



Date: May 27, 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.

On February 19, 2025, the Appeal Board determined that the Judge erred in failing to address the distinctions between Applicant's marijuana use and use of other substances, offering inconsistent or incomplete analyses of the Guideline H mitigating conditions, and rendering an unsustainable Guideline E disqualification analysis. We remanded the case for correction of the foregoing errors. On February 27, 2025, the Judge again denied Applicant's request for security clearance eligibility and Applicant appealed that decision.

Now on its second appeal, Applicant argues that the Judge's adverse remand decision is arbitrary, capricious, or contrary to law because it "failed to address any of the Appeal Board's concerns," and instead "engaged in a proverbial 'double-down' of his original decision that was found to be unsustainable." Appeal Brief at 5. This argument has merit.

Discussion

Under the Directive, the Board is authorized to review the determinations of Administrative Judges. Directive ¶ E3.1.32. The Board's rulings are the law of the case and binding on the judge to whom the case is remanded. DISCR OSD Case No. 87-2107, 1992 WL 388439 at *2 (App. Bd. Sep. 29, 1992). A judge has no authority or discretion to ignore, disregard, or try to evade the rulings of this Board, regardless of how much the judge may personally disagree with those rulings. *Id.* Moreover, the right to due process is not limited to receiving it at the hearing level, but also includes the parties' right to receive due process at the appeal level, including the right not to be deprived of the benefit of legal rulings won on appeal once a case has been remanded.

In his Remand Decision, after first acknowledging the Board's instruction under Guideline H to "consider[] the differences between Applicant's state-compliant use of marijuana and her use of other illegal drugs," the Judge proceeded to explain why he "disagree[d] with this analysis." Remand Decision at 6. Pursuant to the Directive, the Judge was required to "make a new clearance decision in the case after correcting the error(s) identified by the Appeal Board." Directive ¶ E3.1.35. Instead of correcting the identified errors through a new, independent decision on remand, the Judge attempted to refute the majority opinion. This was in error. "Neither the Directive, nor any general principle of law, gives []ISCR Administrative Judges any authority to review the decisions of the Board." DISCR OSD Case No. 87-2107 at *2.

The Board also rejected the Judge's Guideline E disqualification analysis, which relied exclusively on application of AG ¶ 16(e) to address Applicant's drug use. AG ¶ 16(e) considers: 1) conduct or 2) concealment of conduct, when either "creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group," and then illustrates the concern through examples of conduct that could invoke its application. The Judge found AG ¶ 16(e)(1) – "engaging in activities which, *if known*, could affect the person's personal, professional, or community standing" – relevant here. (Emphasis added).

In his original Decision, the Judge simply restated the SOR allegations as his basis for applying AG ¶ 16(e)(1). Noting that Applicant's drug use history was known to her family, friends, and employer, the Board questioned how the known conduct renders her vulnerable to interference by foreign intelligence entities or anyone else. On remand, the Judge opined that he found the Board's statement "baffling," and concluded that his application of mitigating condition AG ¶ 17(e) reflects that he was not "concerned about this information being in the hands foreign intelligence operatives." Remand Decision at 8.

The Judge's explanation for his mitigation analysis missed the Board's point. Before moving to application of mitigating condition AG ¶ 17(e), the Judge needed to articulate his rationale for applying disqualifying condition AG ¶ 16(e) – i.e., how Applicant's known and acknowledged drug use history could affect her personal, professional, or community standing and

open the door for the disqualifying vulnerability to outside influence. The Judge did not explain this in his original Decision and failed to cure the error on remand.

Conclusion

Applicant has met her burden of demonstrating errors that warrant remand. In light of those errors, no useful purpose would be served by remanding the case to the same Administrative Judge. Accordingly, the Board remands the case with the recommendation that it be reassigned to another judge for further processing.

When there is a remand to a different Administrative Judge, and credibility is an issue in the case, a new hearing may be necessary. *See* DISCR Case No. 90-0279, 1993 WL 545025 at *5 (App. Bd. Sep. 22, 1993). Because Applicant's credibility may be important to the issues in this case, the judge assigned on remand should ascertain if the parties consent to have a determination made on the basis of the existing record. If both parties consent to such a determination, then the judge should render a new decision without holding a new hearing. If either party declines to consent to having the case decided on the basis of the existing record, then the judge should hold a new hearing and issue a decision that complies with all of the relevant provisions of the Directive.

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

Signed: Jennifer I. Goldstein

Jennifer I. Goldstein
Administrative Judge
Member, Appeal Board