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: August 29, 2024

In the matter of:	)	
	)	
-----	)	ISCR Case No. 23-02035
	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

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

FOR APPLICANT
Samir Nakhleh, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On November 14, 2023, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision – security concerns raised under Guideline H (Drug Involvement) 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 hearing which was held on May 6, 2024. On June 28, 2024, Defense Office of Hearings and Appeals Administrative Judge Eric H. Borgstrom concluded that it is not clearly consistent with the national interest to grant Applicant's security clearance eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

The SOR's two allegations under Guidelines H alleged that Applicant had used marijuana on various occasions between December 2021 and December 2022, including while having been granted access to classified information. In his response to the SOR, Applicant admitted the allegations and provided amplifying information. The Administrative Judge found against Applicant on both allegations.

On appeal, Applicant does not challenge the Judge's factual findings, but rather argues that the Judge did not appropriately weigh the facts relative to the mitigating conditions. However, the Judge adequately addressed Applicant's circumstances in his decision and reasonably concluded that Applicant's drug use while having access to classified information was unmitigated despite his cessation 17 months prior to the hearing.

Applicant also argues that he should retain his current eligibility for access to secret-level information even if the Judge's decision is affirmed. However, the level of clearance currently held or applied for does not affect the Judge's analysis or the Board's review. Directive ¶ 3.2 makes no distinction concerning basic clearance levels in its procedures for deciding whether access to classified information is clearly in the national interest. *See* ISCR Case No. 05-11366 at 3 (App. Bd. Jan. 12, 2007). 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). Additionally, Applicant cites to language in Appendix C of the SEAD 4, apparently asserting that he should be granted a waiver despite the unmitigated disqualifying security concerns. A waiver was not sought at the hearing and nothing in the record supports a conclusion that the Judge erred in not granting one. *See* ISCR Case No. 23-00521 at 6 (App. Bd. Apr. 11, 2024). Finally, Applicant cites to SEAD 4 and suggests that he be allowed to "keep working with access to classified information with various conditions or security measures." Again, a conditional clearance was not sought at the hearing and nothing in the record supports a conclusion that the Judge erred in not granting one. Although Appendix C to SEAD 4 provides authority to grant conditional clearance eligibility, we decline to do so in this instance.

In essence, Applicant is advocating for an alternative weighing of the evidence. 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). Moreover, Applicant's arguments fail to rebut the presumption that the Judge considered all of the record evidence. The mere presence of some favorable or mitigating evidence does not require the Judge to make an overall favorable determination in the face of disqualifying conduct such as Applicant's. *See* ISCR Case No. 04-08975 at 2 (App. Bd. Aug. 4, 2006).

We have considered the entirety of the arguments contained in Applicant's appeal brief. The record supports a conclusion that the Judge examined the relevant evidence and articulated 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)). His conclusions and adverse decision are 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 in ISCR Case No. 23-02035 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