

to properly consider all available evidence, rendering her adverse decision arbitrary, capricious, or contrary to law.

Judge's Findings of Fact and Analysis

Applicant, 26 years old, attended college from 2015 to 2020, earning his bachelor's degree. He began working for his defense contractor employer in July 2021. Seeking to obtain an initial security clearance, Applicant submitted a security clearance application (SCA) in May 2022, wherein he disclosed his history of illegal drug involvement. Based on those disclosures, the SOR alleged that Applicant used marijuana from 2015 to March 2022, cocaine from 2015 to 2021, hallucinogenic mushrooms from 2016 to 2021, and LSD in 2017. The SOR further alleged that Applicant sold marijuana in 2017, and that he purchased and used various prescription medications not prescribed to him, including Adderall and Vyvanse from 2016 to 2018, Tramadol in 2017, Vicodin in 2018, and Xanax in 2015. In response to the SOR, Applicant denied selling marijuana but admitted the other allegations with explanation.

The Judge found that Applicant used the illegal and prescription drugs as alleged in the SOR. She noted that Applicant knew he was violating state and Federal laws when he used marijuana, cocaine, LSD, and hallucinogenic mushrooms, and that he continued to use marijuana from July 2021 through March 2022 while holding a sensitive position. Moreover, although he did not receive any money for his participation, Applicant acted as a middleman in a transaction involving the sale of marijuana in 2017. The Judge further found that Applicant failed to demonstrate a willingness to comply with laws, rules, and regulations, and concluded that doubts remain about Applicant's eligibility and suitability for security clearance.

Discussion

On appeal, Applicant challenges two of the Judge's factual findings as unsupported by the record and argues that those errors impacted the Judge's analysis of the case. These arguments have merit.

Recommendation Letters

Applicant first argues that the Judge improperly weighed his recommendation letters because she found that they did not reference his illegal drug use and therefore it appeared that the references did not know the specifics of the allegations against him. Appeal Brief at 15. The Judge acknowledged the favorable information expressed about Applicant in his various recommendation letters, including his "good character, work ethic, and commitment to the principles of integrity and confidentiality." Decision at 3. The Judge noted that, per Applicant's testimony, he did not provide the SOR to any of the references, but only "verbally discussed the allegations" with them. *Id.* at 4; Tr. at 60-61. Applicant further testified that none of the letters contain details about his alleged drug use because "the statement that I wanted them to use was they were aware of the allegations for brevity in the letter." Tr. at 61-62.

The Judge went on to find that only one of the letters “makes any reference to being aware of Applicant’s history of illegal drug use, and characterizes it as occurring prior to his employment with the company, which is not accurate.” *Id.* at 3-4. On appeal, Applicant argues that “there is not even a scintilla of evidence to support this finding” because the “letters of recommendation do reference [Applicant’s] drug use.” Appeal Brief at 15. Applicant’s argument, while somewhat hyperbolic, has merit as the Judge’s finding is not technically correct.

Of the six letters provided in support of Applicant, not one, but two reference – in very general terms – an awareness that the SOR alleged concerns about drug use. *See* Applicant Exhibit (AE) I at 4 (“Although he has had a history of drug use *prior to starting work at [the company]*, I know those days are fully behind him.”) (emphasis added); *id.* at 5 (“I would like to address the allegations of former drug use that have surfaced during [Applicant’s] clearance process. I know those days are fully behind him.”). The other four letters reference, without any specificity, “allegations” made against Applicant or challenges during his security clearance process. *See* AE E; AE I at 1-3. To the extent that the Judge did not consider in her decision the second letter that references Applicant’s drug use, she should remedy that error on remand.

Sensitive Positions

More significantly, Applicant challenges the Judge’s finding that he began working in a “sensitive position” in July 2021 and argues that this erroneous finding is unsupported by any record evidence and was harmful as it afforded application of disqualifying condition AG ¶ 25(f).¹

The Judge found that “[i]n July 2021, Applicant began working for a defense contractor in a sensitive position.” Decision at 2. She then referenced this finding throughout her analysis. *See id.* at 6 (finding disqualifying condition AG ¶ 26(f)² applicable because “from July 2021 through March 2022, Applicant continued to use marijuana . . . while holding a sensitive position”); *id.* at 6-7 (Applicant’s “extensive history of illegal drug use . . . coupled with his continued use of marijuana after being hired by a defense contractor and while holding a sensitive position, support a finding that he fails to show the requisite character and judgment required to meet the eligibility requirements for access to classified information.”); *id.* at 7 (Applicant “completely disregarded DoD policies” when he “continued to use marijuana after being hired by a defense contractor and while holding a sensitive position.”). The Judge appears to equate Applicant beginning employment with a defense contractor with his holding a sensitive position. This interpretation is incorrect and, contrary to the Judge’s finding, the record is devoid of evidence that Applicant held a sensitive position during the period in question.

For purposes of national security eligibility determinations, the Directive defines “sensitive position” as:

¹ In making this argument, Applicant relies on Executive Order No. 10,450 (*see* 18 Fed. Reg. 2489 (Apr. 27, 1953)); however, that Order was repealed in 2017 by Executive Order No. 13,764 (*see* 82 Fed. Reg. 8115 (Jan. 17, 2017)).

² AG ¶ 25(f) provides disqualification for “any illegal drug use while granted access to classified information or holding a sensitive position.”

Any position within or in support of an agency in which the occupant could bring about, by virtue of the nature of the position, a material adverse effect on the national security regardless of whether the occupant has access to classified information, and regardless of whether the occupant is an employee, military service member, or contractor.

SEAD 4, ¶ D.8. We have previously held that this broad language is “designed to be inclusive and encompass a wide range of positions, including those that require eligibility for access to classified information (*i.e.*, a security clearance).” ISCR Case No. 22-01661 at 4 (App. Bd. Sep. 21, 2023). The term “sensitive position” is not so broad, however, to encompass any and all employment with a defense contractor.

To the contrary, an individual cannot hold a national security position, to include a sensitive position, until they are found eligible to do so, which either requires favorable completion of the investigative and adjudicative processes or, in exceptional circumstances, may be granted on a temporary basis while the investigation is underway.³ It follows, then, that an individual cannot hold an initial sensitive position prior to commencing the associated background investigation. In this case, Applicant’s background investigation began with submission of his SCA in May 2022 and it was erroneous to find that he held a sensitive position prior to that date. The Judge’s reliance on this finding is inextricable from the rest of her disqualification analysis, and we are therefore unable to conclude that it was harmless error.

In light of the 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 jurisdiction over a remanded decision. However, a 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.

³ See Exec. Order No. 12,968, 60 Fed. Reg. 40245 (Aug. 2, 1995, as amended), § 1.2(a) (“No employee shall be granted access to classified information unless that employee has been determined to be eligible . . . and to possess a need-to-know.”); *id.* at § 3.1(b) (Except in special circumstances, “eligibility for access to classified information shall be granted only to employees . . . for whom an appropriate investigation has been completed and whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information.”); Exec. Order No. 13,764, § 3(v) (applying provisions of Executive Order No. 12,968 regarding eligibility for access to classified information to eligibility to hold any sensitive position).

See also DoD Instruction 5200.02 (Mar. 21, 2014, as amended), ¶ 3.i (“Eligibility for national security positions shall be granted only to persons . . . for whom the investigative and adjudicative process has been favorably completed. However, based on exceptional circumstances where official functions must be performed prior to completion of the investigative and adjudicative process, temporary eligibility for access to classified information may be granted while the investigation is underway.”).

Order

The decision is **REMANDED**.

Signed: Moira Modzelewski

Moira Modzelewski
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