



Date: April 9, 2025

In the matter of:

Applicant for Security Clearance

ISCR Case No. 24-00914

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On August 12, 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) (SEAD 4) and DoD Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). On January 17, 2025, Defense Office of Hearings and Appeals Administrative Judge Roger C. Wesley denied Applicant national security eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Background

Applicant is in his late 20s. He earned a high school diploma in June 2016 and attended college classes in 2017. Applicant has been employed by a federal contractor since September 2023. He has never held a security clearance.

During his initial security clearance investigation, which began with submission of his security clearance application in September 2023, Applicant disclosed information regarding his drug use history, including that he used marijuana recreationally with varying frequency from 2016 to July 2023 and purchased marijuana during that period, and used psilocybin mushrooms and lysergic acid diethylamide between December 2018 and January 2020, cocaine between November 2020 and January 2021, and unprescribed Adderall in May and June 2018. Under Guideline H, the SOR alleged concerns based on the foregoing history, all of which Applicant admitted with further explanation. The Judge found against Applicant on all concerns.

Scope of Review

On appeal, the Board does not review a case *de novo*. Rather, the Board addresses the material issues raised by the parties to determine whether there is factual or legal error. When a judge's ruling or conclusions are challenged, we must determine whether they are arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. 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 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 decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See* 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)). In deciding whether a judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. *See* ISCR Case No. 03-22861 at 2 (App. Bd. Jun. 2, 2006).

When an appeal issue raises a question of law, the Board's scope of review is plenary. *See* DISCR OSD Case No. 87-2107, 1992 WL 388439 at *3-4 (App. Bd. Sep. 29, 1992) (citations to federal cases omitted). If an appealing party demonstrates factual or legal error, then the Board must consider the following questions: (1) Is the error harmful or harmless? (2) Has the nonappealing party made a persuasive argument for how the judge's decision can be affirmed on alternate grounds?; and (3) If the judge's decision cannot be affirmed, should the case be reversed or remanded? *See* ISCR Case No. 02-08032 at 2 (App. Bd. May 14, 2004).

Discussion

On appeal, Applicant contends that the Judge failed to properly apply the Guideline H mitigating conditions and the Whole-Person Concept. For the following reasons, we remand the Judge's decision.

Whole-Person Concept

Conduct alleged under the Adjudicative Guidelines must be evaluated in the context of the Whole-Person Concept, which requires judges to consider numerous variables across a large swath

of an applicant's life in reaching a national security eligibility determination.¹ At the risk of offending this concept, the Board has cautioned judges against conducting piecemeal analyses or assessing individual allegations in isolation. *See* ISCR Case No. 02-11489 at 3 (App. Bd. Sep. 11, 2003). The Whole-Person Concept does not, however, bar a judge from also assessing the security significance of individual aspects of alleged conduct independent from each other.² To the contrary, a mere collective analysis of conduct risks misunderstanding or overstating its security significance, which also offends the Whole-Person Concept.

The instant case reflects a similar fact pattern seen in a narrow, but noteworthy string of cases recently before the Board, where an applicant has previously used other illegal drugs and has also used recreational marijuana, either more regularly, more recently, or both. The common thread in these decisions is that the marijuana use has been relied upon to effectively renew the concern stemming from the other drug use (otherwise likely mitigated by the passage of time or limited use) to find a continuing course of conduct that results in across-the-board adverse findings. When, as discussed below, the recreational marijuana use deserves less, or even no negative inference on judgment, the ensuing analysis is flawed.

To that end, a commonsense understanding of the evolving landscape of marijuana law and policy³ in the United States informs us that simple recreational marijuana use no longer holds the same severe negative implications as many other illegal drugs. This is especially, but not exclusively, true when the use occurs permissibly under state law. The Whole-Person Concept, which identifies “nature, extent, and seriousness” among the factors to consider in assessing the relevance of conduct, therefore plays an especially important role in cases alleging prior recreational marijuana use.⁴ Recognizing that evolving landscape, the resulting increasing prevalence of marijuana use, and the implications of both to national security eligibility, we have

¹ AG ¶¶ 2(a), 2(c). In evaluating the relevance of an individual's conduct, the following factors should be considered: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence. *Id.* at 2(d).

² Such an individualized analysis is regularly conducted under other Guidelines, such as for specific debts alleged under Guideline F or particular foreign relationships alleged under Guideline B.

³ As of May 2024, recreational adult-use marijuana is legal in 24 states, the District of Columbia, and three territories, and its possession is decriminalized in seven states. Additionally, the District of Columbia, three territories, and all but three states permit the use of marijuana for medical purposes. *See* CONG. RESEARCH SERV., LSB10482, STATE MARIJUANA “LEGALIZATION” AND FEDERAL DRUG LAW 3 (2024) (citing <https://www.ncsl.org/health/state-medical-cannabis-laws>); NCSL: CANNABIS OVERVIEW REPORT, <https://www.ncsl.org/civil-and-criminal-justice/cannabis-overview> (last updated June 20, 2024).

⁴ This was highlighted by the Security Executive Agent's 2021 issuance of clarifying guidance, “particularly in response to the increase in the number of state and local governments legalizing or decriminalizing uses of marijuana,” instructing that “prior recreational marijuana use by an individual *may* be relevant to adjudications *but not determinative*.” DIR. OF NAT'L INT., *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 1-2. The guidance emphasized not just the requirement for, but also the importance of, the Whole-Person analysis in recreational marijuana cases and identified frequency of use and demonstration that future use is unlikely to recur, such as by signing an attestation, as particularly relevant in terms of mitigation.

cautioned judges about the potential inadequacy of conducting collective analyses in cases alleging mixed drug use.⁵

Significant Differences in Drug Use

In light of the foregoing, when significant differences exist to make an applicant's prior recreational marijuana use distinguishable from his or her use of other illegal drugs, those distinctions represent an important aspect of mixed drug use cases, which a judge must address.⁶ If, despite consideration of those distinctions in light of the Whole-Person Concept, an unfavorable determination is still warranted, the judge must articulate a rational basis for why the conduct continues to cast doubt on the applicant's current reliability, trustworthiness, and good judgment.⁷ Failure to do so leaves us with serious questions about whether the judge ignored or dismissed that aspect of the case, failed to take it into account, or failed to understand its significance. *See* ISCR Case No. 02-02195 at 3 (App. Bd. Apr. 9, 2004).

Under the facts of this case, Applicant's marijuana use is distinguishable from his use of other illegal drugs, particularly considering the comparative nature, frequency, and recency. Applicant disclosed that he used marijuana recreationally with varying frequency beginning in 2016, including daily until 2021, weekly off-and-on from 2021 through late 2022, and five total times between late 2022 and his cessation by July 2023. *See* Government Exhibit (GE) 3 at 30-33; GE 4 at 5-6.

Applicant's other illegal drug use included unprescribed Adderall three times over two months in 2018, hallucinogens 10 to 20 times over 13 months in about 2019, and cocaine three times over three months ending in January 2021. At these times, he was 20 to 23 years old. During his security clearance interview, he averred that he "cut off all contact with old coworkers and . . . left the restaurant industry to separate from drug use and users." GE 4 at 6.

The Judge characterized the concerns as "[l]ongstanding illegal drug use" and declined application of any mitigating conditions in the absence of "a lengthier time of sustained abstinence from the use of marijuana *and* other illegal drugs." Decision at 6 (emphasis added). This reflects that the Judge did not distinguish between Applicant's different drug use, but instead considered them cumulatively and collectively, which impaired his analysis of the Guideline H concern and Whole-Person Concept. This should be remedied on remand.

Guideline H Mitigating Conditions

Applicant argues that the Judge failed to consider his case for mitigation, including the specific timeline of drug use, period of abstinence, and proactive actions taken to overcome the concern. Applicant's arguments in this regard do more than simply disagree with the Judge's weighing of the record evidence. Rather, the arguments highlight the absence of any mitigation

⁵ *I.e.*, those involving both marijuana use and use of other illegal drugs. *See* ISCR Case No. 22-02132 at 3 (App. Bd. Oct. 27, 2023); ISCR Case No. 23-02402 at 4 (App. Bd. Feb. 19, 2025).

⁶ *See* ISCR Case No. 03-07874 at 2 (App. Bd. Jul. 7, 2005) (failure to discuss an important aspect of a case is error).

⁷ *See* ISCR Case No. 23-02402 at 4 (citing ISCR Case No. 22-02132 at 3).

analysis in the decision and challenge the Judge’s decision on grounds that it fails to articulate a satisfactory explanation for its conclusions and fails to consider relevant factors.

Judges must apply pertinent disqualifying and mitigating conditions. *See* ISCR Case No. 02-05110 at 3 (App. Bd. Mar. 22, 2004) (citing Directive ¶¶ 6.3, E3.1.25). If a provision of the Guidelines appears to apply to the facts of a particular case, then the judge is obligated to either apply that provision or give a rational explanation for not doing so. *See* ISCR Case No. 97-0825 at 2 (App. Bd. Jan. 7, 1999). Failure to do so is arbitrary, capricious, and contrary to law.

Here, the Judge reasonably found that the disclosed and admitted Guideline H concerns raised disqualifying conditions AG ¶¶ 25(a) and 25(c).⁸ Subsequently – and despite finding that “Applicant’s assurances of discontinued marijuana involvement . . . are both plausible and credible and are accepted,” and that “Applicant has not engaged in any recurrent use of [the other drugs] and has no intent of using them in the future”⁹ – the Judge concluded that the drug involvement security concerns were not mitigated. In reaching that conclusion, however, he conducted no apparent mitigation analysis, despite that two conditions were clearly raised by the plain language of Guideline H and the facts of the case. The Judge’s failure to apply AG ¶¶ 26(a) and 26(b) or provide a rational explanation for not doing so constitutes harmful error.

Turning first to AG ¶ 26(a), the condition affords mitigation when an applicant’s drug involvement happened so long ago or infrequently, or under circumstances that make it unlikely to recur or not reflective of the individual’s current eligibility worthiness. Apparently viewing Applicant’s marijuana use collectively with his other drug use, the Judge found that “Applicant’s limited period of cessation of his illegal drug involvement makes it too soon to absolve him of risks of recurrence.” Decision at 6. This conclusion highlights the importance of acknowledging the distinctions between marijuana and other illegal drug use.

Applicant’s marijuana use continued with varying but decreasing frequency until July 2023, two months before submitting his SCA and not yet having begun employment with his sponsor. During the time that his use was, at most, weekly, his residential state had decriminalized marijuana possession. By the time of his final five uses between late 2022 and July 2023, recreational adult-use marijuana was legal in his residential state.¹⁰ The decreasing frequency and change in legal status are circumstances to be considered in analyzing the applicability of this condition.¹¹

Conversely, Applicant’s non-marijuana drug misuse was limited in both frequency and duration, occurred when he was a young man, and ceased between four and six years ago. We have

⁸ 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.

⁹ Decision at 3.

¹⁰ The Board takes official notice that Applicant’s residential state decriminalized marijuana possession in July 2020 and legalized adult recreational use in July 2021. *See* VA Code Ann. § 18.2-250.1 (2020); Cannabis Control Act, VA Code Ann. § 4.1-1100 (2021).

¹¹ The *Clarifying Guidance* specifically highlights “frequency of use” for consideration in determining whether the recreational marijuana use concern has been mitigated. *Clarifying Guidance* at 2.

held that, when such factors exist, “a reasonable person would expect the Judge to determine whether or not that [other illegal] drug misuse was ‘unlikely to recur or does not cast doubt on the individual’s *current* reliability, judgment, or good judgment.’” ISCR Case No. 22-02132 at 3 (emphasis in original) (quoting AG ¶ 26(a)).

Turning next to AG ¶ 26(b), the condition 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, including: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; and (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.” Despite the condition’s relevance to the facts of this case, the Judge did not analyze it or the evidence explicitly identified therein as potentially mitigating.

In response to the SOR, Applicant repeated his intention to not use drugs in the future and addressed some of the actions he has taken to overcome the concern, including disassociating from drug-using associates, improving his physical health, becoming engaged and buying a home with his fiancée, and changing career paths, which removed him from the environment in which certain drugs were being used and offered to him. The Judge made cursory reference to some of this information in his Summary of Pleadings,¹² but discussed none of it substantively.

AG ¶¶ 26(b)(1) and (b)(2) reflect another potential pitfall of collective assessments in mixed drug use cases, as seen with Applicant’s relationship with his brother. While disassociation from users and environments linked to certain illegal drugs affords a reasonable gauge of the individual’s current abstinence and future intentions for drug use, it is potentially unrealistic and therefore less reasonable to expect an individual to disassociate from *marijuana* users and environments in states that permit recreational adult-use marijuana.

Applicant also provided a signed statement of intent, as contemplated by AG ¶ 26(b)(3), which reiterated some of the aforementioned actions and acknowledged that any future drug involvement or misuse is grounds for revocation of national security eligibility. The decision does not reference this evidence at all. The Judge’s failure to discuss most of Applicant’s mitigating evidence, or even mention a particular piece of evidence explicitly identified as potentially mitigating under both Guideline H and the *Clarifying Guidance* constitutes error. *See* ISCR Case No. 02-02195 at 3.

¹² *See* Decision at 2 (Noting that, in his SOR response, Applicant “claimed he has not used marijuana since July [2023] and has taken other positive steps to overcome this problem (inclusive of disassociating with friends and acquaintances who encourage drug-using behaviors) and taking proactive, healthy steps to take care of himself. He claimed, too, to have [] recently bought a house with his fiancée, which has helped to distance himself from his acquaintances. And, he claimed his previous choices to use drugs are not reflective of where he is today.”).

Conclusion

Based on the foregoing errors, we conclude that the Judge's decision was arbitrary, capricious in that it failed to examine relevant evidence, consider relevant factors and important aspects of the case, and articulate a satisfactory explanation for its conclusions. Having found that the 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). Based on this record, 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. Directive ¶¶ E3.1.28 and E3.1.30.

Order

The decision in ISCR Case No. 24-00914 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