

Date: October 12, 2023

In the matter of:)
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Applicant for Security Clearance)
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ISCR Case No. 22-02623

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Christopher Snowden, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On February 15, 2023, 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 August 8, 2023, after conducting a hearing, Defense Office of Hearings and Appeals Administrative Judge Darlene D. Lokey Anderson 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.

Applicant, who is 26 years old, started his current job in July 2021 and submitted a security clearance application (SCA) in May 2022. The SOR alleged that Applicant purchased and used various illegal drugs, including marijuana from about 2015 to early 2022, cocaine from about 2015 to 2021, hallucinogenic mushrooms from about 2016 to 2021, and LSD in about 2017. It also alleged that he sold marijuana in about 2017 and purchased and used various prescription medications that were not prescribed to him, including Adderall and Vyvanse from about 2016 to 2018, Tramadol and Vicodin in about 2017, and Xanax in about 2015. In responding to the SOR, Applicant denied the sale-of-marijuana allegation and admitted the other allegations with

clarifications. The Judge found that Applicant knew he was violating state and Federal laws when he used marijuana, cocaine, LSD, and hallucinogenic mushrooms. As a favor to a friend, Applicant acted as a middleman in a transaction involving the sale of marijuana in 2017, but he did not receive any money for his participation. Concluding that Applicant failed to demonstrate a willingness to comply with laws, rules, and regulations, the Judge found against him on each of the SOR allegations.

On appeal, Applicant challenges the Judge's conclusion in her analysis that he continued to use marijuana "after applying for a security clearance, in total disregard of DoD policies and Federal law." Decision at 6. The Judge did not make a finding of fact or cite any evidence supporting that conclusion. The Judge also listed AG ¶ 25(f), "any illegal drug use while granted access to classified information or holding a sensitive position" as one among other disqualifying conditions but did not state that AG ¶ 25(f) or any other disqualifying conditions specifically applied in this case. From our reading of the decision, it is unclear whether the Judge applied AG ¶ 25(f) in this case.

Applicant testified that he stopped smoking marijuana in March 2022 when he became aware of its potential security implications and further wanted to change his lifestyle. Tr. 39-41. In his May 2022 SCA, Applicant estimated his most recent use of marijuana was in March 2022 and confirmed that information was correct to the best of his recollection during a subsequent background interview. Government Exhibit (GE) 1 at 74, 88-89 and GE 2 at 16. Based on our review of the record evidence, we are unable to find any evidence supporting a finding or a conclusion that Applicant used marijuana after submitting his SCA.

In analyzing this issue, it merits noting that 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). We have further stated that, "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). On the other hand, it also merits noting that Security Executive Agent (SecEA) 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, dated December 21, 2021, provides that prior recreational use of marijuana, which of course constitutes a violation of Federal law, may be relevant in security clearance adjudications but is not determinative. The guidance further emphasizes the application of the "whole-person concept" in analyzing such conduct. *See also* SecEA Adherence to Federal Laws Prohibiting Marijuana Use, dated October 25, 2014. Considering the above pronouncements, we are unable to conclude that the Judge's error in finding that Applicant used marijuana after submitting SCA did not likely affect the outcome of the case.

Based on the foregoing, we conclude that the best resolution of this case is to remand the case to the Judge to correct the above-identified harmful error 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.

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