



DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
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Date: January 16, 2025

In the matter of:)
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)
----) ISCR Case No. 24-00256
)
)
Applicant for Security Clearance)
_____)

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 April 11, 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 October 16, 2024, Defense Office of Hearings and Appeals Administrative Judge Robert Robinson Gales 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 between March 2018 and July 2023, that he used cocaine between April 2019 and September 2021, that he used ecstasy between July and August 2019, and that he used Adderall without a valid prescription between May and November 2018. The Judge found adversely regarding Applicant’s marijuana use and favorably on the remaining three allegations.

Statement of Intent

In concluding that Applicant's marijuana use was unmitigated, the Judge noted that Applicant "had not submitted a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility." Decision at 4, 7-8.¹ On appeal, Applicant successfully challenges this finding.

Applicant, in his mid-20s and a resident of a state where adult recreational marijuana use is legal at the state level, was hired by a federal contractor in July 2022. In his December 2022 initial security clearance application (SCA), he disclosed that he used marijuana from about March 2018 to February 2022, and stated his intention against using the drug again. During his August 2023 clearance interview, Applicant volunteered that he had used marijuana one additional time the prior month and again asserted his intention to not use marijuana in the future.

In his May 2024 Answer to the SOR (Answer), Applicant admitted the alleged marijuana use, explaining that, "I used Marijuana a single time in July of 2023 after stopping use in February of 2022. I avoid any environment where Marijuana was used. Using it that one time in July of 2023 does not change my resolve to never use Marijuana again." Answer at 2. Contrary to the Judge's multiple findings that Applicant submitted no updated Statement of Intent, Applicant concluded his Answer with the following signed attestation:

I, [Applicant], intend to abstain from all drug involvement and substance misuse, acknowledging that any future involvement is grounds for revocation of national security eligibility.

Id. The record before us supports that the Judge did not consider the updated Statement of Intent in his mitigation analysis, which constitutes harmful error as it potentially impacted application of mitigating condition AG ¶ 26(b).²

Sensitive Position

The Judge's finding that Applicant was employed in a "sensitive position" also warrants discussion. The Judge found that Applicant was hired "in a sensitive position in July 2022," and thereby concluded that Applicant's July 2023 marijuana use afforded application of disqualifying condition AG ¶ 25(f).³ Decision at 7. The finding, however, is unsupported by the record.

¹ The Judge further noted that, "as of the closing of the record, Applicant still had in place his seemingly set-aside previous declaration that he would not use marijuana in the future." *Id.* at 7.

² AG ¶ 26(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, including, but not limited to . . . (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

³ AG ¶ 25(f) – any illegal drug use while granted access to classified information or holding a sensitive position.

We have previously held that the term “sensitive position” does not encompass any and all employment with a defense contractor, and that “an individual cannot hold an initial sensitive position prior to commencing a background investigation.” ISCR Case No. 22-02623 at 4 and n.3 (App. Bd. Jan. 24, 2024) (“[A]n individual cannot hold a national security position, to include a sensitive position, until they are found eligible to do so, which either requires favorable completion of the investigative and adjudicative processes or, in exceptional circumstances, may be granted on a temporary basis while the investigation is underway.”).

Applicant’s initial background investigation began with his December 2022 SCA submission and it was erroneous to find that he held a sensitive position prior to that date. Moreover, although Applicant could have been granted temporary eligibility while the investigative and adjudicative processes were ongoing, the record is silent to that matter and there is no basis to conclude that he held a sensitive position at the time of his July 2023 marijuana use. To the contrary, the record’s only evidence regarding the subject is that Applicant *did not* hold a sensitive position at the time of his marijuana use. *See* File of Relevant Material (FORM) Item 4 at 5; FORM Item 5 at 6.

The erroneous finding that Applicant was employed in a sensitive position was harmful in that it formed the basis of the Judge’s application of AG ¶ 25(f) and contributed to his conclusion that Applicant’s “continued use of marijuana after July 2022 . . . raises questions about his judgment, reliability, and willingness to comply with laws, rules, and regulations.” Decision at 7.

In light of the foregoing, the best resolution of this case is to remand it to the Judge to correct the identified errors and for further processing consistent with the Directive. *See* ISCR Case No. 22-01002 at 4 (App. Bd. Sep. 26, 2024) (“[Remand] 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.”). Upon remand, the Judge is required to issue a new decision. Directive ¶ E3.1.35. The Board retains no jurisdiction over a remanded decision; however, the Judge’s decision issued after remand may be appealed pursuant to Directive ¶¶ E3.1.28 and E3.130.

Order

The decision in ISCR Case No. 24-00256 is **REMANDED**.

Signed: Moira Modzelewski

Moira Modzelewski
Administrative Judge
Chair, Appeal Board

Signed: James B. Norman

James B. Norman
Administrative Judge
Member, Appeal Board

Signed: Allison Marie

Allison Marie
Administrative Judge
Member, Appeal Board