

Date: October 27, 2023

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Applicant for Security Clearance)
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ISCR Case No. 22-02132

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Christopher R. Landrigan, Esq.
W. Harry Caulfield, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On November 18, 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) of the National Security Adjudicative Guidelines (AG) of Security Executive Agent Directive 4 (effective June 8, 2017) (SEAD 4) and DoD Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). On July 27, 2023, after conducting a hearing, Defense Office of Hearings and Appeals Administrative Judge Richard A. Cefola denied Applicant’s security clearance eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30. For reasons stated below, we remand the Judge’s decision.

The SOR alleged that Applicant purchased and used various illegal drugs, including marijuana from about 2013 to May 2022, MDMA/Ecstasy from about 2016 to October 2018, LSD from about 2016 to August 2017, cocaine from about 2017 to April 2018, and hallucinogenic mushrooms in about August 2017, and that he used marijuana after completing a security clearance application (SCA) in April 2022. In responding to the SOR, Applicant admitted each of the allegations and provided information in support of his request for security clearance eligibility. The Judge found against Applicant on each of the SOR allegations, concluding insufficient time has passed to mitigate the alleged security concerns.

Errors in Factual Findings

On appeal, Applicant, who is 28 years old, correctly points out the Judge made several factual errors in the decision. These errors are related and, when considered together, constitute harmful error.

First, the Judge erred in stating that there were no objections to Applicant's exhibits (AE). In this regard, the Government objected to a portion of AE Q, a psychological evaluation, based on a sentence in the evaluation that Applicant "does not have any psychiatric . . . substance use condition, dispositions, or behavior patterns that could threaten his reliability, trustworthiness, or judgment in the context of safeguarding classified information or working in cleared setting." AE Q at 5. The Government stated that he saw nothing in the evaluation to establish that the psychologist "has a Security Clearance themselves or has had a Security Clearance and know[s] what that context is. . . . I object to that particular thing because . . . the basis has not been established." Tr. at 17-18. In response to the Government's objection, the Judge stated, "I agree with you" but admitted the psychological evaluation into evidence, noting he would give it the weight it deserves. *Id.* at 18.

The day after the hearing, Applicant submitted the psychologist's curriculum vitae (CV) as AE Y. The Judge's decision does not reflect whether he admitted AE Y into evidence, but he does cite it in a finding, discussed in the next paragraph. The CV reflects that the psychologist has held positions as a Senior Psychological Health Advisor and Chief Behavioral Health Officer in National Guard units and was then serving as the Command Psychologist in a special operations unit. AE Y at 4-6. Furthermore, his CV reflects that he held a Top-Secret security clearance since 2013, and he completed numerous military courses and received several military medals and other awards. *Id.* at 1-3.

Second, the Judge erred in finding Applicant had a "PhD in Philosophy in Counseling Psychology." Decision at 2. In making that finding, the Judge cited to AE Y, obviously confusing the psychologist's and Applicant's educational qualifications. This finding shows that the Judge thought that AE Y was Applicant's CV. In the decision, the Judge did not mention the psychologist's evaluation in either his findings of fact or in his analysis, which would tend to indicate that he gave the evaluation little or no weight. Given these circumstances, it is not unreasonable to conclude that this combination of errors led the Judge to discount AE Q, the psychological evaluation, because he was unaware of the psychologist's background and qualifications. A judge is not required to discuss each and every piece of record evidence; however, his failure to discuss important aspects of a case is error. *See, e.g.,* ISCR Case No. 03-07874 at 4 (App. Bd. Jul. 7, 2005). Considering the emphasis placed on the psychologist's evaluation and security clearance history by the Government and Judge at hearing, these were important aspects of the case and should have been addressed in the decision.

Applicant also argues that the Judge omitted consideration of one of Applicant's negative drug test results in his mitigation analysis. In his decision, the Judge noted that Applicant "submitted negative drug test results from March of 2023," citing AE V. In addition to the March 2023 results, Applicant also submitted a negative drug test from January 2023, which was included

in the record as AE R. While, again, a judge is not required to discuss each and every piece of record evidence, the Judge's reference to one but not both negative test results, when viewed in light of there being missing references to other significant record evidence, suggests that the Judge did not consider Applicant's earlier result. These errors are sufficient to rebut the presumption that the Judge considered all of the record evidence. We are unable to conclude these errors were harmless.

Marijuana Use and Use of Other Illegal Drugs

Applicant contends that the Judge's analysis of the evidence was inadequate. We agree. As the Board has previously stated, a judge's decision must be written in a manner that allows the parties and the Board to discern what conclusions he or she is reaching. *See, e.g.*, ISCR Case No. 16-02536 at 5 (App. Bd. Aug. 23, 2018). Furthermore, a judge cannot ignore, disregard, or fail to discuss significant record evidence that a reasonable person would expect to be taken into account in reaching a fair and reasoned decision. *See, e.g.*, ISCR Case No. 15-02903 at 3 (App. Bd. Mar. 9, 2017). In this case, the Judge considered all of Applicant's drug use together in a very succinct mitigation analysis that, besides the standard Guideline H language, consisted of four sentences. In doing so, the Judge failed to address significant factual and legal differences between Applicant's state-compliant marijuana use and his other illegal drug use. This was an important aspect that a reasonable person would have expected the Judge to address.

Regarding the other illegal drug use allegations, Applicant used Ecstasy, LSD, cocaine, and hallucinogenic mushrooms a limited number of times (once to four times depending on the drug) from 2016 to 2018. During that period, he was about 21 to 23 years old and was attending college and graduate school. Applicant signed a letter of intent to not use illegal drugs in the future. The Judge found that "Applicant's testimony was forthright and his integrity was apparent." Decision at 3. Since Applicant's non-marijuana drug misuse was limited in frequency, happened when he was a young student, and ceased about five years ago, a reasonable person would expect the Judge to determine whether or not that drug misuse was "unlikely to recur or does not cast doubt on the individual's current reliability, judgment, or good judgment." AG ¶ 26(a)(emphasis added).

With respect to his marijuana use, Applicant admitted that "he used marijuana between 75~100 times during the time period December of 2013 and May of 2022." Decision at 2. Under the facts of this case, Applicant's marijuana use is distinguishable from his other illegal drug use, particularly considering the nature, recency, and frequency of these different types of drug use. In response to the increasing number of state and local governments that have legalized or decriminalized the use of marijuana, the Security Executive Agent issued a 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 (SecEA Clarifying Guidance) in December 2021. This Guidance instructs, among other things, that "prior recreational marijuana use by an individual may be relevant to adjudications but not determinative," and reiterates the requirement that agencies utilize the Whole-Person Concept "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." SecEA Clarifying Guidance at 2. Of

note, throughout most of the time that Applicant used marijuana, adult recreational use of marijuana has been legal in his state, and he never held a security clearance. In this case, the Judge failed to conduct an appropriate analysis of Applicant's state-compliant marijuana use under the SecEA Clarifying Guidance.

Applicant's use of marijuana after submitting an SCA also merits discussion.¹ SOR ¶ 1.a alleged that Applicant used marijuana from December 2013 to May 2022, whereas SOR ¶ 1.g alleged that he used marijuana in May 2022 after having completed an SCA a month earlier. As written, SOR ¶ 1.g does not raise any security concerns or, if proven, establish any Guideline H disqualifying conditions that are not already covered by SOR ¶ 1.a. In the decision, the Judge found against Applicant on SOR ¶ 1.g after finding he used marijuana at least once after executing his SCA. However, the Judge did not conduct any analysis of the security significance of the conduct alleged in SOR ¶ 1.g. "As the Appeal Board 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." ISCR Case No. 21-02534 at 4 (App. Bd. Feb. 13, 2023) (citing ISCR Case No. 20-02974 at 6 (App. Bd. Feb. 1, 2022)). The effective timing of such notice is fact dependent. In the present case, the fact that Applicant used marijuana after completing an SCA is only relevant if the evidence establishes that he understood the security significance of further marijuana use after initiating the security clearance process and that he demonstrated a disregard of the security clearance eligibility standards by continuing such use. Here, the Judge erred in failing to make any findings or conclusions that Applicant's use of marijuana after completing an SCA had any added security significance that raised questions about his reliability, trustworthiness, good judgment, or willingness to comply with laws, rules, or regulations. Absent such findings or analysis, SOR ¶¶ 1.a and 1.g were essentially duplicative, and the Judge should have found in favor of Applicant on at least one of them. *See, e.g.*, ISCR Case No. 03-04704 at 3 (App. Bd. Sep. 21, 2005) (addressing a judge's formal findings on duplicative SOR allegations).²

Based on the foregoing, we conclude that the Judge's analysis of the evidence was arbitrary and capricious, which constitutes a harmful error.

Conclusion

In light of the harmful errors identified, above, the best resolution of this case is to remand it to the Judge to correct the 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

¹ Applicant testified that his use of marijuana after submitting his SCA occurred at his sister's engagement. He stated, "Like, she just offered, and I truly did not think at the time that it was frowned upon since I did not have a Security Clearance or access to classified information. So, I did not think that it was going to be a problem." Tr. at 38. He further indicated that he did not know of his company's drug-free policy at that time, and he immediately self-reported his conduct when he learned about the policy. *Id.* at 38-39.

² SOR ¶ 1.g also raises a due process issue about whether Applicant was placed on adequate notice of the specific reason for denying him security clearance eligibility, which is not ripe for discussion at this time.

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.

Order

The Judge's adverse security clearance decision is **REMANDED**.

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

Signed: Gregg A. Cervi
Gregg A. Cervi
Administrative Judge
Member, Appeal Board

Signed: Allison Marie
Allison Marie
Administrative Judge
Member, Appeal Board