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 20, 2024

In the matter of:	)	
-----	)	ISCR Case No. 23-01942
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 September 15, 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). Applicant requested a decision based on the written record, without a hearing. The Government submitted a File of Relevant Material (FORM) containing the entire record and the Government's argument. Applicant was provided an opportunity to respond, but he did not submit a response. On March 21, 2024, 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 alleged under Guideline H that Applicant used marijuana with varying frequency from about June 2017 to March 2022; and that he used marijuana in March 2022, while granted access to classified information. Applicant admitted both SOR allegations, and the Judge found against him on both allegations.

On appeal, Applicant contends the Judge failed to follow relevant law, regulations, and current research with regard to marijuana, and argued for reconsideration of the decision to deny him security eligibility. Consistent with the following, we affirm.

Judge's Findings of Fact and Analysis

Applicant is in his mid-twenties and has been employed by a defense contractor since January 2023. He has held a security clearance since June 2021. He used marijuana with varying frequency in social situations from June 2017 to March 2022. He acknowledged using marijuana on one occasion in March 2022 while holding a security clearance and after receiving written notice of the restriction on illegal drug use as early as June 2021. He has not used marijuana since and recommitted to abstinence. The Judge found that Applicant committed to abstinence in 2021 but violated that commitment with his 2022 marijuana use. Despite his most recent commitment, it is too soon to absolve him of risks of recurrence.

Discussion

On appeal, Applicant contends the Judge's decision was based on "outdated binding precedent" and claims the Judge disregarded current research on the effects of marijuana. He argues that Guideline H exists to "safeguard U.S. classified information from being illegally released due to impairment and susceptibility." Appeal Brief at 1. He argues that his use of marijuana could not have created a security breach because he is diligent with his "interactions and language"; he used it at his home but was not adversely impaired; he avoids conversations about sensitive work while in social settings; and alcohol impairs the brain significantly more than marijuana. *Id*. Finally, Applicant pleads for reconsideration based on his age, reason, and mercy.

There is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th 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).

Applicant's assertions amount to a disagreement with Federal drug laws and policy. However, DOHA proceedings are not a proper forum to debate the pros and cons of whether marijuana should be legal for some purposes, how it should be classified as a controlled substance,

or the merits of DoD policy concerning drug abuse. *E.g.*, ISCR Case No. 02-08613 at 2 (App. Bd. Jan. 6, 2005). The Controlled Substances Act ("CSA") currently categorizes marijuana as a Schedule I drug and makes it illegal under Federal law to manufacture, possess, or distribute certain drugs, including marijuana. 21 U.S.C. § 801, § 812 § 844. The Supreme Court has ruled that, under the Commerce Clause, Congress may ban the use of cannabis even where states approve its use for medicinal purposes. *See Gonzales v. Raich*, 545 U.S. 1 (2005). Although numerous states and the District of Columbia have legalized certain marijuana-related activity, there is no Federal exception for state-legalized marijuana.

Applicant understates the concern expressed under Guideline H.[1] The Guideline H concern includes use of an illegal substance that can raise questions about an individual's reliability and trustworthiness, and a person's ability or willingness to comply with laws, rules, and regulations. AG ¶ 24. The Judge found that Applicant's conduct clearly implicates this concern, especially how the violation of his earlier commitment to abstinence and use while being granted access to classified information "raises continuing concerns about his trustworthiness, reliability, and judgment." Decision at 6. We find the Judge's reasoning and conclusions are supported by the evidence.

With respect to Applicant's marijuana use, he admitted that he used marijuana with varying frequency from 2017 to 2022, including in March 2022, after being granted access to classified information. This was a significant factor cited by the Judge that weighed against Applicant's suitability for continuation of his security eligibility. In particular, an "expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use" is disqualifying. AG ¶ 25(h). The record shows that Applicant completed security clearance applications (SCAs) in 2021 and 2023. In his June 2021 SCA, he stated "I mean I don't plan on smoking weed anymore, but I might. It's legal in my stated (sic), and unless the Government explicitly tells me I cannot, I might keep smoking. I don't know though." Government Exhibit (GE) 5. During Applicant's personal subject interview (PSI) in July 2021, while discussing illegal drug use, he stated, "Never had a security clearance and will not engage in future with security clearance." GE 6. In his 2023 SCA, he repeated his previous SCA drug use statement, but added, "After my last investigation, I took an edible (1) containing THC." GE 3.

In terms of eligibility for access to classified information, the Supreme Court's decision in *Department of the Navy v. Egan*, 484 U.S. 518 (1988), provides that the grant, denial, or revocation of an industrial security clearance is the exclusive province of the Executive Branch of the Federal Government. *See also* Executive Order 10865. In *Egan*, the Court enunciated the general principle that "the grant of a security clearance to a particular [individual], a sensitive and inherently discretionary judgment call, is committed by law to the appropriate agency of the Executive Branch." *Id.* at 527. The Court reasoned that the President's "authority to classify and control access to information flows primarily from this constitutional investment of power in the President [*citing* U.S. Const., Art. II, § 2] and exists quite apart from any explicit congressional grant." *Id.*

[1] AG ¶ 24. The Concern. The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

at 527, *citing Cafeteria Workers v. McElroy*, 367 U.S. 886, 890 (1961). The Court stated further that "the authority to protect [national security] information falls on the President as head of the Executive Branch and as Commander in Chief." *Id*.

State laws cannot override provisions of a Federal national security program under the exclusive auspices of the Executive Branch evaluating the security implications of an individual's conduct. "[S]tate laws allowing for the legal use of marijuana in some limited circumstances do not pre-empt provisions of the Industrial Security Program, and the Department of Defense is not bound by the status of an applicant's conduct under state law when adjudicating that individual's eligibility for access to classified information." ISCR Case No. 14-03734 at 3 (App. Bd. Feb. 18, 2016). A security clearance adjudication remains a determination that must be made within the confines of the basic premise that use of marijuana remains illegal under Federal law and illegal drug use is inconsistent with holding a security clearance. *See* ISCR Case No. 20-01772 at 3 (App. Bd. Sep. 14, 2021). Simply put, there is no exception that permits security clearance holders or applicants to use marijuana or any other drug that is illegal under Federal laws, regardless of state laws that may permit such use.

Security clearance-related concerns arising from the legalization or decriminalization of marijuana in a number of states were addressed in an October 25, 2014, memo issued by the Director of National Intelligence (DNI Memo) and reiterated in clarifying guidance issued in 2021. Consistent with the discussion, above, the DNI Memo unequivocally states that "changes to state laws and the laws of the District of Columbia pertaining to marijuana use do not alter the existing National Security Adjudicative Guidelines. An individual's disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations." The DNI Memo also explicitly states that "under federal law, use of marijuana remains unlawful," and "while several states have decriminalized marijuana or allowed its use for medical or recreational purposes, such use of marijuana remains subject to the applicable disqualifying conditions in the Directive." *See also* ISCR Case No. 16-00258 at 2 (App. Bd. Feb. 23, 2018).

The 2014 DNI Memo confirms that DOHA's administrative judges retain significant latitude and discretion when evaluating an applicant's suitability to hold a security clearance. In terms of possible mitigation of drug use, each case is fact-specific and, "[a]s always, adjudicative authorities are expected to evaluate claimed or developed use of, or involvement with, marijuana using the current adjudicative criteria." The DNI Memo is deferential to the adjudicative process, stating that the "adjudicative authority must determine if the use of, or involvement with, marijuana raises questions about the individual's judgment, reliability, trustworthiness, and willingness to comply with law, rules, and regulations, including federal laws, when making eligibility decisions of persons proposed for, or occupying, national security positions."

As the Appeal Board has previously stated, after applying for a security clearance and being adequately placed on notice that such conduct was inconsistent with holding a security clearance, an applicant who continues to use marijuana demonstrates a disregard for security clearance eligibility standards, and such behavior raises substantial questions about the applicant's judgment, reliability, and willingness to comply with laws, rules, and regulations. ISCR Case No. 21-02534 at 4 (App. Bd. Feb. 13, 2023).

Here, the Judge found that "Applicant's use of marijuana while granted access to classified information makes it too soon to absolve him of risks of recurrence." Decision at 6. Also, the Judge held that Applicant's use of marijuana "after committing to abstinence in 2021 violated his abstinence commitment and raises continuing concerns about his trustworthiness, reliability, and judgment." *Id*. Upon our review, the Judge's findings are supported by substantial evidence of record, that is, "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.

Finally, with regard to Applicant's plea for reconsideration, we note that an applicant's disagreement with the Judge's weighing of the evidence, 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