

**DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
POST OFFICE BOX 3656
ARLINGTON, VIRGINIA 22203
(703) 696-4759**

During his initial security clearance investigation, which began with submission of his security clearance application (SCA) in March 2022, Applicant disclosed information regarding his drug use history, including that he used marijuana with varying frequency from 1993 to March 2022, and that he cultivated marijuana from September 2021 to March 2022. Under Guideline H, the SOR alleged concerns based on the foregoing history, which Applicant admitted with further explanation. The Judge found against Applicant on all concerns.

Applicant started smoking marijuana at the age of 12, after experiencing a traumatic event. He occasionally used marijuana with friends until he was discovered with marijuana at his middle school in State 1 (S1). His possession of marijuana led to his suspension from school, a guilty plea in juvenile court, and supervised probation with random drug urinalysis tests for two years. Applicant did not use marijuana during his two-year probation period.

Applicant resumed marijuana use during his sophomore year of high school, about a year after the end of his supervised probation. In 1997, his parents transferred him to a small, private school. At the request of his parents, his new school performed random drug urinalysis tests and required him to participate in drug education classes. Applicant said he stopped using marijuana at the new school and became more focused. Because of this period of abstinence, Applicant's overall marijuana use during high school was minimal.

Applicant deferred entry into college for one year. During his "gap year," he worked full-time as a kennel manager and surgical assistant for a veterinary clinic. He said he probably used marijuana during the period, but that it was not a significant part of his life at that time.

Applicant enrolled in college in August 2000. It was in State 2, which decriminalized marijuana use in the 1970s. His use of marijuana varied during college from a few times a week to a few times a month from 2000 to about 2005. He said he did not recall using marijuana from late 2004 to about 2009. However, he admitted experimenting with a wide range of drugs, including psychedelic drugs and cocaine through 2007.

In late 2009, Applicant was diagnosed with "hyperthyroidism" or Graves' disease and was treated for the condition using radiation therapy. He said he used marijuana daily during this period to help with nausea and to increase his appetite. He disclosed his awareness that using marijuana was illegal at the federal and state levels, but he was more concerned about surviving the disease. He said he stopped using marijuana a few weeks after his treatment ended in 2010. He did not enjoy using marijuana anymore because he started to feel paranoid after using it.

Applicant used marijuana on social occasions between 2010 and 2015. In 2015, he increased his marijuana use after State 3 (S3) passed legislation allowing the recreational use of marijuana. Applicant continued to use marijuana while taking his prescribed opioid medication until he experienced a heart attack in the spring of 2018 at the age of 37. His heart attack caused him to prioritize his health over his work in the music industry. Applicant decided to stop using opioid medications for good in December 2019. He found a new doctor (Dr. H), and she diagnosed him with opioid use disorder from the opioid drugs prescribed to him since 2004 to treat pain related to a "tarsal condition." Dr. H prescribed him Suboxone at a dose of 16 milligrams (mg) per day, to start the process of tapering his use and dependence on opioids. Over time, she was able to

reduce his daily Suboxone dosage from 16 mg to about 4 mg. He currently takes about 4 mg per day and visits with Dr. H monthly.

In January 2020, Applicant resumed using marijuana. He used it daily to manage his pain from his tarsal condition in lieu of opioids. Before the law changed in S1, he purchased marijuana from dispensaries in S3, traveled with it to his residence in S1, and used it to self-medicate. He said he believed that S1 had decriminalized marijuana possession for personal use by limiting penalties for possession to a very small citation, if any citation was written at all.

In May 2020, Applicant obtained a medical marijuana card issued through a medical marijuana pharmacist and healthcare advisor in S1. He was prescribed 3.5 grams of medical marijuana for daily use. In July 2021, S1 changed its laws to permit the recreational use of marijuana. Applicant said S1 also permitted residents to grow and cultivate marijuana in a personal garden, and that he started his own personal marijuana garden in September 2021. Applicant disclosed his medical marijuana use to the defense contractor before he started working with the team in June 2020. The defense contractor's chief executive officer (CEO), who also worked as the facility security officer, confirmed his statement. The CEO determined Applicant's use of medical marijuana did not pose a security risk for the organization because he did not need a security clearance to perform the job at that time. Applicant provided a copy of his medical marijuana card to the company and remained subject to the company's drug urinalysis testing program. Before completing his March 2022 SCA, Applicant said the defense contractor informed him that his medical marijuana use would not prohibit him from being eligible for a security clearance. In his October 2022 response to interrogatories, Applicant said he answered "yes" to the question of whether he intended to continue using medical marijuana in the future because he did not know or appreciate that using medical marijuana was disqualifying for national security eligibility.

Applicant said he responded to questions in the SCA and his background interview in an open and honest manner, and that he was surprised to receive the November 18, 2022, SOR for using and cultivating medical marijuana. After receiving the SOR and discussing what it meant with a family member and lawyer, Applicant said he understood for the first time that his use and cultivation of medical marijuana was disqualifying for national security eligibility. He decided to stop, and said he would have done so earlier had he known that using medical marijuana is disqualifying for national security eligibility. In January 2023, Applicant consulted both Dr. H and his marijuana pharmacist before stopping his medical marijuana use. He was not diagnosed with marijuana use disorder. His medical marijuana pharmacist provided guidance on tapering and safely stopping marijuana use in about a two-week period. He declined his pharmacist's suggestion that he manage his symptoms by switching to cannabidiol during and after tapering off medical marijuana. About one month after receiving the SOR, he destroyed his marijuana cultivation garden. He allowed his medical marijuana certificate to expire and informed his friends and acquaintances that he stopped using medical marijuana and could no longer be around it. He last used medical marijuana on February 1, 2023.

In March 2023, he signed a statement of intent to abstain from all illegal drug involvement and substance misuse, with an understanding that any future involvement would be grounds for

revocation of national security eligibility. He has voluntarily taken and passed drug tests measuring the presence of synthetic cannabinoid taken in May 2023 and July and August 2024.

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 affirm the Judge's decision.

Guideline H: First Allegation

Applicant asserts that the Judge's adverse finding under the first allegation – that he used marijuana with varying frequency from 1993 to at least March 2022 – was arbitrary and capricious for three reasons. First, Applicant asserts that the Judge failed to consider the Security Executive Agent's *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*], which notes, "particularly in response to the increase in the number of state and local governments legalizing or decriminalizing uses of marijuana," that "prior recreational marijuana use by an individual *may* be relevant to adjudications *but not determinative*." *Clarifying Guidance* at 1-2. The *Clarifying Guidance*

emphasizes the importance of the Whole-Person Concept¹ in marijuana cases in weighing the “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.” Here, the Judge satisfied the *Clarifying Guidance*’s directive by engaging in a robust and comprehensive Whole-Person analysis and we are unpersuaded by Applicant’s argument to the contrary.

In Applicant’s brief, he argues that four specific factors should have been explicitly weighed in light of the Whole-Person Concept, *Clarifying Guidance*, and mitigating conditions: Applicant’s most recent marijuana use was for medicinal purposes and was in compliance with his state requirements; Applicant was previously in the music industry, where marijuana is a cultural norm; he did not plan to work for the government until approached in 2020; and he used marijuana in jurisdictions that decriminalized the drug. Applicant’s second argument asserts that the Judge failed to consider the frequency of Applicant’s marijuana use and surrounding circumstances to include long periods of abstinence during his 29 years of marijuana use.

When applying the Whole-Person Concept, the judge should examine the “nature, extent, and seriousness” among the factors to weigh in assessing the relevance of any disqualifying and mitigating conduct. To that end, the evolving landscape of marijuana law in the United States is one factor that may be considered by the judge when relevant. Here, the Judge explicitly considered Applicant’s mistaken “belief that he could continue using medical marijuana as prescribed by his pharmaceutical advisor, consistent with the laws in S1” and that Applicant used marijuana in jurisdictions that decriminalized or legalized it. Decision at 9-10. However, when she looked at the nature of his marijuana use to include recreational use and medicinal use, and the extent of his marijuana use – over 29 years including “periods of time Applicant used and stopped using marijuana, regardless of its illegality” – the Judge determined that the disqualifying concerns were of such significance that they were not mitigated. *Id.* at 10 “Unless a Judge’s weighing of the record evidence is patently absurd, clearly illogical, or obviously unreasonable, the appealing party must present a cogent reason or argument as to how or why the Judge’s weighing of the record evidence is arbitrary, capricious, or contrary to law.” ISCR Case No. 03-05072 at 4 (App. Bd. Jul. 14, 2005). We conclude that the Judge took into consideration all aspects of the record evidence, which is what the Whole-Person analysis and *Clarifying Guidance* require.

Applicant’s third argument asserts that the Judge’s discussion of Applicant’s prescription opioid use was arbitrary and capricious because “it is unclear from the Decision why these facts were relevant beyond general background or whether they were weighed as aggravating or mitigating.” Appeal Brief at 17. The Judge’s inclusion of the prescription opioid use in her analysis was relevant to the circumstances surrounding Applicant’s marijuana use. “It is not arbitrary or capricious for a Judge to consider record evidence to make findings of fact about the circumstances surrounding events that are the focus of SOR allegations.” ISCR Case No. 00-0030 at 4 (App. Bd.

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).

Sep. 20, 2001). The Judge's analysis was consistent with the Whole-Person Concept and not in error.

The remainder of Applicant's arguments amount to a disagreement with the Judge's weighing of the evidence. These arguments fail to demonstrate the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law.

Conclusion

Applicant has not established that the Judge committed harmful error. Our review of the record reflects that the Judge examined the relevant evidence and articulated a satisfactory explanation for the decision, which is sustainable on this record. "The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." AG ¶ 2(b).

Order

The decision in ISCR Case No. 22-01865 is **AFFIRMED**.

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

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

Signed: Jennifer Goldstein
Jennifer Goldstein
Administrative Judge
Member, Appeal Board