



**DEPARTMENT OF DEFENSE
 DEFENSE LEGAL SERVICES AGENCY
 DEFENSE OFFICE OF HEARINGS AND APPEALS
 APPEAL BOARD
 POST OFFICE BOX 3656
 ARLINGTON, VIRGINIA 22203
 (703) 696-4759**

Date: May 9, 2024

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 In the matter of:)
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 Applicant for Security Clearance)
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ISCR Case No. 23-00597

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 14, 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 August 16, 2023, Department Counsel amended the SOR to add security concerns under Guideline E (Personal Conduct). On March 5, 2024, after conducting a hearing, Defense Office of Hearings and Appeals Administrative Judge Roger C. Wesley denied Applicant’s security clearance eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

The SOR initially alleged under Guideline H that Applicant used methamphetamine with varying frequency from June to December 1995; marijuana with varying frequency from 2009 through approximately 2010; and hallucinogenic mushrooms with varying frequency from about March to May 2022. The SOR also alleged that Applicant assisted with the cultivation of marijuana in his home from about July 2021 to about August 2022 and that he was discharged from the U.S. Navy under other than honorable conditions (OTH) in 1996 after he tested positive for tetrahydrocannabinol (THC). Applicant admitted all allegations.

In the months prior to hearing, Department Counsel amended the SOR to cross-allege, under Guideline E, Applicant's use of methamphetamine as stated above while on active duty in the U.S. Navy and his 1996 discharge with an OTH. The written amendment was submitted to Applicant, who admitted the two Guideline E allegations.

On appeal, Applicant contends the Judge mischaracterized his drug use and made factual findings that were not supported by the evidence. The Board agrees that the Judge made erroneous findings of fact constituting harmful error. Additionally, the Board finds that the Judge failed to make appropriate findings under Guideline E. Therefore, we remand the case back to the Judge for corrective action as appropriate consistent with the Directive and the record evidence.

Judge's Findings of Fact and Analysis

Applicant is in his late-40s and has been employed by a defense contractor since August 2022. He is married and has three children. He served in the U.S. Navy from 1993 until he was discharged with an OTH in April 1996 after testing positive for THC.

Applicant was introduced to methamphetamine in the Navy and used it with varying frequency between June and December 1995 without appreciating the consequences until he tested positive and was discharged. He then had difficulty finding employment. Between 2009 and 2010, he used marijuana on a couple of occasions. Between July 2021 and August 2022, he assisted his spouse in cultivating hallucinogenic mushrooms while using the drug a couple of times in 2022 to reduce anxiety and depression. He purchased supplies for growing the mushrooms. He and his spouse stopped their activities in August 2022 and committed to avoiding all illegal drug use and drug cultivation.

In the Judge's analysis, he noted that Applicant's admissions to his involvement with multiple illegal drugs (inclusive of use and aiding his wife in the cultivation of hallucinogenic mushrooms) raise security concerns including risk of recurrence and judgement. Applicant was credited for abandoning all use and involvement with illegal drugs for almost two years. However, with the combination of multiple uses of illegal drugs, along with his brief involvement with the cultivation of marijuana in 2022, it is still too soon to absolve Applicant of the risk of recurrence. With only one-plus years of demonstrated abstinence from illegal drug involvement, more time with more corroborating evidentiary sources to support his continued abstinence are needed to safely predict the risk of future recurrence.

Discussion

On appeal, Applicant contends the Judge mischaracterized his drug use as "with varying frequency" without distinguishing the exact number of uses for each drug and made factual findings that were not supported by the evidence. We agree that the Judge made findings and conclusions that are unsupported by the evidence.

When an Administrative Judge's factual findings are challenged, the Board must determine whether "[t]he Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary

evidence in the same record.” Directive, E3.1.32.1. The Board must consider not only whether there is record evidence supporting a Judge’s findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings, and whether the Judge’s findings reflect a reasonable interpretation of the record evidence as a whole. ISCR Case No. 02-12199 at 2–3 (App. Bd. Aug. 8, 2005).

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. ISCR Case No. 97-0435 at 3 (App. Bd. Jul. 14, 1998).

Applicant argues with the Judge’s use of “varying frequency” in describing his use of various drugs. He contends he used methamphetamine one time between June and December 1995; used marijuana one time in 1996 and twice between 2009 and 2010; and used hallucinogenic mushrooms four times between March and May 2022, after purchasing once and dividing it into four doses. In addition, Applicant argues that he never assisted in the cultivation of hallucinogenic mushrooms, as found by the Judge. Rather, he contends that he assisted his spouse with cultivation of marijuana for her personal use and that he never used the marijuana grown.

We note that the record evidence is inconsistent with Applicant’s current assertions with regard to the frequency of his drug use and that he admitted the SOR allegations that characterized his uses as “varying frequency.” *See, e.g.*, Government Exhibit (GE) 2; SOR Answer (Ans.); Tr. However, we agree that some of the Judge’s findings of fact and analyses are erroneous and not supported by the record. In particular, the Judge made erroneous findings with regard to the assistance Applicant provided to his spouse for the cultivation of hallucinogenic mushrooms and his personal use of the cultivated product. Decision at 3, 6. Notably, marijuana and its cultivation for personal use are legal at the state level in Applicant’s state of residence, while hallucinogenic mushrooms are not. In the context of this case, we cannot conclude that these errors were harmless, *i.e.*, that they did not likely affect the outcome of the case.

In addition, we note that the Judge failed to properly characterize the amended SOR allegations by erroneously stating that they were amendments to the Guideline H allegations to include adding “while in the U.S. Navy” to SOR ¶ 1.a. and italicizing “tetrahydrocannabinol” in SOR ¶ 1.b. As noted above, the amended SOR actually added two allegations under Guideline E, and the Judge failed to make appropriate finding and conclusions with regard to those Guideline E allegations.

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 and the record. 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.

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: James B. Norman

James B. Norman
Administrative Judge
Member, Appeal Board