DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
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Date: May 1, 2024

In the matter of:	)	
------	)	ISCR Case No. 23-00476
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Julie R. Mendez, Esq., Chief Department Counsel

FOR APPLICANT
Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On June 5, 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). Applicant requested a decision on the written record. On February 15, 2024, Defense Office of Hearings and Appeals Administrative Judge Eric H. Borgstrom 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 both purchased and used marijuana from about June 2022 until November or December 2022, including after submitting his security clearance application (SCA). In responding to the SOR, Applicant admitted to both allegations in part, noting that he ceased use in September 2022 rather than the later months alleged. In response to the Government's File of Relevant Material (FORM), Applicant submitted additional

information regarding his marijuana use. The Judge found against Applicant on both allegations. For the reasons detailed below, we remand.

Findings of Fact: The Judge's findings are summarized and quoted below.

Applicant is in his mid-fifties. He served on active duty in the mid-1990s, during which time he held a clearance. Since September 2022, he has been employed by a DoD contractor. In August 2022, Applicant completed and submitted a security clearance application (SCA). Under Section 23 – Illegal Use of Drugs or Drug Activity, Applicant reported no illegal drug use or purchases within the prior seven years and reported no drug arrest, drug charges, or felony charges.

Applicant's FBI criminal history record revealed a charge in October 2000 for illegal possession of a controlled substance without a prescription, a felony. In his September 2022 security clearance interview, Applicant "initially denied any drug arrests or charges." Decision at 2. After the agent confronted him with details, Applicant admitted a drug arrest in 2000 but did not remember the details of the charged offense, other than the fact that the charge was later dismissed.

During his security clearance interview, Applicant disclosed the following facts about his marijuana use. He first used marijuana in 1988 until 2004, to include using approximately three times per week around the time of his 2000 drug offense. In March 2022, Applicant suffered a traumatic brain injury (TBI) and other injuries. After obtaining a medical marijuana card, Applicant started using marijuana —typically edibles—in June 2022 to manage his pain. He used marijuana daily from June 2022 until early September 2022. He explained to the background investigator that he did not disclose his marijuana use on his SCA because he did not understand that his marijuana use violated Federal laws.

In his May 2023 response to DOHA interrogatories, Applicant listed his marijuana use as 2019 to 2022, noted that he associated with a parent and prior spouse who still used marijuana, and listed his last use of marijuana as "late 2022." *Id*. at 3, quoting GE 5 at 15.

In his June 2023 Answer to the SOR, which alleged purchases and use from June 2022 until at least November or December 2022, Applicant admitted using marijuana from June 2022 until September 2022 and purchasing from state-licensed dispensaries during those same months. In his FORM Response, Applicant explained that he had obtained a medical marijuana card to manage pain from a TBI and other injuries after a physician identified medical marijuana as a potential substance to prevent future strokes and seizes. Applicant admitted that he used marijuana from about 1988 to 1993 and again between 1996 and 2004. He disclosed that he used marijuana occasionally with his then-fiancé beginning in 2019, at which time she had a medical marijuana card, and he did not. He stated that he no longer associates with either ex-spouse and that his father no longer uses marijuana.

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

Applicant's illegal use, possession, and purchase of marijuana spanned from about 1993 to 1996, 1996 to 2004, and from 2019 until September 2022. He admitted daily use of marijuana between June 2022 and September 2022. AG ¶¶ 25(a) and 25(c) apply.

. . .

Applicant used marijuana from about 1993 to 1996, from 1996 to 2004, and between 2019 and September 2022. He also was charged with a felony drug offense in 2000. During his security interview, Applicant reported that he was using marijuana as frequently as three times a week around the time of his 2000 arrest. He also initially denied any drug arrests, despite the 2000 felony arrest and charge. Applicant did not possess a medical marijuana card when he used marijuana with his fiancée beginning in 2019. Any use by Applicant prior to obtaining a medical marijuana card in June 2022 violated both Federal and state drug laws. Applicant has not adequately explained why he did not report his pre-injury marijuana use (with his ex-wife between 2019 and March 2022) or his felony drug arrest in his [SCA].

Applicant's disclosures about his drug involvement and associations have been inconsistent throughout the security clearance investigation and adjudication. In his May 2023 response to DOHA interrogations, he stated that his marijuana use continued until "late 2022"; however, in his June 2023 Answer, he stated that his use ended following his September 2022 [security clearance] interview.

In his response to DOHA interrogatories, Applicant stated that he did not intend to use marijuana in the future. In his FORM Response, Applicant stated that he did not "anticipate to have any plans to use marijuana." Applicant has not clearly and convincingly expressed his intent to abstain from marijuana use. AG 26(b)(3) does not apply.

I have considered the length, frequency, and recency of Applicant's marijuana use. I have also considered that his marijuana use persisted after he submitted his [SCA] and began his employment with a DOD contractor, and potentially after his September 2022 [security clearance] interview. Applicant's marijuana use to alleviate pain and reduce the risk of stroke and seizure still violates Federal law and does not mitigate the triggered security concerns. Applicant's recreational use of marijuana prior to his injury and his inconsistent statements about his drug use and associations undercut his credibility, reliability, and good judgment.

Discussion

A judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). "The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." AG ¶ 2(b). The Appeal Board may reverse a judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶¶ E3.1.32.3 and E3.1.33.3.

In deciding whether the Judge's rulings or conclusions are arbitrary and capricious, we will review the Judge's 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).

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Use of Marijuana After Completing an SCA

The appeal in this case raises several issues that merit discussion and require remand. We turn first to an issue with the allegations as drafted by the Government and found against Applicant by the Judge—that Applicant both purchased and used marijuana from June 2022 to November or December 2022, *including after he completed his SCA.* The evidence of record indicates that Applicant completed his SCA on August 18, 2022, and ceased using medical marijuana in September 2022, after he met with the investigator for his security clearance interview. That is, the record confirms use for a brief period after Applicant submitted his SCA and prior to his interview. The question before us is whether that post-SCA use is of independent security concern as the Government alleged and the Judge found.

The belief that post-SCA drug use raises additional security concerns hinges entirely on a long-standing presumption of notice: that when an applicant completes a SCA, he is alerted by Section 23.1("In the last seven (7) years, have you illegally used any drugs or controlled substances?") that illegal drug use is of security concern. Given the state and Federal illegality of marijuana use, this language was presumed to put applicants on notice that any continued use of drugs demonstrates both poor judgement and a disregard for security clearance standards. In past decades, that presumption made sense. An applicant who was using marijuana in, for example, 2010 was doing so illegally regardless of the state in which the use occurred, and it was fair to assume that the applicant knew he was using illegally and recognized upon completing the SCA that his illegal drug use was of security concern. Consequently, the Appeal Board has repeatedly held that drug use after completing an SCA raises a substantial question about an applicant's judgment and reliability. *See, e.g.*, ISCR Case No. 14-03450 at 3 (App. Bd. Sep. 11, 2015).

As the pace of marijuana legalization has accelerated in recent years, the presumption that the SCA itself puts applicants on notice has become more tenuous. Notably, although the SCA in Section 23 generally advises that the "questions pertain to the illegal use of drugs . . . in accordance with Federal laws, even though permissible under state laws," the SCA does not inform an applicant that marijuana remains illegal under Federal law. Depending on the facts of a given case, it is foreseeable that some applicants might believe that their state-authorized use of marijuana is legal, and erroneously check "No" to "illegal use." The security significance of that answer in terms of a falsification under Guideline E would be defined by the specific circumstances. Regardless of a "Yes" or "No" answer, whether or not this question puts applicant on notice that continued use of state-legal marijuana is incompatible with being granted eligibility for access to classified information is a separate matter. Given the dichotomy between state and Federal laws, some applicants may continue to use marijuana products after completing the questionnaire—not in reckless disregard of security clearance standards but in ignorance of Federal law. In the subsequent interview, the background investigator may—or may not—clarify the Federal position and put an applicant on notice that such use is Federally illegal and incompatible with holding a clearance.

Applicants cannot be expected to be constitutional law experts or versed in the concept of Federal supremacy. The ambiguity between state and Federal drug laws and the ensuing confusion was addressed by the Security Executive Agent in December 2021 in "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). Relevant to the topic of notice, the Guidance encourages employers "to advise prospective national security workforce employees that they should refrain from any future marijuana use upon initiation of the national security vetting process, which commences once the individual signs the certification contained in the [SCA]." SecEA Guidance at 2. Implicit in this guidance is the recognition that the SCA itself no longer puts applicants on notice and that employers should affirmatively be providing notice to prospective employees. The SecEA's guidance to employers, however, cannot be presumed to have been followed.

In light of these developments, the Appeal Board has in the past year clarified that the timing of notice is fact dependent and must be evaluated on a case-by-case basis. Specifically, we have held that the fact that an applicant used marijuana after completing an SCA or being interviewed 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. ISCR Case No. 22-02132 at 4 (App. Bd. Oct. 27, 2023); ISCR Case No. 23-00093 at 3 (App. Bd. Nov. 21, 2023). Once an applicant is on notice, ongoing use continues to have significant security concerns in terms of both its illegality and the judgment reflected in that use. *See* ISCR Case No. 20-02974 at 6 (App. Bd. Feb. 1, 2022).

Here, the record established that Applicant continued to use marijuana after completing his SCA, but there is no evidence in the record that Applicant understood such post-SCA use to be problematic at the time. Indeed, there is considerable evidence to the contrary. The summary

of his September 2022 interview reflects that Applicant and the agent discussed the distinction between state and Federal marijuana laws. GE 5 at 8–9. Both in his Answer to the SOR and his response to the FORM, Applicant stated that he stopped using marijuana after that interview in which the "more stringent federal guidelines were more fully explained." Although the Judge found against Applicant on the allegations that he used and purchased marijuana after completing his SCA, he failed 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. Instead, the Judge states simply that Applicant's "ignorance or uncertainty about whether marijuana was prohibited under Federal law does not excuse his conduct." Decision at 6–7. This is error, as the Judge failed to consider an important aspect of the case and failed to articulate a rational connection for the facts found and the choice made. We are unable to conclude that the error was harmless, *i.e.*, that the Judge's finding that Applicant used marijuana after submitting his SCA did not likely affect the outcome of the case.

Date of Last Drug Use

The record presents a conflict regarding the date on which Applicant stopped using marijuana. Because Applicant made two different statements regarding the date of his last use, the Judge found him to be inconsistent on this issue and cited to this inconsistency repeatedly as a reason for denial. The Judge's analysis in this regard is in error and necessitates remand.

The SOR alleges that Applicant used and purchased marijuana from June 2022 "until at least November or December 2022." The only evidence of record that supports this end date is Applicant's response to DOHA interrogatories, completed on May 18, 2023. In response to the question "Provide the date of the last time you used marijuana/THC," Applicant responded, "Probably in late 2022." GE 5 at 15. The SOR was issued within weeks, interpreting the dates from Applicant's response as "November or December 2022." On June 13, 2023, Applicant submitted his Answer to the SOR, admitting use of "state authorized medical marijuana" until the "more stringent federal guidelines" were explained during his security clearance interview in September 2022. He explained that he "had recalled the interview was in December, which is not verified through my calendar" and added that his "last purchase was on August 29, 2022." Said differently, Applicant first provided the equivocal date of "probably late 2022" and at the first opportunity corrected the date to September 2022 after verifying the date of his security clearance interview.

When conflicts exist within the record, a judge must weigh the evidence and resolve such conflicts based upon a careful evaluation of factors such as the evidence's "comparative reliability, plausibility and ultimate truthfulness." ISCR Case No. 05-06723 at 4 (App. Bd. Nov. 14, 2007). In some cases, inconsistencies in record evidence can be credited to an applicant's intentional omission or changing reports during a clearance investigation where motive to do so is apparent. That is not invariably the case, however, and resolution of the inconsistencies must be done in consideration of the reliability of the evidence as a whole. ISCR Case. No. 23-00093 at 3. Here, the Judge's decision poses at least two problems. First, he twice misquotes Applicant's answer to the interrogatories as "late 2022" rather than "probably late 2022," which makes the responses appear more inconsistent than they actually were. Second, the Judge fails to

even acknowledge, much less credit, Applicant's explanation for the inconsistency—that he checked his calendar for the date of the interview prior to answering the SOR and corrected the date.

Of note, all of the evidence of Applicant's drug use, with the exception of the FBI rap sheet discussed below, comes from Applicant himself, who made unprompted voluntary disclosures regarding his marijuana use at the interview, on the interrogatories, in his answer to the SOR, and in his response to the FORM. The Judge makes no findings that would support a conclusion that Applicant made varying answers in bad faith, and our review of the record reveals none. His report of a September 2022 marijuana cessation date is buttressed by his prompt correction of his earlier mistake, his explanation, and his voluntary disclosures. Here, the Judge does not resolve the conflict and instead states "I have also considered that his marijuana use persisted after he submitted his [SCA] and . . . potentially after his September 2022 [security clearance] interview." Decision at 7. With regard to the issue of the terminal date, the Judge failed to consider an important aspect of the case—Applicant's explanation for the differing answers. Because the Judge cites repeatedly to Applicant's inconsistent answers as a basis for denial, we cannot conclude that this error is harmless.

Drug Arrest of 2000

On appeal, Applicant submits documents regarding his arrest for possession of synthetic marijuana in October 2000. While the Board generally cannot consider new evidence (Directive ¶ E3.1.29), it may do so in limited circumstances. The Board has distinguished between considering new evidence as to the allegations in the SOR, which is precluded as beyond the scope of its review, and considering such evidence on threshold issues such as jurisdiction, due process, or the fundamental fairness of the adjudicative process. *See* ISCR Case No. 99-0462 at 2 (App. Bd. May 25, 2000) discussing the dilemma posed when new evidence raises a serious allegation concerning the fairness and integrity of the proceedings below. For the reasons detailed below, we conclude that the new evidence regarding the 2000 arrest raises issues of notice and fundamental fairness, that it may properly be considered by the Appeal Board, and that it requires remand.

First, we note that the SOR does not allege any arrest or charges. In submitting the FORM, however, Department Counsel elected to include a FBI rap sheet that reflected an arrest in October 2000 for possession of synthetic marijuana without prescription and listed the charge as "Felony 3rd Degree." The FBI rap sheet did not include any further information about the case, to include the disposition of the offense.

In his September 2022 security clearance interview, Applicant "was asked twice if he had ever been charged with a felony" and replied negatively both times. When confronted with information concerning the 2000 charge, Applicant recalled it, but he "had no idea" that it was a felony. GE 5 at 6. Applicant then described going to court within a few weeks of the arrest. The judge called out the names of people who could have their cases dismissed or expunged, Applicant agreed to this resolution, and he was not incarcerated, fined, or otherwise punished. Applicant explained to the investigator that he failed to list this incident as a felony arrest because he did not understand it to be a felony and that he failed to list it elsewhere on the SCA

because he had forgotten about it altogether or believed it to have been expunged.

It is unclear why Department Counsel chose to submit a document that reflects a possession charge from 24 years ago with no disposition information. The arrest was not alleged on the SOR, Applicant had explained in his clearance interview that the charge was quickly dismissed, and the Government apparently had no evidence to the contrary. A Judge may consider non-alleged conduct (a) in assessing an applicant's credibility; (b) in evaluating an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) in considering whether the applicant has demonstrated successful rehabilitation; and (d) in applying the whole-person concept. *See, e.g.,* ISCR Case No. 12-01038 at 3 (App. Bd. Jun. 26, 2013). However, when conduct is being considered for one of these purposes, it is incumbent upon the Judge to explain its relationship to the conduct alleged in the SOR. Having received this document without any explanation of relevance or value in the Government's case, the Judge gave it significant weight, citing repeatedly in his mitigation analysis to Applicant's "felony drug arrest," to his failure to report the same on his SCA, and to the fact that Applicant in his interview "initially denied any drug arrests, despite the 2000 felony arrest and charge." Decision at 6. Although this unalleged conduct was considered in the context of mitigation, the Judge failed to articulate a rational connection between this arrest and the allegations in the SOR. It was harmful error for the Judge to have failed to articulate a nexus or, in the alternative, *sua sponte* amend the SOR and provide Applicant an opportunity to respond. Directive Additional Procedural Guidance ¶E3.1.17.

We note that none of this conduct was alleged and that the last statement is also inaccurate, as the summary of interview clearly reflects that Applicant was asked about *felony* drug arrests, which Applicant denied because he did not believe he was charged with a felony. Furthermore, the significance of this failing is reflected in the fact that upon receipt of the Judge's decision, which highlighted the weight that he gave to this non-alleged incident, Applicant obtained court documents that confirm that the FBI rap sheet is simply inaccurate. The arrest in October 2000 was for a misdemeanor, not a felony, no prosecution was filed as a result of pre-trial diversion, and the charge was dismissed. Putting aside the broader issue of whether the Judge gave undue weight to other non-alleged conduct, we conclude that the Judge clearly gave inordinate weight to this erroneous document and that it likely affected the outcome of the case. These circumstances require remand.

Statement of Intent

Finally, the Judge concluded in his mitigation analysis that AG ¶ 26(b)(3) does not apply as "Applicant has not clearly and convincingly expressed his intent to abstain from marijuana use." Decision at 7. As support of this conclusion, the Judge cites Applicant's statement in his FORM response that he does "not anticipate to have any plans to use marijuana," which the Judge apparently found to be equivocal. Elsewhere in the same FORM response, however, Applicant clearly states that he "willingly intend[s] to follow and obey all laws, specifically, but not exclusively those concerning marijuana and substance use." FORM Response at 2. The Judge erred in his mitigation analysis under AG ¶ 26(b)(3) as he did not examine relevant evidence and failed to articulate a satisfactory explanation for his conclusions.

Conclusion

We conclude that the best resolution of this case is to remand the case to the Judge to correct the above-identified harmful 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, the Judge's decision issued after remand may be appealed pursuant to Directive ¶¶ E3.1.28 and E3.130.

Order

The Judge's adverse security clearance 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: James B. Norman
James B. Norman
Administrative Judge
Member, Appeal Board