  
Administrative Judge  
Member, Appeal Board

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