

Date: June 1, 2023

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Applicant for Security Clearance )  
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ISCR Case No. 22-00392

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Andrew Henderson, Esq., Department Counsel  
James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

Joseph M. Wager, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On May 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 the National Security Adjudicative Guidelines (AG) of Security Executive Agent Directive 4 (effective June 8, 2017) and DoD Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On April 20, 2023, Defense Office of Hearings and Appeals Administrative Judge Wilford H. Ross granted Applicant’s request for a security clearance. The Government appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Under Guidelines H and E, the SOR cross-alleged concerns that Applicant used marijuana with varying frequency from about April 2017 to about June 2021, all while being granted access to classified information. In response to the SOR, Applicant admitted that he used marijuana during the defined period but denied that his use occurred while he had access to classified information. The Judge found in favor of Applicant on all allegations.

On appeal, the Government argues that the Judge's application of the Guideline H and Guideline E mitigating conditions was arbitrary, capricious, and not supported by the record evidence. For the reasons stated below, we reverse the Judge's decision.

### **Background and Analysis**

Applicant is in his mid-30s and has earned both bachelor's and master's degrees. He was granted a security clearance in 2011 while employed with a previous defense contractor and has worked for his current defense contractor employer since 2015.

As part of his periodic reinvestigation, Applicant completed a new security clearance application (SCA) on March 8, 2021, wherein he disclosed that he started using marijuana in or around April 2017 and last used the drug the month prior to completing his SCA. Applicant acknowledged that his use occurred while possessing a security clearance and indicated that he intended to use the drug in the future, noting that he "anticipate[d] THC to be removed from [the] list of controlled substances in the near future." Government Exhibit (GE) 1 at 38.

During the corresponding interview three weeks later, Applicant explained that he used marijuana at home and "would take THC in the form of a tablet . . . about 2-3 nights a week." GE 2 at 8. He had used marijuana again since completing his latest SCA, and he expressed it was "likely" that he would continue to use the drug in the future to help regulate his sleep, but he was willing to abstain if that was "a requirement to maintain a clearance." *Id.*

In a subsequent response to interrogatories, Applicant disclosed that he last used marijuana in approximately June 2021, three months after his aforementioned clearance interview. *Id.* at 4. He again acknowledged that his use occurred while possessing a security clearance, but averred that he had stopped using marijuana and had no intention to use again in the future. *Id.*

The Judge found that Applicant used marijuana about 50 times "from approximately mid-to-late 2017 to August 2018, and again from November 2020 to June 2021," and that his clearance was active during the time he was using the drug. Decision at 3, 5. From August 2018 to November 2020, Applicant resided in a state where marijuana was illegal under state law, and he abstained. Decision at 2-3. The Judge found that "Applicant has abstained from any marijuana use since [June 2021] and evinced a credible intent not to use marijuana in the future." Decision at 3. Relying on Guideline H mitigating conditions 26(a) and 26(b), the Judge concluded that Applicant's "conduct was in the past and he stated convincingly that it will not be repeated." Decision at 6. He reached a similar conclusion in applying Guideline E mitigating conditions 17(c) and 17(d). Decision at 7. These conditions address similar concepts – that the concerning behavior was so minor or happened so long ago, so infrequently, or under such circumstances that it is unlikely to recur; and that the applicant acknowledged the concerning behavior and provided evidence of actions taken to overcome the problem.

## Discussion

There is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th 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.” AG ¶ 2(b).

A Judge’s decision can be found to be arbitrary or capricious if it “fails to examine relevant evidence, fails to articulate a rational connection between the facts found and the choice made, fails to be based on a consideration of relevant factors, involves a clear error of judgment, fails to consider an important aspect of the case, or is so implausible as to indicate more than a mere difference of opinion.” ISCR Case No. 94-0215 at 4-5 (App. Bd. Apr. 13, 1995) (citing *Motor Vehicle Mfr. Ass’n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983)). On appeal, the Government argues that the Judge’s treatment of the Guideline H and E mitigating conditions was not supported by the totality of the record evidence. We find this argument to be persuasive.

The Judge appears to have reached his favorable decision by leaning heavily on Applicant’s positive attributes, such as being “viewed as a solid performer by his employer” and “respected by his coworkers and supervisors,” and having “repeatedly received recognition for his job performance.” Decision at 3, 6. In doing so, however, the Judge failed to meaningfully address how Applicant’s decision to start and continue using marijuana while holding a security clearance was mitigated other than by asserting that Applicant’s use, which last occurred only about 15 months prior to the hearing, was “in the past.” Decision at 6, 7. While a Judge may conclude that the record supports a favorable decision through the whole-person analysis (*see, e.g.*, ISCR Case No. 16-02243 at 2-3 (App. Bd. Nov. 30, 2018)), such analysis requires “consideration of the evidence as a whole, not just those pieces of evidence that support a Judge’s final decision.” ISCR Case No. 94-1213 at 4 (App. Bd. Jun. 7, 1996).

There is no question that Applicant understood that his marijuana use was inconsistent with holding a security clearance. Indeed, Applicant testified at hearing that he was aware that marijuana is illegal under Federal law. Tr. at 42. When asked why he continued to use marijuana not only after he completed his 2021 SCA, but also after the subsequent clearance interview despite understanding throughout that time that the drug is a violation of Federal law, Applicant replied, “It was working. It was helpful for my sleep. As much as I did understand that it was illegal under Federal Law, I was benefitting from it.” Tr. at 46-48. The Appeal Board has “long held that applicants who use marijuana after having been placed on notice of the security significance of such conduct may be lacking in the judgment and reliability expected of those with access to classified information.” ISCR Case No. 20-01772 at 3 (App. Bd. Sep. 14, 2021). *See also* ISCR Case No. 21-02534 at 4 (App. Bd. Feb. 13, 2023) (“[A]fter 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.”). The Judge’s analysis failed entirely to address the substantial questions raised by Applicant’s conduct.

The record reflects that Applicant knew at the time he was using marijuana that it was prohibited by Federal law. He began purchasing and using marijuana while holding a security clearance and continued to do so well into his current reinvestigation, despite having been repeatedly placed on notice that such conduct was inconsistent with holding a security clearance. We note that, in rendering his favorable decision, the Judge took notice of the Security Executive Agent’s December 2021 *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*, which instructs that “prior recreational marijuana use by an individual may be relevant to [security clearance] adjudications but not determinative.” Notwithstanding this clarifying guidance, Applicant’s conduct – including his marijuana use while holding a security clearance and continuing well into his latest clearance reinvestigation, all of which was in knowing violation of Federal law and security clearance standards – raises unmitigated security concerns.

Considering the record as a whole, we conclude that the Judge’s decision is arbitrary and capricious. The decision fails to consider important aspects of the case and runs contrary to the weight of the record evidence and is not sustainable.

### **Order**

The Judge’s favorable security clearance decision is **REVERSED**.

Signed: James F. Duffy

James F. Duffy  
Administrative Judge  
Chair, Appeal Board

Signed: Moira Modzelewski

Moira Modzelewski  
Administrative Judge  
Member, Appeal Board

Signed: Allison Marie

Allison Marie  
Administrative Judge  
Member, Appeal Board