



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: November 6, 2024

In the matter of:)	
)	
)	
-----)	ISCR Case No. 23-01884
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

John G. Hannink, Esq., Department Counsel
 Julie R. Mendez, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 24, 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 Government’s evidence and arguments. Applicant provided a response to the FORM and, on August 26, 2024, Defense Office of Hearings and Appeals Administrative Judge Charles C. Hale granted Applicant security clearance eligibility. The Government appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

The SOR alleged that Applicant both purchased and used marijuana from October 2022 until December 2022, while having been granted access to classified information or employed in a sensitive position. In responding to the SOR, Applicant admitted the allegation. On appeal, the Government alleges that the Judge erred by failing to discuss or analyze the applicability of disqualifying condition AG ¶ 25(f). The appeal also alleges that the Judge’s application of

mitigating conditions AG ¶¶ 26(a) and 26(b), as well as his whole person analysis were erroneous. These allegations have merit and for the reasons discussed below, we remand.

Findings of Fact and Analysis

Applicant is a 55-year-old employee of a government contractor and has held a security clearance since 2009. He admits that he used and purchased marijuana while granted access to classified information and/or while employed in a sensitive position. FORM Items 5, 9; SOR Answer. Applicant self-disclosed his drug involvement on his 2023 security clearance application (SCA) admitting that, during a three-month period in 2022, he tried different forms of marijuana a total of four to five times. He purchased the drugs in a state where marijuana sales and use are legal under state law and used them in his home state where marijuana sales and use are illegal. He reported his drug use to his facility security officer after completing his SCA and also discussed his drug use during his security clearance interview. In his Answer to the SOR, Applicant stated it had been his understanding that marijuana use was “treated like alcohol consumption: as long as it did not impact work or other personal affairs, it was not of any consequences to [his] security clearance.” The Judge found that Applicant’s involvement with marijuana was limited in scope and nature and that he stopped prior to his security clearance renewal. He concluded that Applicant’s “security clearance interview does not read consistently with a person stating an intent to use in the future, rather it appears consistent with a statement that he has no intention to use marijuana or any other illegal drug in the future.” Decision at 2.

The Judge found that Guideline H disqualifying conditions AG ¶¶ 25(a) and 25(c) applied;¹ however, he concluded that the security concerns were mitigated under AG ¶¶ 26(a) and 26(b).² The mitigation analysis focused on a conclusion that “[t]here is no evidence in the record that Applicant understood his [illegal drug] use to be problematic at the time and there was no evidence to the contrary” and that Applicant voluntarily disclosed his actions on his SCA, acknowledged his past actions, and clearly stated that he will no longer use any marijuana products. Decision at 5.

Discussion

One of the Government’s arguments on appeal is that the Judge’s failure to apply disqualifying condition AG ¶ 25(f) was arbitrary, capricious, and not supported by the record evidence. In deciding whether the Judge’s rulings or conclusions are arbitrary and capricious, 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

¹ (a) any substance misuse; (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

² (a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment; (b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence.

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. 95-0600, 1996 WL 480993 at *3 (App. Bd. May 16, 1996) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Applicability of Disqualifying Condition ¶ 25(f)

Disqualifying condition AG ¶ 25(f) (any illegal drug use while granted access to classified information or holding a sensitive position) provides a basis for disqualification that is distinct from the simple drug use the Judge addressed under AG ¶¶ 25(a) and 25(c). Conduct falling under AG ¶ 25(f) reflects a heightened security concern inasmuch as individuals who have already been granted access to classified information or who hold sensitive positions are held to a higher standard than individuals not similarly situated because of the existing potential to adversely impact national security. *See* Security Executive Agent Directive 3, *Reporting Requirements for Personnel with Access to Classified Information or Who Hold a Sensitive Position* (effective June 12, 2017); ISCR Case No. 22-01661 at 3 (App. Bd. Sep. 21, 2023). It is undisputed that Applicant's drug use occurred after he was granted access to classified information and/or was in a sensitive position. Although he maintained that he was not working on a classified program at the time of his drug use, that is of no consequence because he was employed in a sensitive position. *See* ISCR Case No. 22-02623 at 3 (App. Bd. Jan. 24, 2024). Despite the clear applicability of AG ¶ 25(f), the Judge failed to address or even acknowledge that provision. This constitutes a failure to consider a specifically alleged fact and the relevant and material evidence proffered in support the allegation. This failure reflects harmful error and renders the decision unsustainable.

Conclusion

When the Board finds that a judge's decision is unsustainable, we must determine if the appropriate remedy is remand or reversal. The former is appropriate when the legal errors can be corrected through remand and there is a significant chance of reaching a different result upon correction, such as when a judge fails to consider relevant and material evidence. If the identified errors cannot be remedied on remand, the decision must be reversed. ISCR Case No. 22-01002 at 4 (App. Bd. Sep. 26, 2024). In this instance, the Judge's failure to address AG ¶ 25(f) was clearly erroneous and is best remedied through remand.

Having concluded that this error warrants a remand, the allegations of error regarding the application of mitigating conditions AG ¶¶ 26(a) and 26(b) are not ripe for consideration. However, we note that the centerpiece of the Judge's mitigation analysis under AG ¶ 26(a) is his conclusion that "[t]here is no evidence in the record that Applicant understood his use to be problematic at the time and there was no evidence to the contrary." Decision at 5. In support of this, the Judge relied upon ISCR Case No. 23-02476 at 4–5 (App. Bd. May 1, 2024) in which the Board addressed the fact that, with the myriad of state statutes legalizing marijuana, a first-time applicant might not realize how continued use of marijuana is viewed in the context of a security clearance and federal drug laws. That case focused on whether the drug questions in Section 23 of the SCA put applicants on notice that marijuana use is a security concern regardless of state laws. However, the relied-upon case is factually distinguishable and wholly inapplicable because Applicant was not seeking a clearance for the first time; he had been employed in a sensitive

position and been granted eligibility for access to classified information for many years. In light of this, the decision on remand should address the basis for Applicant's assertion that he believed marijuana use is "treated like alcohol consumption" in the context of DoD drug policies.

ORDER

The decision in ISCR Case No. 23-01884 is **REMANDED**.

Signed: Moira Modzelewski
Moira Modzelewski
Administrative Judge
Chair, Appeal Board

Signed: Allison Marie
Allison Marie
Administrative Judge
Member, Appeal Board

Signed: James B. Norman
James B. Norman
Administrative Judge
Member, Appeal Board