



**DEPARTMENT OF DEFENSE  
 DEFENSE LEGAL SERVICES AGENCY  
 DEFENSE OFFICE OF HEARINGS AND APPEALS  
 APPEAL BOARD  
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Date: May 30, 2024

In the matter of:	)	
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	)	
Applicant for Security Clearance	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Julie R. Mendez, Esq., Chief Department Counsel

**FOR APPLICANT**

Christopher Snowden, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On May 2, 2023, DoD issued a Statement of Reasons (SOR) advising Applicant of the basis of that decision – security concerns raised under Guideline H (Drug Involvement and Substance Misuse) of the National Security Adjudicative Guidelines (AG) in Appendix A of Security Executive Agent Directive 4 (effective June 8, 2017) and DoD Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). On March 14, 2024, after a hearing, 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.

The SOR alleged under Guideline H that Applicant used marijuana with varying frequency from about 2016 to March 2023; that he used prescription stimulants such as Adderall or Vyvanse, which were not prescribed to him, between April 2017 to April 2023; and that he used cocaine approximately 10 times between January 2018 and May 2020, and once in late 2021. Applicant admitted, with clarifications, all of the SOR allegations. The Judge found against him on all allegations.

On appeal, Applicant contends the Judge failed to consider all relevant evidence submitted by Applicant rendering the decision as arbitrary, capricious, and contrary to law. Consistent with the following, we affirm.

### **Judge's Findings of Fact and Analysis**

Applicant is in his mid-twenties and earned a bachelor's degree in May 2021. He has been employed by a Department of Defense (DoD) contractor since June 2021. He is unmarried and has no children. In his 2021 security clearance application (SCA), Applicant reported his use of marijuana, LSD, psilocybin mushrooms, Ecstasy, and cocaine. He also admitted to using prescription amphetamines (Adderall and Vyvanse) without a prescription.

In his SCA, Applicant stated he used marijuana between January 2016 and May 2021, and he intended to continue to use it in the future, although he said he did not intend to use illegal drugs while employed by a DoD contractor. He also admitted using LSD twice and psilocybin mushrooms once between March 2017 and July 2019; prescription amphetamines approximately six times between April 2017 and May 2021; Ecstasy once in September 2019; and cocaine approximately 10 times between January 2018 and May 2020. He further admitted to purchasing marijuana from classmates or licensed dispensaries every other month between May 2017 and 2019, and approximately twice a year between 2019 and May 2021. He purchased cocaine from classmates on two or three occasions between August 2019 and May 2020, and he purchased prescription drugs without a prescription on multiple occasions between April 2017 and May 2021. He stated that he did not intend to use LSD, psilocybin mushrooms, Ecstasy, Adderall, and cocaine in the future and that he did not intend to use illegal drugs while employed by a DoD contractor, but that he enjoyed experimenting with various drugs and his use had little impact on his mental or physical health.

At the hearing, Applicant confirmed his responses in his SCA as to frequency and span of illegal drug use at that time, and in his statements made during a January 2022 security interview and his response to interrogatories about his subsequent use of illegal drugs, Delta-8 tetrahydrocannabinol (Delta-8) and prescription drugs. In response to interrogatories, Applicant admitted that he used marijuana once or twice between August 2021 and August or September 2022. He reported his last use of marijuana on March 18, 2023, his last use of Delta-8 on April 1, 2023, and his last use of Adderall on April 2, 2023. He further admitted that he obtained Adderall in March 2023 from his girlfriend who had a prescription. He included a statement of intent to abstain from illegal drugs and substance misuse in the future.

In contrast, in Applicant's answer to the SOR, he admitted all three allegations with no corrections or revisions as to the drugs identified or the span and frequency of drug use, and he did not claim that his recent "marijuana" use was in fact Delta-8 or a legal hemp derivative. He stressed that he recently reassessed his priorities and no longer intended to use illegal drugs or misuse prescription drugs. On July 5<sup>th</sup> and 6<sup>th</sup> 2023, Applicant tested negative for illegal drugs.

Applicant testified that he is aware that his employer has a drug-free policy, and that he has not informed his supervisor or his Facility Security Officer (FSO) about his illegal use of marijuana, cocaine, and a prescription drug while employed with a DoD contractor.

The Judge found that at the time Applicant used marijuana, LSD, psilocybin mushrooms, and cocaine, and misused a prescription drug, he was aware such conduct violated federal law and his employer's drug-free policy. He nonetheless repeatedly illegally purchased and used these substances. As an aggravating factor, he used cocaine once, marijuana multiple times, and Adderall at least once after employed with a DoD contractor and after he submitted his SCA and acknowledging its illegality and expressing his intent to abstain from future use. At the hearing, he walked back previous admissions in his answer to the SOR and response to interrogatories wherein he admitted, with assistance of counsel, his most recent use of marijuana in March 2023 and his most recent use of Adderall in April 2023. At the hearing, he claimed that his March 2023 use of marijuana was in fact, either Delta-8 or another legal derivative, but the Judge did not find the testimony recharacterizing his most recent marijuana use to be credible.

Even if Applicant's most recent use of marijuana was a legal derivative, his cocaine and Adderall use while employed with a DoD contractor illustrates his cavalier attitude toward federal drug laws and his employer's policies. He is credited with mitigation for his statement of intent to abstain from future illegal drug use, but on the whole, his lengthy and recent history of illegal drug use does not reflect the maturity, good judgment, and adherence to rules and regulations of one entrusted to safeguard classified information. He has not demonstrated a sufficient pattern of abstinence nor a significant change in circumstances to avoid further drug involvement.

## **Discussion**

There is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9<sup>th</sup> Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government produces evidence raising security concerns, an applicant bears the burden of persuasion concerning mitigation. *See* Directive ¶ E3.1.15. The standard applicable in security clearance decisions "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." Directive, Encl 2, App. A ¶ 2(b).

In deciding whether the Judge's rulings or conclusions are erroneous, 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. *E.g.*, ISCR Case No. 14-02563 at 3-4 (App. Bd. Aug. 28, 2015).

On appeal, Applicant's counsel argues the Judge did not consider all of the evidence presented and applied facts not supported by the evidence. In particular, he argues the Judge erred by finding that Applicant never raised the distinction between his use of marijuana and a "THC derivative" prior to the hearing. Applicant argues that the Judge's comment that Applicant "tried to 'walk back' some of his 'previous admissions in his response to the DOHA interrogatories and in his Answer'" was clear error because, he argues, "contrary to the Judge's finding, Applicant explicitly stated his consumption in March 2023 was Delta-8 THC and that he purchased it legally

in his state at a local store.” Appeal Brief (AB) at 10. He also argues the erroneous finding is inseparable from the Judge’s unfavorable credibility determination because the Judge found that Applicant lacked credibility because he “recharacterized” two prior admissions. *Id.* We disagree with Applicant’s interpretation of the evidence.

In August 2022, Applicant was interviewed by a background investigator, who summarized the pertinent part of that interview as follows:

**DRUG USAGE/INVOLVEMENT:**

Subject listed multiple usages of THC products, Hallucinogenics, Stimulants, Cocaine/Crack, and Adderall through 05/2021 as reported. Subject advised that he spoke to multiple investigators into 02/2022 and 03/2022 and that all of his prior usage was full (sic) discussed. Subject volunteered that since his last interview he has continued to use THC products in the form of marijuana, smoking this as well as ‘Delta 8’ that he purchases locally at many stores in the region since it is legal to sell over the counter... Subject was asked if he uses anything else that would be considered a drug, or illegal material to include common street drugs, and responded that he takes Adderall weekly or as needed mostly due to work demands and pressure to get his work projects completed by deadlines. (GE 2)

Subsequently, Department Counsel issued interrogatories (undated, but propounded prior to issuance of the SOR) and asked Applicant to address the above statement.<sup>1</sup> In his response to this interrogatory, Applicant stated:

I deny this as stated. I did say that I used marijuana socially and Delta-8 recreationally. However, when these drugs were being continually used, needs to be corrected. I completed my e-QIP in August/September 2021 and had my interview in August/September 2022.<sup>2</sup> In between that time period, I had used marijuana socially 1-2 times because I believed it was okay to continue doing so outside of work because it did not interfere with my job in any capacity. Further, the Delta-8 (products containing less than .3% THC) was used after my SF-86 fill out recreationally, but not because it was like marijuana. I continued to use Delta-8 products because they are not illegal and could be purchased at most stores, and they gave me relaxation and calmness. Delta-8 is a great alternative to drinking alcohol socially, and I do not do it while working.

I did say that I take Adderall weekly. I stated that I used it on occasion when projects required it and when applying for jobs. This was not weekly. (*Id.*)

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<sup>1</sup> Applicant’s personal subject interview (PSI) summaries, which were part of the Government’s interrogatories, were not authenticated or certified by Applicant, so upon Applicant’s objection at the hearing, the Judge ordered the PSIs to be excluded from Government Exhibit (GE) 2. Of note, certain sections of the PSIs were quoted in the body of the interrogatories and were not excluded from the record. Subsequently, Applicant opened an inquiry in the hearing based on the August PSI. Apparently based on the Applicant’s counsel’s inquiry, the PSIs documents remained in the final administrative record. *See* Tr. 13, 69-79; GE 2.

<sup>2</sup> Applicant completed his SCA on November 15, 2021, and was interviewed by an investigator on January 20, 2022, February 28, 2022, March 20, 2022, and August 24, 2022. Each of these interviews resulted in PSIs.

In Applicant's subsequent Answer to the SOR, he did not raise the use of Delta-8 or other "THC derivative" when he admitted to marijuana use from 2016 to March 2023. In his answer to SOR ¶ 1.a, he stated: "I admit with clarification. During that period, I exhibited immaturity by engaging in marijuana use within social contexts. The group of people I associated with were also involved in such activities...."

Contrary to Applicant's argument on appeal, Applicant did not raise the issue of Delta-8 use in his Answer to the SOR. Instead, he admitted in his Answer that he used marijuana until March 2023. Moreover, in his response to interrogatories, Applicant did not clearly state that he used Delta-8 rather than marijuana in March 2023. Rather, his narrative answer was incomplete and equivocal. Regardless, Applicant further stated in response to another interrogatory question, "When did you last use marijuana (month/day/year)?" He answered "March 18, 2023." GE 2 (p. 25). He was also asked "When did you last use Delta-8 THC" to which he replied, "April 1, 2023;" and "When did you last use Adderall that was not prescribed to you?" to which he answered "April 2, 2023." GE 2 (p. 25-26). In the decision, the Judge noted that Applicant admitted in his response to interrogatories that he used marijuana once or twice between August 2021 and August or September 2022, and that he last used marijuana on March 18, 2023, and Delta-8 on April 1, 2023. Decision at 3. The Judge's findings in this regard are consistent and supported by the evidence.

Applicant also argues that the Judge erred by finding that Applicant did not "inform his supervisor or his Facility Security Officer (FSO) about his illegal use of marijuana, cocaine, and a prescription drug while employed with a DoD contractor." AB at 11. Applicant points to a colloquy between Department Counsel and Applicant at the hearing where Department Counsel questioned Applicant about his Adderall use in 2023 and asked if he reported his "use" to the FSO at [his company], whereby Applicant answered, "No, I guess I told my lawyer." AB at 12, quoting Tr. at 62-63. The Judge asked, "Does your supervisor know about your drug use to 2021," to which Applicant answered, "No." Tr. at 65.

We agree that the record shows that Applicant failed to notify his FSO of his illegal use of Adderall and that he failed to notify his supervisor of his illegal drug use. However, the record is unclear as to what obligation, if any, Applicant had to do so. As we have recently discussed, we are aware of no policy that suggests that a defense contractor's supervisor or program manager is the appropriate person to receive information concerning security incidents. ISCR Case No. 22-02601 at 6 (App. Bd. Feb. 22, 2024). Rather, the Defense Counterintelligence and Security Agency advises contractor employees to self-report *certain* life events and security incidents to their FSO.<sup>3</sup> Additionally, while Applicant *could have* reported any continued drug use to his FSO, there is no evidence in the record that he was required to do so under any policy of his employer's. In his November 2021 SCA, Applicant thoroughly disclosed his use of federally illegal drugs and a non-prescribed prescription drug. As the adjudicative process continued, Applicant disclosed continued use to background investigators, as he was required to do. Of note, all of the evidence of Applicant's drug use comes from Applicant himself. The record does not support any negative inference that Applicant should have also disclosed to others. Regardless, we find that any error in this regard is harmless. The SOR does not allege failure to report drug use to his employer's

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<sup>3</sup> See, e.g., Defense Counterintelligence and Security Agency, *Report A Security Change, Concern, Or Threat*, [www.dcsa.mil/mc/pv/mbi/self\\_reporting](http://www.dcsa.mil/mc/pv/mbi/self_reporting) (last visited Feb. 15, 2024).

representatives, and Applicant's failure to report any illegal drug use is secondary to the fact that he violated his employer's drug-free policy, a factor that the Judge cited and the evidence supports.

Finally, Applicant argues that the Judge, in discussing Applicant's intent to use marijuana in the future, improperly considered Applicant's excluded PSI, which was attached to the interrogatories but not adopted by Applicant. Applicant's argument in this regard is factually erroneous. First, he argues that the Judge did not cite to a source for his finding that "[Applicant] reported that he had used marijuana between January 2016 and May 2021, and he intended to use marijuana in the future." AB at 13 *citing* Decision at 2. In fact, the Judge cited to Applicant's SCA, in which Applicant disclosed those precise dates for THC use and responded "yes" to the question "Do you intend to use this drug or controlled substance in the future?" GE 1 at 34. Contrary to Applicant's assertion, the cited source directly supports the Judge's finding. Applicant then argues that the Judge improperly used his PSI, which was not admitted upon his objection, for the contradictory fact that Applicant now states he does **not** intend to use marijuana in the future, arguing that "the alleged fact that the [Applicant] did not intend to use marijuana in the future *only* appears in portions of GE 2 which were *excluded* from the record due to a lack of authentication." AB at 15 (emphasis in original). However, Applicant stated his intent not to use marijuana at multiple junctures during the adjudication process, including in a Statement of Intent (Applicant Exhibit E) and at the hearing (Tr. at 34-35). In sum, this assignment of error is meritless.

Applicant's remaining assertions amount to a disagreement with the Judge's weighing of the evidence. We have noted that such a disagreement or an ability to argue for a different interpretation of the evidence is not sufficient to demonstrate that the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *E.g.*, ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

Applicant has not established that the Judge committed harmful error. Our review of the record reflects that the Judge examined the relevant evidence and articulated a satisfactory explanation for the decision, which is sustainable on this record. "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).

**Order**

The decision is **AFFIRMED**.

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