

Date: February 13, 2023

In the matter of:)
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Applicant for Security Clearance)
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ISCR Case No. 21-02534

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On February 11, 2022, 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) and Guideline E (Personal Conduct) of DoD Directive 5220.6 (January 2, 1992, as amended) (Directive). Applicant requested a hearing. On December 19, 2022, after the record closed, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert Robinson Gales denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

The Judge found in favor of Applicant on one Guideline H allegation and the sole Guideline E allegation. Those favorable findings were not raised as an issue on appeal. The Judge found against Applicant on two Guideline H allegations. These alleged that Applicant used marijuana with varying frequency from about May 2008 to at least January 2022 and that he intended to continue to use marijuana in the future.

In his appeal brief, Applicant contends that the Judge's decision is unjust and inequitable. He argues that he has "gone through extensive length to educate [himself] on the security clearance process and to ensure that [he is] in compliance with all aspects of the law and have sought out guidance from experts in the field to ensure [he is] fully aware of [his] obligations and responsibilities as someone who holds a security clearance." Appeal Brief at 1. We construe his arguments as contending that the Judge's decision is arbitrary, capricious, or contrary to law and, more specifically, that he is challenging the Judge's adverse determination regarding his intent to use marijuana in the future. For reasons stated below, we affirm the Judge's decision.

Intent to Use Marijuana in the Future Allegation

The Judge erred in his findings and conclusions regarding this allegation. In his security clearance application (SCA) of April 2021, Applicant disclosed his marijuana use from 2008 to 2021 and stated, "I do not intended (sic) to use it unless recommended by my doctor." Government Exhibit (GE) 1 at 41-42. In his background interviews of May 2021, Applicant reportedly stated:

[Applicant] said that he realizes that it is possible that it is still considered a violation of regulations to use MJ while holding a contract clearance position, and he said that if his security officer says that it is still a violation of regulations, he will have to consider what his future holds, . . . as to whether or not he plans to continue the MJ use, or whether or not he plans to continue in a contractor position which requires a clearance. [Applicant] said that at the time he filled out application and security forms for this current . . . contract position, he was unaware that continued MJ use violates regulations while holding a security clearance. [Applicant] knows that it is possible that he is still in violation of such protocols and regulations, as he still uses MJ today, with the current license, for medical purposes, but he is not sure if that is the case or not. [Applicant] said that he will find out from his security officer. [GE 2 at 12]

In his SOR Response, Applicant denied the allegation that he intended to continue to use marijuana and noted he has contacted a licensed substance abuse therapist and was scheduled to start a recovery/substance abuse program.

The Judge found that Applicant "claimed that he does not intend to use marijuana in the future, [but] he might do so if it is recommended by his doctor. (Tr. at 29)." In his analysis, the Judge stated:

[Applicant] initially stated that he had no plans to stop using marijuana in the future, at least until someone at his place of employment tells him it is unacceptable to continue using it, but then changed his mind and stated he [has] no intent to use marijuana in the future. He altered his comment again and stated that while he does not intend to use marijuana in the future, he might do so if it is recommended by his doctor. Thus, his future intentions are not really convincingly clear. [Decision at 7.]

Contrary to the Judge’s finding quoted above, which cites to Tr. at 29, we are unable to find that Applicant testified that he still intended to use marijuana if his doctor recommended that he do so. During the hearing, the following exchange occurred:

[Department Counsel]: The next allegation is your previous, at least stated, intent that you intended to continue using marijuana. I would draw your attention to your [SCA] where you stated that you did not intend to use it unless recommended by your doctor and your discussion in the interview that your doctor recommended it. Seems like in your answer you clarify that you actually have no intention of future use now that you’re understood what the federal prohibition is, is that correct?

[Applicant]: That is correct.

[Department Counsel]: So, it was a combination of this process and it sounds like some research that you did that brought you to the understanding that although it is legal for medical use in [his state], it is not legal federally and, therefore, you do not intend to continue using with a clearance, if you are granted.

[Applicant]: That is correct. [Tr. at 28-29. *See also*, Tr. at 30, 34, and 36.]

We conclude the Judge erred by interpreting Applicant’s testimony as indicating he might use marijuana in the future if a doctor recommended it. This error, however, was harmless for the reasons stated below. *See, e.g.*, ISCR Case No. 19-01220 at 3 (App. Bd. Jun. 1, 2020) (an error is harmless if it did not likely affect the outcome of the case).

Use of Marijuana Allegation

In responding to the SOR, Applicant admitted that he used marijuana from May 2008 to at least January 2022. Applicant stated in his SCA that he “[t]ried marijuana a handful of time (sic) since 2008[.]” GE 1 at 41. Later, during his background interview, he reportedly stated he “habitually used MJ, once per week, unknown number of times (in the several hundreds), in [his state], for what he claims is continuous, current, and extensive use of MJ for nutritional and medicinal purposes (even though subject was illegally using MJ from 2008 to recent months, when he recently obtained a [state] medical license for such usage).” GE 2 at 9. The Judge concluded that Applicant “gave inconsistent evolving accounts of his use of marijuana[.]” Decision at 7. The Judge also concluded that Applicant’s unalleged purchases of marijuana could be considered for limited purposes, including in evaluating the mitigating evidence.

Applicant continued to use marijuana after submitting his SCA in April 2021 and undergoing background interviews in May 2021. During his interviews, Applicant was questioned extensively about his marijuana use, including being contacted two days after the initial interview to further discuss that particular issue. GE 2 at 9-12. As noted above, he acknowledged during the interviews that it is possible he is in violation of “protocols and regulations” due to his marijuana use and that he would check with his security officer about that issue. *Id.* at 12. It is reasonable to conclude the SCA and interviews adequately placed Applicant on notice that his marijuana use raised security concerns, yet he continued to use that substance after submitting his

SCA and undergoing those interviews. As the Appeal Board has previously stated, after applying for a security clearance and being adequately placed on notice that such conduct was inconsistent with holding a security clearance, an applicant who continues to use marijuana demonstrates a disregard for security clearance eligibility standards, and such behavior raises substantial questions about the applicant's judgment, reliability, and willingness to comply with laws, rules, and regulations. *See, e.g.*, ISCR Case No. 20-02974 at 6 (App. Bd. Feb. 1, 2022).

In his analysis, the Judge stated:

A person should not be held forever accountable for misconduct from the past. Continued abstinence is to be encouraged, but, when balanced against [Applicant's] full history of marijuana use, the relatively brief period of reported abstinence is considered insufficient to conclude that abstinence will continue, especially after so many altered plans regarding the use of marijuana. Applicant's use of marijuana for such a lengthy period, despite that fact that such use was prohibited by both the Federal Government and government contractors, continues to cast doubt on his current reliability, trustworthiness, and good judgment. [Decision at 8.]

Based on our review of the record, the Judge's conclusions regarding Applicant's marijuana use from 2008 to 2022 are sustainable and sufficient to support denial of his security clearance eligibility regardless of the errors discussed above.

Applicant failed to establish the Judge committed any harmful error. 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 the national security."

Order

The decision is **AFFIRMED**.

Signed: James F. Duffy

James F. Duffy
Administrative Judge
Chairperson, Appeal Board

Signed: Moira Modzelewski

Moira Modzelewski
Administrative Judge
Member, Appeal Board

Signed: Gregg A. Cervi

Gregg A. Cervi
Administrative Judge
Member, Appeal Board