

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

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Andrea M. Corrales, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On February 26, 2024, 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 28, 2024, Defense Office of Hearings and Appeals Administrative Judge Carol G. Ricciardello denied Applicant security clearance eligibility. Applicant appealed pursuant to Directive ¶ E3.1.28 and E3.1.30.

The SOR alleged that Applicant used and purchased marijuana from 2006 to at least January 2024, including while holding the sensitive position that he obtained in about December 2021, and that he tested positive for marijuana on a urinalysis test in 2019. In response to the SOR, Applicant admitted all of the allegations with explanation and requested that his case be decided based on the written record. Applicant was provided a complete copy of the Government's File of Relevant Material (FORM) on May 3, 2024, and was notified of his ability to respond to the FORM

with any objections or additional information for the Judge to consider. Applicant did not respond to the FORM and the Judge found against him on all allegations.

There is no presumption of error below and the appealing party has the burden of demonstrating that the judge committed factual or legal error. *See* ISCR Case No. 00-0050, 2001 WL 1044490 at *1 (App. Bd. Jul. 23, 2001). On appeal, Applicant provides new evidence in the form of additional explanation regarding the SOR allegations. The Appeal Board does not review cases *de novo* and is prohibited from considering new evidence on appeal. Directive ¶ E3.1.29.

Applicant also expresses regret in having chosen to have his case decided based on the written record instead of at a hearing. Applicant waived his right to a hearing when he responded to the SOR. Although he had the opportunity to offer additional evidence for the Judge to consider in a response to the FORM, he declined any response. Applicant cannot fairly challenge the Judge's decision based on a proffer of new evidence on appeal, and he has failed to demonstrate any 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 \P 2(b).

Order

The decision in ISCR Case No. 23-02934 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: Allison Marie Allison Marie Administrative Judge Member, Appeal Board