

Date: August 10, 2022

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| In the matter of: |) | |
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| ----- |) | ISCR Case No. 20-03111 |
| |) | |
| Applicant for Security Clearance |) | |
| |) | |

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Brittany D. Forrester, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On December 7, 2020, 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) of DoD Directive 5220.6 (January 2, 1992, as amended) (Directive). Applicant requested a hearing. On May 11, 2022, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert E. Coacher denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

The Judge found against Applicant on two allegations that he used drugs while granted access to classified information. On appeal, Applicant alleges that the Judge erred in his factual findings regarding the status of his clearance and that the Judge’s adverse conclusions were arbitrary, capricious, and contrary to law. For the reasons stated below, we remand.

Judge’s Findings of Fact: The Judge’s findings of fact pertinent to this remand decision are summarized and quoted below:

Applicant held a security clearance when he served in the military from 1997 until 2003. Since 2008, Applicant has worked for a defense contractor subject to federal drug-free workplace requirements. In 2008, that employer sponsored him for a security clearance, which was granted.

The SOR alleged Applicant used marijuana and cocaine in June 2017 while granted access to classified information. In his answer to the SOR, Applicant admitted using cocaine and marijuana on one occasion each, but denied that he had access to classified information in June 2017.

Applicant’s security clearance application (SCA) established that he was granted access to classified information in 2008. Applicant’s security manager authored an email in March 2021, stating that Applicant had “access with a clearance for [his employer] from 8/19/2008 through 10/12/2009 when he was downgraded as no longer requiring a clearance for his job duties.” The Government produced a document from the Defense Information System for Security (DISS) showing that as of December 1, 2021, Applicant held a security clearance. While Applicant may not have had current access to classified information, he continued to possess a security clearance and could have been granted access at any time. [Decision at 2.]

Judge’s Analysis: The Judge’s analysis pertinent to this remand decision is summarized and quoted below:

In June 2017, Applicant used cocaine and marijuana one time each, establishing two disqualifying conditions under the Adjudicative Guidelines (AG): AG ¶ 25(a) *any substance misuse*; and AG ¶ 25(f) *any illegal drug use while granted access to classified information or holding a sensitive position*.

Although Applicant’s marijuana use was infrequent and over three years ago, both of his uses in June 2017 occurred when he was aware of his employer’s drug-free policy and after he was granted his 2008 security clearance.

Even, if we believe he did not hold an active clearance in 2017, he was fully aware of his duties not to use illegal substances as an employee of this defense contractor, from his time holding an active clearance in 2008, and from his day holding an active clearance in the [military]. For these reasons, AG ¶ 26(a)¹ does not fully apply. [Decision at 6–7.]

I considered Applicant’s negative drug tests, his written statement of intent not to use illegal drugs in the future, his substance abuse evaluation conducted by

¹ AG ¶ 26(a): the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment. Directive, Encl. 2, App. A.

Ms. B, his military service, his education, his letters of recommendation, and his job performance appraisals and awards. However, I also considered that he used both cocaine and marijuana in 2017, while holding a security clearance and while fully aware he was violating federal law and the no-drug policy of his employer. [Decision at 7.]

Discussion

Background

On appeal, Applicant takes issue with the Judge’s factual findings regarding the status of his clearance and his ultimate adverse conclusion that Applicant used marijuana and cocaine in June 2017 while granted access to classified information, as alleged in the SOR. Applicant asserts that his clearance was deactivated when he transferred out of a classified program in September 2009 and moved to a separate division of his company, where he has worked solely on an unclassified project. Therefore, he argues, the Judge’s conclusion that he used marijuana and cocaine while granted access to classified information is arbitrary and capricious. Based on the record before us, we concur that it is unclear from his decision how the Judge concluded that AG ¶ 25(f) (*any illegal drug use while granted access to classified information . . .*) was established.

In addressing Applicant’s appeal issues, it is important to note the distinction between possessing a security clearance and being granted access to classified material. Eligibility for access to classified information and the granting of access to classified information are not synonymous concepts. They are separate determinations. The issuance of a security clearance is a determination that an individual is eligible for access to classified national security information up to a certain level. Security clearance eligibility alone does not grant an individual access to classified materials. In order to gain access to specific classified materials, an individual must have not only eligibility (*i.e.*, a security clearance), but also must have signed a nondisclosure agreement and have a “need to know.” *See* Executive Order 13526, dated December 29, 2009, at § 4.1. While an eligibility determination is generally made at the agency level and is subject to various regulatory due process requirements; an access determination is most often made at the local level without any due process guarantees.

Applicant’s Security Clearance Eligibility as of December 2021

The Judge erred in finding that, based on a DISS document, Applicant continued to hold a security clearance as of December 2021, and could access classified information at any time.² To the contrary, the DISS document, Government Exhibit (GE) 4 at 1, reflects: “Eligibility Level: None[;] Eligibility Determination: None” as of December 6, 2021. We interpret these entries as showing that Applicant did not have security clearance eligibility on that date. As a result of this error, it appears the Judge erroneously concluded Applicant held security clearance eligibility from 2008 to late 2021. Because Applicant’s security clearance eligibility is a key issue in this case and, as discussed below, there is conflicting evidence as to his eligibility status during the period at issue (June 2017), we are unable to conclude this error was harmless. *See, e.g.*, ISCR Case No. 11-15184 at 3 (App. Bd. Jul. 25, 2013) (an error is harmless if it did not likely affect the outcome

² The Judge’s finding at issue is quoted verbatim above in the section on the Judge’s Finding of Fact.

of the case). At this stage, it also merits noting we are unable to discern from the record evidence when Applicant lost his security clearance eligibility after being granted a security clearance in about 2008.

Conflicting Evidence Regarding Applicant's Security Clearance Status in June 2017

Applicant has consistently denied that he had a security clearance or access to classified information in June 2017. In his January 2019 SCA, Applicant disclosed the June 2017 uses of marijuana and cocaine. In response to the follow-up question—"Was your use while possessing a security clearance?"—Applicant responded "No" for both uses. GE 1 at 32–34. In his background interview of July 2019, he confirmed his reported June 2017 use of marijuana and cocaine and stated that he did not have a security clearance at the time. GE 3 at 2. In his December 2020 answer to the SOR, Applicant denied the allegations that he used drugs while granted access, asserting that he did not have "an active security clearance" and that he did not have access to classified information in June 2017. SOR Answer at 1. At the hearing, Applicant presented a March 2021 email from his company's security manager indicating that he had a security clearance from August 2008 to October 2009 "when he was downgraded as no longer requiring a clearance for his job duties." Applicant's Exhibit (AE) R at 1. In the fall of 2009, Applicant left the division of his company where he had access to classified information and moved to a different division in another state for a position not requiring a clearance. Tr. at 45–46.

In contrast, we note that—although the SOR allegations were obviously controverted—the Government submitted no evidence in its case-in-chief that Applicant had been granted access to classified information in June 2017, as the SOR alleged. Instead, the Government's evidence in the case, sent to Applicant in March 2021 and submitted to the Judge at hearing, consisted of Applicant's 2019 SCA (GE 1), a portion of his 2008 SCA (GE 2), and a summary of his July 2019 background interview (GE 3). Nothing in those documents substantiated the SOR allegations that Applicant had been granted access to classified information in June 2017 or even established that Applicant was eligible for access in June 2017, *i.e.*, that he possessed a security clearance.

During Applicant's cross-examination, Department Counsel produced the DISS document, a two-page print-out from Applicant's file dated December 6, 2021, which was 11 days prior to the hearing. The Judge ultimately admitted the document during closing arguments. Tr. at 53–54. As noted above, the first page of the document reflects that Applicant did not hold a security clearance. The second page contains electronic notes from an unidentified source, entitled: "Assignee Comments," dated June 1, 2020. In pertinent part, the comments read: "Subject admitted he used cocaine once in 2017 and [marijuana] in 2017. Subject said he did not have access to classified at the time but [Joint Personnel Adjudication System] shows Subject was cleared on a [National Agency Check with Law and Credit] since 2008." GE 4 at 2. Nothing in GE 4 substantiates the SOR allegations that Applicant was granted access to classified information in June 2017. Moreover, the JPAS entry to which the adjudicator refers is not in evidence.

A Judge is responsible for resolving apparent conflicts in the evidence. *See, e.g.*, ISCR Case No. 14-00281 at 4 (App. Bd. Dec. 30, 2014). In doing so, the Judge should consider the comparative reliability, plausibility, and ultimate truthfulness of conflicting pieces of evidence. *See, e.g.*, ISCR Case No. 05-06723 at 4 (App. Bd. Nov. 14, 2007). In resolving such conflicts, the

Judge must carefully weigh the evidence in a common sense manner and make findings that reflect a reasonable interpretation of the evidence that takes into account all the record evidence. *See, e.g.*, ISCR Case No. 00-0233 at 3 (App. Bd. Feb 14, 2001). *See also* Directive ¶ 6.3 (“Each clearance decision must be a . . . common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy . . .”). In conducting an analysis of this nature, the Judge should address not only the evidence supporting his or her determination regarding the conflicting evidence, but also the evidence that fairly detracts from that determination.

In this case, the only evidence supporting a determination that Applicant had security clearance eligibility in June 2017 was the unidentified assignee’s comment in the DISS document. That comment needed to be weighed against all the evidence supporting Applicant’s claim that he did not hold a clearance during that period. The Judge erred in failing to conduct such an analysis of the conflicting evidence regarding Applicant’s security clearance eligibility in June 2017.

Variance Between SOR Allegations and Record Evidence

Although the Judge acknowledged that Applicant may not have had access to classified information in 2017,³ he did not directly address whether the notable disconnect between the SOR allegation and the evidence raised due process concerns. As discussed earlier, the record contains no evidence establishing that Applicant had, as alleged, access to classified information in June 2017. In finding adversely to Applicant on the SOR allegations as written, a variance exists between the SOR allegations and the evidence. We are unable to determine how the Judge analyzed this variance.

A variance is material when the SOR allegation fails to serve as reasonable notice to an applicant of the concerns against him, thereby subjecting him to unfair surprise when confronted with the Government’s evidence. *See, e.g.*, ISCR Case No. 17-02595 at 3 (App. Bd. Jul. 31, 2018). If a variance exists, the Judge should determine whether it is material, *i.e.*, does it create due process concerns. If such a variance is material, the Judge should take appropriate corrective action, which, depending on the nature of the variance, may include amending the SOR, granting a continuance to address the discrepancy, reopening the record, etc. In this case, the Judge should have directly addressed the variance both at the hearing and in the decision and determined whether or not it was material.

Conclusion

Based on the foregoing, we conclude that the best resolution of this case is to remand the case to the Judge to correct the identified errors and for further processing consistent with the Directive. Upon remand, a Judge is required to issue a new decision. Directive ¶ E3.1.35. The Board retains no jurisdiction over a remanded decision. However, the Judge’s decision issued after remand may be appealed pursuant to Directive ¶¶ E3.1.28 and E3.130. Other issues in the case are not ripe for consideration at this time.

³ “While Applicant may not have had current access to classified information, he continued to possess a security clearance and could have been granted access at any time.” Decision at 2.

Order

The decision is **REMANDED**.

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 Modzelewski
Moira Modzelewski
Administrative Judge
Member, Appeal Board