



position,<sup>1</sup> and that he intends to continue marijuana use in the future. Under Guideline E, Applicant is alleged to have falsified his 2022 security clearance application (SCA) by failing to report his use and purchase of marijuana, including while holding a security clearance. Applicant admitted the Guideline H allegations, including admitting using and purchasing marijuana after being granted a security clearance and occupying a sensitive position, with an explanation that he “legally” purchased “an item that contained small amounts of THC from a local smoke shop,” that he consumed them in a “safe environment” outside of work, and that his use did not compromise his ability to conduct his duty as a DOD contract employee. He denied the Guideline E allegations, claiming his usage and purchase was not illegal. Answer to SOR. The Judge found against Applicant on all allegations.

On appeal, Applicant contends that the Judge erred in his application of the disqualifying conditions, rendering his decision arbitrary, capricious, and contrary to law. He also takes issue with the choice of forum to adjudicate his clearance. Consistent with the following, we affirm.

**The Judge’s Findings:** The Judge’s findings relevant to the appeal are summarized below.

Applicant is in his mid-40s. He is a college graduate and has worked as a program engineer for defense contractors since 2005. He completed SCAs in 2002, 2012, and 2022, and has held a secret security clearance since 2002. He is now seeking a top secret clearance. Decision at 2.

Applicant completed an SCA in March 2022 wherein he denied use or purchase of illegal drugs in the past seven years and denied ever using illegal drugs while possessing a security clearance. During his personal subject interview (PSI) by a government investigator, he admitted to purchasing marijuana edibles in January 2022 while vacationing out of the country. He consumed one per day over the course of five days during the trip. He then disclosed that he used marijuana in March 2021 after a funeral. He summarized his marijuana use as recreationally, about twice a year since 2016, typically on special occasions. When asked why he did not disclose his marijuana use in his SCA, he said he “just forgot about it.” He said he would still use it in the future but would reserve his use to when he was in a “safe environment,” would not let his marijuana use compromise his work quality, and would not become dependent. He confirmed that he knew marijuana was federally illegal. Decision at 2-3.

Applicant responded to interrogatories in November 2022, and provided more details of his marijuana involvement. He said he first used on January 23, 2016, in State 1 and last used on October 29, 2022, in State 2 for a Halloween celebration. He purchased marijuana edibles from a local smoke shop near his residence in State 2, and last purchased on October 28, 2022. When asked when, if ever, he had decided to stop, he responded, “I suspended use of (marijuana) during work hours or when I don’t feel safe. Last use was Halloween weekend (10/29/2022). Can and

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<sup>1</sup> SOR ¶ 1.b was amended by department Counsel on November 29, 2023, to clarify the allege drug use “after being granted access to classified information *or while holding a sensitive position.*” Applicant admitted the allegation with an explanation. Answer to SOR.

will stop if required to maintain clearance and/or perform work duties responsibly.” Government Exhibit (GE) 3 at 10–11.

In testimony, Applicant described his marijuana use as sporadic and said he used less than 25 total times in six years. He reiterated that he used marijuana in “safe environments like his home, with a brother, cousins, or others he trusted.” Decision at 3, citing Tr. at 39–47. He noted that in 2016, the stigma around THC and marijuana in State 1 was dying down, it was easily accessible, and it had been decriminalized in State 1. He decided on his birthday, in his home with people he trusted, “okay, I guess I’ll give it a shot.” Decision at 3–4, citing Tr. at 36–37. He also testified to his stressors and challenges from COVID-19 and caring for his mother with dementia. He used to be in counseling, but since moving to his current state, he has been unsuccessful at finding a counselor.

Applicant noted in testimony that he was “well educated” on the federal illegality of marijuana and stated that he had the impression that the climate of the country was not as severe and that “it would be possible to assess one’s capability to hold a clearance and be a responsible, contributing member of the U.S. society, even if they’ve used marijuana.” *Id.* at 4.

Applicant testified that the investigator asked whether he knew marijuana was still classified as a Schedule 1 drug, to which he responded, “I do.” He stated the conversation ended, but looking back, he wished the investigator had told him to stop using marijuana. He said he believed the investigator’s questions regarding illegality of marijuana meant that, if he was being responsible while using marijuana, it was okay. Applicant was aware of his employer’s drug policy prohibiting the use of illegal drugs and was subject to random drug urinalysis testing as a condition of employment, but he said he was not concerned. *Id.*

Applicant testified that, when completing his SCA, he overlooked the language in Section 23 asking about *Illegal Use of Drugs or Drug Activity*. He testified that he denied the Guideline E SOR allegations because he did not believe his use and purchase of marijuana on various occasions was illegal at the time he completed his SCA. He asserted such activities were decriminalized in States 1 and 2 at the time of his use and purchase. At the end of testimony, Applicant changed his answer regarding his intent to continue using marijuana to state that he “would just discontinue use.” *Id.* at 5.

The Judge noted that Applicant made inconsistent statements concerning his failure to disclose his illegal drug use or drug activities in his March 2022 SCA. In his April 2022 interview, he told the investigator he “just forgot about it.” GE 3 at 6. In his SOR response and during his testimony, he asserted he did not disclose his illegal drug use or drug activities because he believed his activities were not illegal. During the hearing, he repeatedly commented on his desire to be honest. Decision at 5.

**Judge’s Analysis:** The Judge’s analysis is summarized and quoted below.

Under Guideline H, the Judge found that AG ¶¶ 25(a), (c), (g), and (f) applied.<sup>2</sup> The Judge held that Applicant purchased and used marijuana for more than six years and as recently as October 2022. During his PSI, he stated his intent to continue using marijuana in the future with caveats. Although he changed his previously stated future intent over halfway through the hearing, he was unable to commit clearly and convincingly to discontinue his misuse. He also used marijuana since 2016 while holding a sensitive position, and he continued to use and purchase marijuana through October 2022, about six months after his investigative interview.

Applicant was aware his drug involvement violated federal law, even assuming it was legal under state law. He was also aware of, but unconcerned about his employer’s drug policy and random drug urinalysis testing program, and continued to use marijuana in a self-described “safe” environment. He also did not provide a signed statement of intent to abstain from using or purchasing marijuana in the future. Applicant’s purchase and use of marijuana while holding a sensitive position reflect poor judgment and raise questions about his reliability and trustworthiness. His evidence in mitigation is insufficient to overcome the concerns and doubts about his judgment, reliability, and overall willingness to comply with laws, rules, and regulations. *Id.* at 8.

Under Guideline E, the Judge noted that Applicant made inconsistent statements about his failure to disclose his illegal drug use or drug activities in his March 2022 SCA. In his April 2022 interview, he told the investigator he “just forgot about it.” In his SOR response and drug testimony, he stated he did not disclose his illegal drug use or drug activities because he believed his activities were not illegal. The Judge held that Applicant deliberately provided false information about his use and purchase of marijuana on his SCA. She found that AG ¶ 16(a) applied.<sup>3</sup> The Judge concluded that mitigating conditions did not apply since Applicant failed to disclose his illegal drug activities in his SCA. His after-the-fact discussion with the investigator was insufficient to mitigate the security concerns. The late disclosures did not amount to a prompt, good-faith effort to correct his prior omission in this case, and the evidence leaves her with questions and doubts about whether Applicant has overcome his personal conduct security concerns. *Id.* at 9-10.

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<sup>2</sup> AG ¶¶ 25(a) any substance misuse; (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; (f) any illegal drug use while granted access to classified information or holding a sensitive position; and (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

<sup>3</sup> AG ¶ 16(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities.

## Discussion

On appeal, Applicant asserts that the Judge misapplied AG ¶ 25(g) (expressed intent to continue drug involvement) because he stated at the hearing that he abstained from marijuana use since October 2022 and would not use in the future, and he did not know he could provide a signed statement of intent, nor was he presented with the opportunity to do so. Appeal Brief (AB) at 1. In addition, Applicant asserts the Judge misapplied AG ¶ 16(a) (deliberate omission, concealment, or falsification of relevant facts from SCA) because he thought his drug use and purchase was legal. He claims that when he completed his SCA, he did not know marijuana was illegal, but that since his PSI, he understood “this was not to be the case and that any purchase or usage was to be documented.” He said he completed a “follow up” questionnaire in late 2022 where he disclosed his marijuana use (but does not recall the date). AB at 2.

In deciding whether the Judge's rulings or conclusions are erroneous, we will review the decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See, e.g.*, ISCR Case No. 97-0435 at 3 (App. Bd. Jul. 14, 1998).

Our examination of the record shows the Judge's application of disqualifying conditions were appropriate given the evidence presented. Applicant's appeal points to a disagreement with the Judge's weighing of the evidence in mitigation. Applicant provided inconsistent statements with regard to his history of marijuana use and purchase, including while holding a security clearance, and with regard to his understanding of the legality of marijuana use. The record shows that Applicant understood his marijuana use and purchases were prohibited by Federal law and his employer. In addition, he failed to commit clearly and convincingly to discontinue use in the future. Applicant was provided with a copy of the AG with the SOR and, additionally, was made aware of it throughout the pre-hearing process.

Under Guideline H, mitigating condition ¶ 26(b), Applicant may provide a signed statement of intent to abstain from all drug involvement. His failure to provide such evidence was noted by the Judge. An applicant has the burden of presenting evidence sufficient to warrant application of such mitigating conditions. *See, e.g.*, ISCR Case No. 03-08525 at 6 (App. Bd. Sep. 22, 2005). It is an applicant's job to present evidence sufficient to mitigate the concerns raised in his or her case, and the applicant bears the ultimate burden of persuasion that he or she should be granted a clearance. Directive ¶ E3.1.15. *See* ISCR Case No. 16-02243 at 2 (App. Bd. Nov. 30, 2018). Applicant's claim that he should have been made aware of this mitigating component and should have been presented with it at some point during the investigative or hearing process is without merit. It is neither the Judge's nor Department Counsel's duty to seek additional mitigating evidence or otherwise undertake further investigation of the concerns raised in an SOR. *See, e.g.*, ISCR Case No. 14-03062 at 3 (App. Bd. Sep. 11, 2015). Although *pro se* applicants are not held

to the standards of attorneys, they are expected to take reasonable steps to protect their rights. *See, e.g.*, ISCR Case No. 12-02371 at 3 (App. Bd. Jun. 30, 2014).

Applicant continued to use marijuana after submitting his SCA and undergoing a background interview. During his interview, Applicant was questioned about his marijuana use. He reluctantly disclosed greater information about his drug use as the interview progressed, and further clarified his use in a subsequent interrogatory response. His explanation at the hearing that he believed the interviewer was inquiring about whether he was “responsible” with his drug use is baseless and contrary to the evidence. We have 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. *See, e.g.*, ISCR Case No. 17-04198 at 2 (App. Bd. Jan. 15, 2019).

The Directive provides that “illegal use of controlled substances . . . raises questions about a person’s ability or willingness to comply with laws, rules, and regulations.” Directive, Encl. 2, App. A ¶ 24. This paragraph defines “substance misuse” as a generic term to describe, *inter alia*, the conduct just quoted. It does not limit Guideline H concerns to habitual drug use. Rather, the Directive provides that *any* use of an illegal drug can raise security concerns. *See, e.g.*, ISCR Case No. 12-06635 at 2 (App. Bd. Mar. 28, 2014). This clearly addresses the kind of use to which Applicant has admitted. We note Applicant’s argument that many states have legalized marijuana for medical purposes or have simply decriminalized it. However, marijuana use remains an offense under Federal law, and Applicant stated that he understood the Federal prohibition.

Applicant provided additional evidence for the Board’s consideration. We note the Appeal Board is prohibited from considering new evidence on appeal. Directive ¶ E3.1.29. Finally, Applicant argues that he should not have lost his Secret clearance as a result of the denial of his Top Secret clearance and requests to retain his Secret level clearance at a minimum. The Board has no authority to deny Applicant a higher-level clearance while permitting him to retain a lower-level clearance. *See, e.g.*, ISCR Case No. 03-11627 at 4 (App. Bd. Mar. 18, 2005). The Directive makes no distinction concerning basic clearance levels in its procedures for deciding whether access to classified information is clearly in the national interest. Possession of a previously granted clearance does not give rise to any right or vested interest, nor does any favorable clearance decision preclude the Government from reassessing a person's security eligibility in light of current circumstances. ISCR Case No. 03-24144 at 6 (App. Bd. Dec. 6, 2005).

None of Applicant’s arguments are enough to rebut the presumption that the Judge considered all of the record evidence or to demonstrate the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. Applicant has failed to establish that the Judge committed any harmful error or that he should be granted any relief on appeal. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The decision is sustainable on the record. “The general standard is that a clearance may be granted only when ‘clearly consistent with national security.’” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). *See also*, AG ¶ 2(b): “Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.”

**ORDER**

The decision is **AFFIRMED**.

Signed: Moira Modzelewski

Moira Modzelewski  
Administrative Judge  
Chair, Appeal Board

Signed: James B. Norman

James B. Norman  
Administrative Judge  
Member, Appeal Board

Signed: Gregg A. Cervi

Gregg A. Cervi  
Administrative Judge  
Member, Appeal Board