



Date: April 11, 2025

In the matter of:

Applicant for Security Clearance

ISCR Case No. 24-01005

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 July 30, 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) and Guideline F (Financial Considerations) 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 February 18, 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.

Findings of Fact

Applicant, in her early 30s, married in February 2018 and has three children. During her initial security clearance investigation, Applicant disclosed that she began using marijuana on about a weekly basis as a teenager in about 2008. In 2018, when she was about 23 years old, she began using marijuana daily with her husband. Applicant was employed at a marijuana dispensary in her residential state from August 2020 to September 2021 and received monthly allotments of

marijuana as part of her employment compensation. Upon leaving the dispensary in September 2021, Applicant reduced her marijuana use to socially on weekends. She stopped using the drug completely in January 2023 and expressed no intent of resuming use in the future. She continues to associate with people who use marijuana, including her husband, and purchased marijuana for him since discontinuing her own use. Applicant has been employed as a program specialist for her defense contractor employer since February 2023, and is subject to random drug testing, although she had not been tested as of the decision. She has never held a security clearance.

Based on these disclosures, the SOR alleged that Applicant used marijuana with varying frequency from 2008 to about January 2023, and that she worked at a dispensary from August 2020 to September 2021 and received compensation in the form of a marijuana allotment. In response to the SOR, Applicant admitted both allegations and reiterated that she has not used marijuana since January 2023 and has no plans to use again in the future. The Judge found against her on both Guideline H concerns.¹

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).

¹ The Judge found favorably regarding the Guideline F case, which is not a subject of this appeal.

Discussion

On appeal, Applicant challenges several of the Judge's factual findings and his Guideline H mitigation analysis. For the following reasons, we reverse the Judge's decision.

Errors in Findings of Fact

Applicant challenges the Judge's finding that "she did not supply a written statement of intent to avoid marijuana use in the future *at the risk of losing her clearance should she elect to resume her use of the drug.*" Decision at 4 (emphasis added). In support, she points to the following statement included in her SOR response: "I do not use marijuana now (and have not since January 2023) and am currently enrolled in a drug test/screening program through my current employer. I have no plans to use marijuana or any other drug(s) in the future." SOR Response at 1.² Applicant's argument as it pertains to the Judge's factual finding fails because her statement against future drug use does not, in fact, contain the identified language acknowledging the potential consequence to her national security eligibility. To the extent that she also challenges the Judge's mitigation analysis under AG ¶ 26(b)(3)³, that too fails because her SOR response falls short of the statement envisioned by the condition. *See, e.g.,* ISCR Case No. 15-00535 at 3-4 (App. Bd. Mar. 13, 2017).

Turning to the next alleged factual error, the Judge found that several individuals occasionally used marijuana in Applicant's presence, including "her mother, *stepfather*, and her husband's stepfather," which Applicant challenges on the basis that she does not have a stepfather and has no contact with her biological father. Appeal Brief at 1 (citing Decision at 4 (emphasis added)). The record does not support the Judge's finding about a secondary stepfather. While it is possible that this error is merely typographical and did not, in and of itself, likely affect the outcome of the case, the subsequent reliance on Applicant's association with marijuana-using individuals is problematic, as discussed further, below.

Finally, Applicant challenges the Judge's finding that she "tested positive for marijuana in drug tests administered by her former employers." Decision at 4. This challenge has merit. Applicant disclosed that she tested positive for marijuana during the births of her three children – a routine step of the labor and delivery process – which she discussed with her doctor without follow-up. The Judge appears to have misunderstood these tests as a series of employer-sponsored drug tests. Contrary to the Judge's finding, the record reflects that Applicant was not subject to any employer drug policy while using marijuana, and she has never participated in, let alone tested positive during an employer-sponsored drug test. Because using marijuana while under such a policy or failing an employer-sponsored drug test carries negative implications on trustworthiness and judgment, we cannot conclude that this error was harmless.

² On appeal, Applicant supplements her statement by asserting, "I do acknowledge and understand that any use, purchase, cultivation (legal or illegal) will result in the loss of a security clearance, should one be provided to me." Appeal Brief at 1. This constitutes new evidence, which the Board may not consider. Directive ¶ E3.1.29.

³ AG ¶ 26(b)(3): "[T]he 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 . . . 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."

Guideline H Mitigating Conditions

Despite finding that mitigating conditions AG ¶¶ 26(a) and 26(b)⁴ were partially applicable, the Judge concluded that “Applicant’s lengthy personal history of marijuana use, her continued purchasing of the drug for herself and her husband, the continued use of marijuana by her husband in her presence, and the continued use of marijuana (occasionally in her presence) by other family members undercut her commitments to avert all risks of recurrence of marijuana involvement in the foreseeable future.” Decision at 9. On appeal, Applicant contends that the foregoing analysis is flawed because it is based on inaccuracies, including that: 1) Applicant continues to purchase marijuana for herself; and 2) Applicant’s husband and other family members have used marijuana in her presence after January 2023. Both arguments have merit.

The record reflects that, since she stopped using marijuana in January 2023, Applicant purchased it twice, both times from a dispensary and for her husband’s use. Tr. at 39. The record supports neither that Applicant’s post-cessation purchases were for herself nor that her purchases continue to-date. There is no evidence about when these purchases occurred, but Applicant averred that she was unaware until March 2023 that marijuana use remains federally illegal. Government Exhibit (GE) 2 at 16. With no evidence that Applicant purchased marijuana after being put on notice that the drug is illegal under federal law and inconsistent with holding national security eligibility, any negative inference gleaned from these state-compliant purchases is unsustainable.

Applicant also challenges the finding that her husband and other family members continue to use marijuana in her presence, which raises issues of both factual and legal error. While Applicant acknowledged that various family members used marijuana with or around her *prior to* her cessation,⁵ there is no evidence in the record that anyone, including Applicant’s husband, has used marijuana in her presence *after* January 2023.⁶ The Judge’s contrary finding is unsustainable, and his reliance on it and the previous finding to conclude that no mitigating conditions fully applied was arbitrary and capricious.

Further with respect to Applicant’s continued association with marijuana users, the Appeal Board recently assessed that “a commonsense understanding of the evolving landscape of marijuana law and policy in the United States informs us that simple recreational marijuana use

⁴ AG ¶¶ 26(a): the behavior happened so long ago, was so infrequent, or happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment; 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.

⁵ The record reflects that Applicant’s mother used marijuana in the home when Applicant was younger, and Applicant previously used marijuana with her mother, sister, cousin, father-in-law, and husband. GE 2 at 7.

⁶ The record reflects the following regarding Applicant’s association with marijuana users after January 2023: Applicant’s husband used marijuana daily in their home until at least October 2023. GE 2 at 7. By July 2024, Applicant asserted that her husband continued to use marijuana, but not in their home, and affirmatively averred that he did not use marijuana in her presence. *Id.* at 16. As of the January 2025 hearing, his use was reduced to several times per week. Tr. at 39. Also at hearing, in response to the Government’s question about how often her mother currently uses marijuana in her presence, Applicant responded, “Not at all,” and she also explained that her mother quit using marijuana entirely five or six months prior. *Id.* at 38.

no longer holds the same severe negative implications as many other illegal drugs,” which is “especially . . . true when the use occurs permissibly under state law.” ISCR Case No. 24-00914 at 3 (App. Bd. April 9, 2025) (citations omitted).⁷ As a result, we held that “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.” *Id.* at 6.

Here, Applicant resides in a state where marijuana possession was decriminalized before she began using it as a teenager and recreational adult purchase, possession, and consumption of marijuana have been permissible under state law since 2017.⁸ It is therefore unrealistic to demand that she disassociate from all recreational marijuana users, particularly family members, to establish her commitment to abstinence. To the contrary, the evidence supports Applicant’s sustained commitment to marijuana abstinence, which the Judge acknowledged by finding that she “has ceased using marijuana and is committed to abandoning all involvement with the drug in the future” and “is credited with remaining abstinent from marijuana use herself over the past 24 months and exhibits no visible signs or indications of succumbing to any risks or pressures she might encounter to return to illegal drug use in the foreseeable future.” Decision at 8. This commitment,⁹ along with the legal status of marijuana where she resides and the fact that she never used the drug while granted national security eligibility or with awareness that it was illegal under federal law, together merit full application of AG ¶¶ 26(a) and 26(b).

Conclusion

The Judge’s adverse decision in this matter was arbitrary and capricious in that it failed to consider relevant factors and important aspects of the case, and it offers an explanation for the decision that runs contrary to the record evidence. It is not sustainable. Based on the record before us, Applicant’s conduct is mitigated by the circumstances surrounding her prior marijuana use and her demonstrated commitment to abstain from use in the future. *See* ISCR Case No. 22-01002 at 4 (App. Bd. Sep. 26, 2024) (Reversal is appropriate when the Board concludes from the record that a contrary formal finding or overall grant or denial of security clearance eligibility is the clear outcome.).

⁷ Notably, the Appeal Board issued this decision after the Judge issued his decision in the instant case.

⁸ Recreational marijuana is legal in Applicant’s residential state. *See, e.g.*, GE 2 at 16; Tr. at 35. Her residential state defelonized marijuana possession effective October 2001, and legalized the purchase, possession, and consumption of adult use marijuana by initiated state statute, effective January 2017. *See* NEV. REV. STAT. § 453.336 (2001); Regulation and Taxation of Marijuana Act, NEV. REV. STAT. § 453D.020 (2017), *repealed by* NEV. REV. STAT. § 678D.200 (2020, as amended).

⁹ Applicant’s commitment to abstain is bolstered by her assertion that, faced with marijuana use in her presence, she “would leave the premises and not partake.” GE 2 at 16.

Order

The decision in ISCR Case No. 24-01005 is **REVERSED**.

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