

Date: November 14, 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.

On August 10, 2022, the Appeal Board remanded the decision to the Judge to examine conflicting evidence regarding Applicant’s security clearance status at the time of his alleged cocaine and marijuana use in 2017. In the Remand Decision dated August 31, 2022, the Judge again found against Applicant on the two drug-use allegations and, in doing so, concluded Applicant neither had access to classified information nor held a security clearance at time of that drug use. Decision at 2-3. In the findings, the Judge noted that Applicant (1) used marijuana while

holding a security clearance and serving in the military in 1999; (2) took a drug test when he began his current employment in 2008; (3) was generally aware of his employer's no-drug-use policy; and (4) continues to associate regularly with a friend who provided him marijuana. The Judge concluded:

Applicant's marijuana use was infrequent and occurred over five years ago, however, there are two troubling aspects about his actions that go straight to the heart of his reliability, trustworthiness, and willingness to comply with laws, rules, and regulations. First, when he revealed his 1999 use of marijuana in [his 2008 security clearance application], he pledged not to use it again. He broke that pledge with his 2017 use of marijuana and cocaine. Second, both of these uses were when he was aware of his employer's drug-free policy. Even, if he did not hold a clearance in 2017, he was 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 days holding an active clearance in the [military]. [Decision at 7-8.]

Applicant's appeal brief disputes the Judge's assertions that Applicant used marijuana and cocaine in 2017 while granted access to classified information. Appeal Brief at 4. Applicant is apparently misreading the Judge's decision. As noted earlier, the Judge made a finding that the Government did not produce sufficient evidence to establish that Applicant held a security clearance or had access to classified information during 2017. In his analysis, the Judge reiterated, "[t]hese uses were not while he was holding a security clearance or when he was granted access to classified information" (Decision at 6) and concluded that Disqualifying Condition 25(f), "any illegal drug use while granted access to classified information or holding a sensitive position," was not established. See Directive, Encl. 2, App. A ¶ 25(f). This assignment of error is resolved adversely to Applicant because a plain reading of the Judge's decision simply does not support it.

Applicant disagrees with the Judge's statement that Applicant's "last use of illegal substances occurred less than three years ago." Appeal Brief at 4, citing Decision at 6. This challenged statement is from the Judge's first decision in this case that resulted in a remand. A remanded decision is vacated and becomes a legal nullity. See, e.g., DISCR OSD Case No. 90-0821 at 4 (App. Bd. Oct. 17, 1991). Upon remand, the Judge is required to issue a new decision after correcting identified errors. An error in a remanded decision cannot serve as a basis for error in the subsequent decision, which is a separate and distinct security clearance determination subject to appeal. *Id.* and Directive ¶ E3.1.35. In this case, Applicant's disagreements with the Judge's remanded decision merit no relief. Regarding this issue, Applicant also notes the Judge in the subsequent decision concluded, "Applicant's marijuana use . . . occurred over five years ago" (Decision at 7), which comports with the record evidence.

In the decision, the Judge indicated that he was treating Applicant's alleged use of illegal drugs as an equivalent of a lesser included offense for notice and due process purposes and was effectively disregarding the portion of the SOR allegations that asserted the drug use occurred "while granted access to classified information." Applicant argues the Judge's approach created a material variance between the SOR allegation and the findings of fact and asserts he "did not have a reasonable opportunity to respond" to that variance. Appeal Brief at 10-11, citing ISCR

Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014) as supporting authority. In this case, the SOR allegations stated Applicant used marijuana and cocaine in 2017, which is the conduct that the Judge determined raised security concerns. Applicant was adequately placed on notice of the conduct at issue in this case. By disregarding the phrase “while granted access to classified information” in the SOR, the Judge effectively eliminated language that, if proven, could have raised additional security concerns under Disqualifying Condition 25(f). The Judge’s action in disregarding that language inured to Applicant’s benefit. We fail to see how Applicant was prejudiced in any manner by the Judge noting he was disregarding language in the SOR allegations because the evidence did not support it. This assignment of error fails to establish any due process violation.

The Judge found that Applicant regularly associates with the friend who provided him marijuana. Decision at 3. Applicant challenges that statement by asserting he “testified that he no longer associates with individuals whom he used the illegal substances with.” Appeal Brief at 12, citing Tr. at 22. In this regard, Applicant testified that he had not seen the individuals who supplied him with cocaine since that incident in 2017. Tr. at 21-22. However, record evidence establishes that Applicant still associates with the friend with whom he used marijuana in 2017. Tr. at 43; Government Exhibit (GE) 1 at 16 and 17 (security clearance application); GE 3 at 2 (summary of background interview). Applicant testified their continuing association involves “other activities.” Tr. at 43. This assignment of error establishes no harmful error.

Applicant contends the Judge erred by not considering all of the record evidence and by not applying properly the mitigating conditions and whole-person concept. He argues, for example, the Judge did not consider that he avoids the environment where he used drugs, that his drug use was not serious based on its nature and extent, that a qualified medical professional determined he needed no treatment, that he signed a statement of intent not to use illegal drugs in the future, and that he now understands the repercussions of his legal drug use. None of his arguments, however, are enough to rebut the presumption that the Judge considered all of the record evidence or to demonstrate the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 21-01169 at 5 (App. Bd. May 13, 2022).

Applicant also relies on a number of hearing-level decisions in unrelated Guideline H cases to argue the Judge erred in his analysis of this case. His reliance on those hearing-level decisions is not persuasive. As the Board has previously stated, how particular fact scenarios in other cases were decided at the hearing level are generally not a relevant consideration in our review of another case. *See, e.g.*, ISCR Case No. 19-02593 at 3 (App. Bd. Oct. 18, 2021), setting forth a lengthier discussion of this issue. In short, Applicant’s arguments based on favorable hearing-level decisions in cases involving different applicants and different facts do not establish that the Judge’s conclusions and analysis in this case are arbitrary, capricious, or contrary to law.

Applicant failed to establish that the Judge committed any harmful error or that he should be granted any relief on appeal. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The decision is sustainable on the record. “The general standard is that a clearance may be granted only when ‘clearly consistent with national security.’” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). *See also*, Directive, Encl. 2, App. A

¶ 2(b): “Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of national security.”

**Order**

The decision is **AFFIRMED**.

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