



Date: February 19, 2025

In the matter of:

Applicant for Security Clearance

ISCR Case No. 23-02402

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Carl Anthony Marrone, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On November 30, 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) and Guideline E (Personal Conduct) 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 22, 2024, Defense Office of Hearings and Appeals Administrative Judge LeRoy F. Foreman denied Applicant security clearance eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Judge's Findings of Fact

Applicant, in her early 30s, earned her associate degree in 2017 and enrolled in a bachelor's degree program in 2022. She has a five-year-old daughter. Applicant has been employed by a federal contractor as a help desk technician since April 2023.

Applicant began using marijuana in high school. She also began taking Adderall as a teenager and, although she had a prescription for the medication, acknowledged times when her prescription ran out and she obtained the medication from family members. Applicant stopped using marijuana and taking Adderall when she was 25 years old and learned she was pregnant. After her daughter's birth in February 2019, Applicant abstained from marijuana for about two more years because she was breastfeeding.

In about 2021, an acquaintance contacted Applicant and, apparently remembering that Applicant used Adderall in high school, offered to buy the medication from her. Applicant decided she could use the extra income and sold her prescription a few times over two or three months.

Applicant has been the victim of assault on multiple occasions, including in late 2019 when she was physically assaulted by her daughter's father, for which she obtained a protective order, and in January 2023 when she was sexually assaulted. Following the 2023 assault, Applicant used marijuana on one occasion and cocaine on another, both times with friends who were attempting to comfort her. Applicant used cocaine three times total between when she was 18 and the January 2023 incident.

Applicant testified that she is determined to refrain from further drug involvement. She is in a committed, healthy relationship, has started working on physical fitness, and no longer associates with drug users with the exception of her younger siblings who use marijuana. When asked how she would react if they used marijuana at a family gathering, Applicant stated, without hesitation, "I would leave. I would let my [facility security officer] know about it." Decision at 3. Applicant reads the Bible regularly and attends church, through which she has received spiritual counseling and a church official attested to Applicant's candor, reliability, and unwavering commitment to personal growth. Numerous other individuals attested to Applicant's good character, including that she is hardworking, driven, responsible, trustworthy, and devoted to her daughter. Multiple sources commented specifically about witnessing Applicant's positive changes since her adolescence.

In April 2024, Applicant was evaluated by a certified alcohol and drug counselor, who diagnosed her with mild cannabis use disorder and mild alcohol use disorder, both in remission. She tested negative for cocaine and marijuana in March 2024 and August 2024 drug tests.

Cross-alleged under Guidelines H and E, the SOR alleged that Applicant used marijuana from 2007 to February 2023, purchased marijuana from 2011 to 2021, used cocaine between 2012 and January 2023, and misused prescription Adderall between 2007 and 2022, during which time she sold her own prescription medication in 2021. In response to the SOR, Applicant admitted the Guideline H concerns, but denied Guideline E's cross-allegation, explaining that she had "cooperated with all security processing, interviews, forms and releases" and had voluntarily "provided full, frank, and truthful answers" during the same. SOR Response at 3. The Judge found against Applicant on all concerns.

Discussion

On appeal, Applicant contends that the Judge failed to sufficiently analyze the Guideline H concerns and failed to properly apply the Guideline H and Guideline E mitigating conditions, rendering his decision arbitrary and capricious.

A judge's decision can be arbitrary or capricious if: "it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts 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." 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)). For the following reasons, we remand the Judge's decision.

Failure to Address All Guideline H Concerns

With the five Guideline H concerns admitted, the Judge reasonably found Applicant's conduct disqualifying under AG ¶¶ 25(a) and 25(c).¹ Then, citing generally Applicant's "lifelong abuse of drugs," but specifically addressing her marijuana and cocaine use and referencing her 2021 Adderall sales, the Judge concluded that none of the mitigating conditions was fully established. Decision at 8. Applicant argues that the Judge's failure to specifically address SOR ¶¶ 1.c and 1.d resulted in a "deficient analysis" that renders the decision arbitrary and capricious. Appeal Brief at 6. This argument is of mixed merit.

While his characterization of Applicant's drug use history is arguably hyperbolic, it is clear that the Judge considered all of Applicant's drug-related conduct in his Guideline H analysis. His failure to specifically address Applicant's marijuana purchases or Adderall misuse does not, *per se*, constitute error because his analysis of Applicant's history of drug use, to include the subject allegations, is clear from the decision. *See* ISCR Case No. 98-0809 at 2 (App. Bd. Aug. 19, 1999) ("A Judge's decision must set forth findings and conclusions with sufficient specificity and clarity that the parties and this Board can discern what the Judge is finding and concluding."). The hyperbole coupled with the Judge's cumulative analysis of Applicant's drug-related conduct are, however, problematic.

The Board has long cautioned judges against weighing evidence in isolation, lest such breakdown violate the Whole-Person Concept and result in an unsustainable piecemeal analysis. *See* ISCR Case No. 02-11489 at 3 (App. Bd. Sep. 11, 2003). While the requirement to consider the totality of an applicant's conduct and circumstances remains firmly in place, the intersection of marijuana use and other illegal drug use represents a unique, limited, and nuanced situation where it may be inadequate to exclusively analyze the conduct together.

¹ AG ¶¶ 25(a): any substance misuse; 25(c): illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

In recognition of the changing landscape of marijuana law and in consideration of the Director of National Intelligence's *Clarifying Guidance Concerning Marijuana*², the Board has noted that significant factual and legal differences may exist between an applicant's state-compliant marijuana use and use of other illegal drugs, holding that such differences are an important aspect of the case that a reasonable person would expect to be addressed. *See* ISCR Case No. 22-02132 at 3 (App. Bd. Oct. 27, 2023). In initial eligibility determinations, if the record reflects such differences, the judge must articulate a rational basis for why, after consideration of those differences and the *Clarifying Guidance*, the conduct continues to cast doubt on the individual's current reliability, trustworthiness, and good judgment.

Acknowledging that Applicant last used marijuana and cocaine in January 2023, there are significant differences in her drug-related conduct to be noted. For example, she abstained from using marijuana from mid-2018 to mid-2021 in conjunction with her pregnancy, and marijuana possession was decriminalized in her residential state in July 2020 and adult recreational use was legalized in July 2021.³ Unlike her recreational marijuana use and contrary to the Judge's summary finding that the use was "frequent", Applicant used cocaine a total of three times between approximately 2012 and 2023. Regarding her Adderall misuse, Applicant sold her prescription "a few times" in 2021 and misused Adderall when her own prescription ran out "a few times" at unknown dates, but no more recently than early 2022 when she stopped using the prescription entirely. *See* Tr. at 40, 42, 45; Government Exhibit (GE) 1 at 50; GE 2 at 7. We note the foregoing, not to minimize the seriousness of illegal drug use or misuse, but simply to identify the distinctions between Applicant's marijuana use and use of other substances that make a summary analysis insufficient.

² In 2014, noting the recent decriminalization of marijuana use in several states and the District of Columbia, the Director of National Intelligence issued a memorandum reminding agency heads that such changes to state marijuana laws do not alter the existing National Security Adjudicative Guidelines and asserting that an individual's disregard of federal marijuana law remains adjudicatively relevant in national security determinations. DIR. OF NAT'L INT., *Adherence to Federal Laws Prohibiting Marijuana Use* (Oct. 2014).

Subsequently in 2021, however, particularly in response to the increasing number of state and local governments legalizing or decriminalizing marijuana use, the Director of National Intelligence issued clarifying guidance, which instructs that "prior recreational marijuana use by an individual may be relevant to adjudications but not determinative," and reiterates the requirement that agencies utilize the Whole-Person Concept "to carefully weigh a number of variables in an individual's life to determine whether that individual's behavior raises a security concern, if at all, and whether that concern has been mitigated such that the individual may now receive a favorable adjudicative determination." DIR. OF NAT'L INT., *Security Executive Agent Clarifying Guidance Concerning Marijuana for Agencies Conducting Adjudications of Persons Proposed for Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (Dec. 2021) [hereinafter *Clarifying Guidance*] at 2.

³ The Board takes official notice of the following:

- (1) Effective July 1, 2020, simple marijuana possession was decriminalized in Virginia. VA Code Ann. § 18.2-250.1 (2020), *repealed by* Cannabis Control Act, VA Code Ann. §§ 4.1-600 to -628, -1100 to -1121, -1302, -1500 to -1503 (2021).
- (2) Effective July 1, 2021, adult recreational use of marijuana was legalized in Virginia. VA Code Ann. § 4.1-1100 (2021).

In his Guideline H analysis, the Judge did not identify any of the foregoing factual and legal differences between Applicant’s marijuana use and other drug use, but instead addressed Applicant’s marijuana and cocaine use in tandem, finding that her “use of marijuana and cocaine was frequent” and summarizing her drug involvement as a “lifelong abuse of drugs.” Decision at 7, 8. The Judge’s rendering of such broad and communal findings impairs his analysis of the Guideline H concern and Whole-Person Concept in light of the *Clarifying Guidance*, which should be remedied on remand.

Guideline H Mitigating Conditions

The Judge identified mitigating conditions AG ¶¶ 26(a), 26(b), and 26(d) as potentially applicable, but ultimately concluded that none was fully established. Applicant challenges the Judge’s failure to apply AG ¶ 26(b), which affords mitigation when “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.” The condition identifies several non-exclusive examples to support such mitigative efforts, which the Judge analyzed individually.

Noting that Applicant “found new friends and is working in a drug-free environment,” the Judge concluded that AG ¶ 26(b)(1) – disassociation from drug-using associates and contacts – was *fully* established. Decision at 8. Referring to one particular friend, the Judge went on to assess that AG ¶ 26(b)(2) – changing or avoiding the environment where drugs were used – *was not* established because, although Applicant “has promised to disassociate from” the friend with whom she last used cocaine, “insufficient time has passed to determine if she will keep that promise, especially if she encounters another stressful situation.” *Id.*

Applicant first argues that the Judge’s analysis under AG ¶ 26(b) imposed an improper timing requirement when he concluded that insufficient time has passed to determine if Applicant will maintain her disassociation from her drug-using friend. This argument is unpersuasive. Assessing a *pattern* of abstinence requires reviewing an individual’s conduct for consistency and repetition over time. It was not error for the Judge to consider how much time had passed since Applicant disassociated from drug-using contacts in assessing her pattern of abstinence.

To that end, however, the Judge’s analyses under AG ¶¶ 26(b)(1) and 26(b)(2) are conflicting and therefore unclear. Either Applicant has sufficiently disassociated from drug-using associates and environments, or she has not. We are unable to discern which conclusion the Judge reached here, rendering his analysis of these conditions unsustainable.

Applicant also challenges the Judge’s failure to consider certain evidence that she contends supports application of AG ¶ 26(b), including two negative drug tests and the diagnosis received during her April 2024 substance abuse evaluation.⁴ In his factual findings, the Judge identified that “Applicant was evaluated by a certified alcohol and drug counselor on April 23, 2024, and was diagnosed with mild cannabis use disorder in remission” and that she “underwent hair follicle tests on March 4 and August 29, 2024, and tested negative for cocaine . . . and marijuana.” Decision at

⁴ Although Applicant assigns the Judge’s failure to consider her evaluation and diagnosis as error under AG ¶ 26(d), it is more appropriately considered in the context of AG ¶ 26(b).

4. The Judge did not address this evidence further, except to conclude that the evaluation failed to establish AG ¶ 26(d).⁵ While we agree with the Judge’s assessment that the evaluation does not afford application of AG ¶ 26(d), considering the emphasis placed on Applicant’s ability to demonstrate abstinence, her diagnosis in remission and multiple negative drug tests taken about six months apart was significant evidence that should be discussed. *See* ISCR Case No. 05-03250 at 4 (App. Bd. Apr. 6, 2007) (Although a judge is not required to discuss each and every piece of record evidence, he “cannot ignore, disregard, or fail to discuss significant record evidence that a reasonable person could expect to be taken into account in reaching a fair and reasoned decision.”).

Turning to the third example supporting mitigation, AG ¶ 26(b)(3) considers an applicant “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.” The Judge found that the condition was not fully established because, although Applicant “provided a statement of intent to abstain from drug involvement and substance abuse,” that statement did not “include the specific acknowledgement that future involvement is ground for revocation of any security clearance.” Decision at 8. Applicant challenges this finding and the resulting inapplicability of the mitigating condition.

Applicant submitted two separate documents in response to the SOR, including her response to the SOR’s allegations and a personal statement. In the former, she stated, “*I have provided* a signed Personal 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.” SOR Response at 3 (emphasis added). In the latter, she “recognize[d] the severity of [her] past drug use and involvement” and expressed regret for the same, stated her intention to abstain from future drug use, and detailed her positive changes she has made in her life to support that abstinence. Applicant’s personal statement did not, however, recite the specific language used in mitigating condition AG ¶ 26(b)(3), acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

We have routinely upheld findings that AG ¶ 26(b)(3) is not met by a statement of intent that fails to include an acknowledgment that future drug involvement or misuse is grounds for revocation of national security eligibility. *See, e.g.,* ISCR Case No. 15-00535 at 3-4 (App. Bd. Mar. 13, 2017). This is not such a case. Rather than reading the initial statement and personal statement exclusive of each other, the entire SOR response should be considered together. Contrary to the Judge’s finding, Applicant’s initial statement did not suggest her *willingness* to provide the necessary statement of intent, but asserts that she *did* provide it, with all necessary language. Although the latter personal statement does not include AG ¶ 26(b)(3)’s acknowledgment language, it is clear from Applicant’s initial statement that she intended to incorporate – and was committed to – the potential consequence to her national security eligibility. Indeed, the Judge

⁵ AG ¶ 26(d): satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional. Notably, Applicant also argues that the Judge erred by failing to apply this mitigating condition, “despite ample evidence in the record supporting such a finding.” Appeal Brief at 9. Contrary to Applicant’s argument, it was not improper for the Judge to decline to apply mitigating condition AG ¶ 26(d) because Applicant had not, in fact, completed a prescribed drug treatment program.

opined that he was “satisfied that she understands that any future drug involvement may result in revocation of any security clearance that she receives.” Decision at 8.

Despite that conclusion, which appears to reflect that the Judge agreed that the entire SOR response included the requisite recitals, the Judge found the applicable mitigating condition only partially applicable. To the extent that the Judge did not find Applicant’s SOR response sufficient to merit full application of AG ¶ 26(b)(3), such finding is in error.

Guideline E Analysis

We turn next to the Guideline E concern, which simply cross-alleged the exact conduct alleged already under Guideline H. The Judge found that Applicant’s drug use was disqualifying under AG ¶ 16(e), which considers “personal conduct, or concealment of information about one’s conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes . . . engaging in activities which, if known, could affect the person’s personal, professional, or community standing.” Noting that “Applicant has disclosed her drug involvement to her current boyfriend and her employer,” the Judge found mitigating condition AG ¶ 17(e)⁶ was established but concluded that the Guideline E concern was not mitigated. Applicant argues that the Judge “failed to articulate a satisfactory explanation for his conclusion and ruling against [Applicant’s] eligibility under Guideline E,” citing specifically a lack of “any analysis of how he came to this conclusion.” Appeal Brief at 12. We agree.

The Judge’s disqualification analysis consisted of a finding that AG ¶ 16(e) was established by “Applicant’s admissions that she used marijuana, used cocaine, associated with drug users, and illegally sold Adderall.” Decision at 9. He failed, however, to articulate why the information would be of interest to foreign intelligence operatives or how such actors would use it to pressure or coerce Applicant, rendering his Guideline E disqualification analysis unsustainable.

Applicant also argues that the Judge, having found mitigating condition AG ¶ 17(e) applicable, erred in concluding that the Guideline E concern was unmitigated. There is a rational connection between conduct that an applicant does not want discovered by her family, friends, or employer, and a concern that she “could be pressured to disclose classified information should this conduct come to the attention of those interested in acquiring U.S. protected information.” ISCR Case No. 15-02407 at 2 (App. Bd. Oct. 12, 2017). Here, however, Applicant’s family, friends, and employer are aware of the SOR concerns, which she voluntarily disclosed and openly discussed throughout her security clearance investigation. Assuming, arguendo, that the Judge found AG ¶ 16(e) applies based on a concern that Applicant’s prior drug use was not widely known and could create a vulnerability, it is unclear why that concern is not fully mitigated by her openness about the conduct.

⁶ AG ¶ 17(e): the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Based on the foregoing, we conclude that the Judge's Guideline E decision is arbitrary and capricious as the analysis fails to articulate a rational connection between the facts found and the choice made.

Conclusion

When the Board finds that a judge's decision is unsustainable, we must determine if the appropriate remedy is remand or reversal. The latter is appropriate when the identified errors cannot be remedied through remand and the Board concludes from the record that a contrary formal finding or overall grant or denial of security clearance eligibility is the clear outcome. Remand is appropriate when the errors can be corrected and there is a significant chance of reaching a different result upon correction. *See* ISCR Case No. 22-01002 at 4 (App. Bd. Sep. 26, 2024). In light of the record before us, we conclude that there is such a chance, and the best resolution of this case is to remand it to the Judge for the opportunity to address the errors identified herein and thereafter determine if Applicant has or has not sufficiently mitigated the Government's concerns. 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. 23-02402 is **REMANDED**.

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

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

Separate Opinion of Board Member James B. Norman

I respectfully dissent from my colleagues' remand of the Administrative Judge's decision in this case.

Failure to Address All Guideline H Concerns

The majority's remand of this case finds error in the Judge's analytical process because he discussed Applicant's drug involvement cumulatively, which they conclude failed to properly consider the Security Executive Agent's Clarifying Guidance Concerning Marijuana (Clarifying Guidance), as well as Appeal Board precedent. However, this is an overly broad reading of the Clarifying Guidance and our prior cases, and impinges on the discretion afforded judges. After reviewing the record, I conclude that the Judge's analytical process was in accord with the Clarifying Guidance and case law, that his material findings as to Applicant's conduct of security concern are based upon a permissible interpretation of the record evidence, and, therefore, a remand is not necessary.

The Clarifying Guidance is not a stand-alone document. It is an elaboration on an October 25, 2014, Security Executive Agent Memo titled, "*Adherence to Federal Laws Prohibiting Marijuana Use*." (2014 Memo) That 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 2014 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 fn. 2 (App. Bd. Feb. 23, 2018).

The 2014 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 2014 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." *See* ISCR Case No. 23-00521 at 5-6 (App. Bd. Apr. 11, 2024).

Consistent with the 2014 Memo, the Clarifying Guidance is unequivocal that "under policy set forth in SEAD 4's adjudicative guidelines, the illegal use or misuse of controlled substances can raise security concerns about an individual's reliability and trustworthiness to access classified information or to hold a sensitive position, as well as their ability or willingness to comply with laws, rules, and regulations (Reference B, Guideline H). Drug involvement may raise similar concerns about personal and criminal conduct (Reference B, Guidelines E, J)." However, within

that construct, the Clarifying Guidance states that although disregard of federal law pertaining to marijuana remains relevant, it is not determinative. The Guidance elaborates by focusing on the importance of a whole person analysis and notes some of the mitigating factors reflected in the Adjudicative Guidelines. The Appeal Board has interpreted the Clarifying Guidance as a recognition that the proliferation of state laws legalizing medical and recreational marijuana may frame pre-clearance marijuana use in a different light inasmuch as that use may have taken place with an honest belief that it was legal despite federal law to the contrary. ISCR Case No. 23-00476 at 5 (App. Bd. May 1, 2024).

Inasmuch as the Clarifying Guidance was promulgated “particularly in response to the increase in the number of state and local governments legalizing or decriminalizing uses of marijuana,” it cannot be read broadly to encompass all marijuana use. The focus is on presumptively-legal marijuana use. Even then, whatever leeway state-legality offers in terms of mitigation may be diminished when there is evidence that includes use of other drugs, the sale of drugs, or drug use that occurs over an extended period of time. Therefore, although pre-clearance, state-legal marijuana use, standing alone, may raise fewer security concerns than in the past, a proper drug analysis is contextual and it is not improper for a judge to consider marijuana use concurrent with the assessment of other drug use or conduct.

The majority finds error because the Judge addressed Applicant’s marijuana and cocaine use in tandem. However, neither the Clarifying Guidance nor DOHA case law mandate that a separate assessment of marijuana use be conducted that is independent of the weighing of an applicant’s other drug use. There is a presumption in favor of regularity and good faith on the part of DOHA judges as they engage in the process of deciding cases. ISCR Case No. 14-02025 at 2 (May 12, 2015) *citing* ISCR Case No. 99-0019 at 5 (App. Bd. Nov. 22, 1999). Just as a judge is presumed to have considered all evidence, a judge is presumed to be knowledgeable about and follow applicable law and regulations rather than personal predilections. *See* ISCR Case No. 09-06406 at 3 (Apr. 13, 2011); *See, also* ISCR Case No. 11-07666 at 3 (June 7, 2013) (presumption that the Judge properly considered applicable mitigating conditions).

The majority places emphasis on ISCR Case No. 22-02132 (App. Bd. Oct. 27, 2023) for the proposition that factual and legal differences may exist between an applicant’s marijuana use and use of other illegal drugs, and that this is an important aspect of the case that a reasonable person would expect to be specifically addressed. In that case the Board concluded that “the Judge considered all of Applicant’s drug use together in a very succinct mitigation analysis that, besides the standard Guideline H language, consisted of four sentences. In doing so, the Judge failed to address significant factual and legal differences between Applicant’s **state-compliant** marijuana use and his other illegal drug use.” ISCR Case 22-02132 at 3 (emphasis added). As such, because “the Judge failed to conduct an appropriate analysis of Applicant’s **state-compliant** marijuana use under the SecEA Clarifying Guidance,” the case was remanded. *Id.* at 4 (emphasis added). Based upon that case, the majority concludes in the present case that the Judge failed to conduct an appropriate analysis of Applicant’s marijuana use under the Clarifying Guidance because he did not address factual and legal differences between Applicant’s marijuana and cocaine use.

I do not disagree with the proposition that marijuana use may involve some unique contextual considerations that are not present when an applicant is using a drug such as cocaine.

Nor do I disagree that when there are significant factual and legal differences between an applicant's marijuana and other drug use those differences should be addressed. Where the majority and I diverge is whether, in this case, Applicant's marijuana use presented sufficient factual or legal differences from her other drug use that required a more detailed discussion.

In ISCR Case No. 22-02132, the majority of the applicant's marijuana use was in a state in which the recreational use of marijuana was legal and the Board concluded that the judge failed to address significant factual and legal differences between Applicant's state-compliant marijuana use and his other illegal drug use. *Id.* at 4. However there is a significant factual difference between the present case and the cited case because in the present case there is no evidence that any of Applicant's marijuana use was under color of law. When there is such evidence, it could present a distinction requiring further explanation, depending upon the overall circumstances. Even if the Judge had, *sua sponte*, taken judicial notice of a state marijuana law, as the majority has done, and concluded that Applicant's 2021 marijuana use was compliant with her state's laws, that single event does not mandate a separate or comparative analysis.⁷

Unlike ISCR Case No. 22-02132 in which the Judge engaged in a minimalist, "succinct" mitigation analysis, the Judge in the present case conducted a more robust analysis of the cumulative drug involvement. The majority's assessment of the Judge's characterization of Applicant's drug use amounts to a subjective disagreement with the weighing of the evidence which, in turn, informs its conclusion that a more detailed analysis was required. Much as 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 error, the Board also must not engage in such an assessment in the context of invoking the Clarifying Guidance.

Although the Judge could have written more in his decision about these matters, the Board does not review a Judge's decision against a standard of perfection. ISCR Case No. 01-17539 at 3 (May 2, 2003). Considering the decision in its entirety, I conclude that the Judge adequately and correctly addressed Applicant's marijuana use.

Guideline H Mitigating Conditions

I disagree with the majority's conclusion that the Judge's analyses of AG ¶¶ 26(b)(1) and 26(b)(2) conflict with each other. Applicant's argument that a finding for Applicant under AG ¶ 26(b)(1) mandates the same finding under AG ¶ 26(b)(2) would merge the two mitigating conditions into one. However, "[p]rovisions of the Directive should not be construed or interpreted in a manner that renders them meaningless or superfluous." ISCR Case No. 02-12199 at 3, 5 (App Bd. Oct. 7, 2004). While some mitigating conditions have overlapping aspects, each is a separate provision and will be interpreted in that manner. ISCR Case No. 17-01213 at fn. 2 (App. Bd. Jun. 29, 2018). It is entirely feasible that Applicant may have disassociated herself from associations with certain individuals but in the larger context of the evidence, there remain questions as to whether this will continue. For example, in this instance an old high school acquaintance spontaneously re-entered Applicant's life and asked Applicant to sell her Adderall; a request to

⁷ Although the Board can take judicial notice of a statute or regulation on appeal, just as a judge may take judicial notice at a hearing, a judge is not required to *sua sponte* take judicial notice of a state marijuana statute absent an assertion or other evidence that an applicant's marijuana use was allegedly state-compliant.

which Applicant complied. Such conduct could reasonably weigh against application of AG ¶ 26(b)(2) despite a favorable finding under AG ¶ 26(b)(1).

The majority also finds that the Judge erred in addressing Applicant's negative drug tests and diagnosis only under AG ¶ 26(d) and not AG ¶ 26(b). However, given the presumptions discussed above, it is reasonably likely that this was considered throughout the Judge's assessment of the case even though it was not specifically mentioned *vis a vis* each possible mitigating condition.

As to Applicant's statement of intent not to use illegal drugs in the future, neither the statement of intent nor the Judge's discussion of AG ¶ 26(b)(3) are models of clarity. When the Appeal Board examines individual words or sentences in a Judge's decision, we do not consider them in isolation. ISCR Case No. 02-11489 at 3 (App. Bd. Sep. 11, 2003). Rather, we consider them in light of the decision in its entirety. ISCR Case No. 20-02219 at 2-3 (App. Bd. Oct. 28, 2021). I agree with the majority that, read in concert, various statements reflect Applicant's intent not to use illegal drugs in the future and an understanding of the repercussions of doing so. However, just as we read Applicant's statement in a comprehensive manner, we must read the Judge's analysis in concert with his broader discussion of the facts in this case. In the context of the entire paragraph, it is clear that the Judge gave Applicant's statement some degree of mitigating value. However, the presence of some favorable or mitigating evidence does not compel a favorable security clearance decision. *See* ISCR Case No. 04-08975 at 1 (App. Bd. Aug. 4, 2006). Rather, the judge must weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable, or vice versa. *Id.* Even if Applicant's statement was sufficient to merit full application of AG ¶ 26(b)(3) and the Judge's application was erroneous, it is harmless error in the context of the Judge's overall analysis of the facts.

Guideline E Analysis

I concur with the majority's analysis of this Guideline, however, given my opinion that the Judge's findings under Guideline H are sustainable, this error is harmless and does not mandate remand.

Conclusion

It is not necessary that the Board agree with the ultimate result or analysis to find that the Judge followed the correct process in reaching his conclusion. Here, he examined the relevant facts in a manner consistent with ISCR Case No. 22-02132, the Clarifying Guidance, and the Adjudicative Guidelines. The adverse decision is sustainable on this record.

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