

Discussion

Applicant is in his late twenties and is employed by a defense contractor. He was granted a secret security clearance in November 2018 and, during the preceding investigation, disclosed that he used marijuana while in college from July 2015 to May 2017. In November 2022, Applicant submitted a new application in support of a request to upgrade his security clearance, wherein he disclosed that he used hallucinogenic mushrooms one time in March 2020. At the time of said use, he was granted security clearance eligibility and held a sensitive position.

Finding that “Applicant knowingly used hallucinogenic mushrooms, an illegal substance, in March 2020, while granted access to classified information or while holding a sensitive position,” the Judge applied disqualifying conditions AG ¶¶ 25(a), 25(c), and 25(f).¹ Decision at 5. The Judge identified mitigating conditions AG ¶¶ 26(a) and 26(b) for the record, presumably to note their potential relevance, but ultimately held that neither applied, and she concluded that “Applicant has not demonstrated the level of maturity, integrity, good judgment, and reliability necessary to access classified information.” Decision at 6.

Failure to Apply AG ¶ 26(a)

On appeal, Applicant contends that the Judge erred by failing to apply AG ¶ 26(a), arguing that his illegal drug use “happened roughly 4 years ago . . . , exactly once, and happened under such anomalous circumstances that it has never occurred again.” Appeal Brief at 1. Applicant’s argument in this regard warrants review.

AG ¶ 26(a) affords mitigation where “the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment.” The Directive is silent on what constitutes a sufficient period of reform and rehabilitation. That silence, however, does not relieve a judge of the obligation to construe and apply pertinent provisions of the Directive in a reasonable, common-sense way. *See* ISCR Case No. 02-08032, 2004 WL 1434394 at *5 (App. Bd. May 14, 2004). The Board has repeatedly held that, if the record reflects a significant period of time has passed without misconduct by an applicant, then the judge must articulate a rational basis for concluding why that time does not demonstrate changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation. *Id.*

Here, Applicant’s single hallucinogenic mushroom use occurred in mid-2020, more than two years before he submitted his latest security clearance application and over three years prior to the close of the record in this matter. Despite the foregoing, the Judge concluded that AG ¶ 26(a) was not applicable but provided problematic analysis as to the frequency of use and no analysis as to the passage of time. With respect to the former, the Judge opined that, “Whether Applicant used the hallucinogenic mushrooms ten times or one time, while granted a security clearance, the

¹ AG ¶ 25(a) – any substance misuse; AG ¶ 25(c) – illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; AG ¶ 25(f) – any illegal drug use while granted access to classified information or holding a sensitive position.

number of times he used it is not as relevant to the issue as is the fact that he violated security procedures in the first place.” Decision at 5-6. Such a limited analysis would effectively render AG ¶ 26(a) inapplicable to clearance holders. We cannot support such an interpretation. The Judge’s failure to articulate a sustainable rationale for discounting the mitigative effect of AG ¶ 26(a) constitutes harmful error. *See, e.g.*, ISCR Case No. 04-09239, 2006 WL 4078449 at *3 (App. Bd. Dec. 20, 2006).

Adjudicative Desk Reference

In his brief, Applicant incorrectly cites to Adjudicative Desk Reference (ADR) provisions in support of his arguments. Appeal Brief at 2. Applicant’s reliance upon the ADR is misplaced. DOHA judges are required to decide cases by using the Adjudicative Guidelines, not the ADR. The ADR itself contains language instructing that “it is not U.S. Government policy and may not be cited as authority for denial or revocation of access.” *See* ADR (Version 4, Mar. 2014) at 2. *See also* ISCR Case No. 03-04090, 2005 WL 1382026 at *5 (App. Bd. Mar. 3, 2005).

Conclusion

Pursuant to Directive ¶ E3.1.33.2, the Board remands the case to the Judge with instruction to issue a new decision, consistent with the requirements of Directive ¶ E3.1.35, after correction of the identified error and reconsideration of the record as a whole. The Board retains no jurisdiction over a remanded decision; however, a judge’s decision issued after remand may be appealed. Directive ¶¶ E3.1.28 and E3.130.

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