DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
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Date: August 28, 2025

In the matter of:	)	
	)	
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	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

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

FOR APPLICANT
Katie Quintana, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On August 15, 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) 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 April 17, 2025, Defense Office of Hearings and Appeals Administrative Judge Erin C. Hogan denied Applicant national security eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Under Guideline H, the SOR alleged that Applicant used marijuana from about March 2022 to about October 2022 while possessing a security clearance and that, in his January 2023 security clearance application (SCA), he expressed an intent to continue using marijuana. In response to the SOR, Applicant admitted the allegations with explanations. On appeal, Applicant argues that the Judge violated his rights under the Fifth Amendment.

Background

Applicant is in his mid-twenties. After graduating from college in 2021, Applicant initially worked as a civilian for the U.S. military and obtained a Secret security clearance for that employment in July 2021. In early 2023, Applicant was hired by his current employer, a federal contractor, and he completed a new SCA in January 2023 in order to obtain a Top Secret clearance.

On his January 2023 SCA, Applicant disclosed that he had taken marijuana edibles about four times between March 2022 and October 2022. In response to specific questions on the SCA, Applicant acknowledged that he used while holding a security clearance and indicated that he intended to use marijuana in the future. Government Exhibit (GE) 1 at 44. In explanation of his intent, Applicant noted, "I intend to move to an area where edibles are legal, so I may intend to continue taking them in the future." *Id*. Applicant's use was illegal in his state of residence.

In his subject interview of March 2023, Applicant stated his regret that he used marijuana, asserted that he had not used more recently, and vowed not to use in the future. Answer to SOR (Answer) at 4. In his November 2023 Answer, Applicant highlighted that he had not used marijuana for over a year and attached a statement of intent to abstain from all substance abuse. *Id*.; Answer, Exhibit C.

At hearing, Applicant testified that he ingested marijuana edibles while at social gatherings with friends, that he did not understand the consequences at the time, and that he was not an avid or habitual user. Applicant explained that he did not understand the difference between state and federal law either when he was using marijuana in 2022 or when he completed the SCA in January 2023. Now aware of the illegality and the security concerns, Applicant stated his intent to never use marijuana in the future.

During cross-examination, the Government asked Applicant about his use since October 2022, the date of his last disclosed incident:

> DEPARTMENT COUNSEL: So you haven't used marijuana since October of 2022. Is that correct?
>
> APPLICANT: I decline to answer that question.
>
> DEPARTMENT COUNSEL: Okay. Have you used any other illegal drugs, aside from marijuana, since October of 2022?
>
> APPLICANT: I also decline to answer that question.

Transcript (Tr.) at 27. Following closing arguments in which the Government referenced Applicant's refusal to answer questions, the Judge addressed Applicant's attorney and highlighted that "throughout the investigation and even during the hearing, the Government expects that applicants will provide full disclosure and truthful answers to their questions." *Id*. at 65. She then allowed Applicant and his attorney an opportunity to confer on the issue, after which his counsel

confirmed that Applicant had "decided to stand by his decision not to answer the question that was posed to him by Government's counsel." *Id*. at 66.

In her mitigation analysis, the Judge considered the applicability of AG ¶¶ 26(a) and 26(b)[1] but concluded that neither fully applied. Specifically, the Judge determined that Applicant's refusal to answer the questions about more recent drug use precluded her from finding that his use "happened so long ago" and "is unlikely to recur," as required under AG ¶ 26(a). Decision at 8. She found that Applicant's failure to answer the questions also raised doubts about whether "he is serious [in] his intentions to refrain from illegal marijuana use." *Id*. The Judge found that AG ¶ 26(b) partially applied, as Applicant acknowledged his illegal drug use and signed a statement of intent to abstain, but she gave this mitigating condition "less weight because he refused to answer the question about whether he used marijuana after October 2022." *Id*. Similarly, in her Whole-Person analysis, the Judge acknowledged Applicant's accomplishments and favorable character references but ultimately concluded that she could not ignore Applicant's refusal to answer questions about more recent drug use, as that refusal raised doubts about his trustworthiness and reliability.

Discussion

On appeal, Applicant contends that the Judge "committed harmful error, violated the law, and violated his constitutional rights in compelling his testimony and using his refusal to incriminate himself, without immunity, to revoke his clearance, thus impacting his employment and livelihood." Appeal Brief at 6. Relying primarily on *National Federation of Federal Employees v. Greenberg*, 983 F.2d 286 (D.C. Cir. 1993), Applicant argues that he satisfied the multi-pronged test established therein in that: 1) he invoked the privilege against self-incrimination; 2) he did so in the face of "real and appreciable" risk of criminal self-incrimination; and 3) he was "compelled" to testify against himself. We are not persuaded.

We must first address the context and history of the case relied upon, as even a cursory examination confirms that the case provides no foundation for Applicant's argument. *Greenberg* arose in the early 1990s when DoD began reinvestigating civilian employees who held security clearances at the Secret level and requested the employees complete DD Forms 398 or 398-2 (DD Forms), personnel security questionnaires. The DD Forms informed each employee that "failure to furnish the requested information may result in our being unable to complete your investigation, which could result in your not being considered for clearance, access, or assignment to sensitive duties." Individual DoD employees and unions representing federal workers brought suit challenging, on various grounds, those portions of the DD Forms that inquired into employees' financial, criminal, mental health, alcohol, and drug histories. The plaintiffs challenged the drug use question — which asked for their lifetime drug history — on the ground that it violated the Fifth Amendment privilege against self-incrimination. The district court granted a preliminary injunction against the administration of the questionnaire, based in part on the possibly incriminating nature of responses to the drug question and the DD Forms' general warning that

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

information employees provided may be turned over to federal, state, or local law enforcement authorities if it indicated a violation of law. On appeal, the D.C. Circuit reversed, highlighting in pertinent part that none of the plaintiffs had invoked the privilege and that the plaintiffs were unlikely to succeed in their facial attack, as multiple scenarios were possible in which no self-incrimination risks would arise (*e.g.*, cases in which drug use was outside the statute of limitations, or the risk of self-incrimination was improbable, or DoD responded to an employee's assertion of the privilege by offering use immunity).

Following reversal, the plaintiffs amended their complaint, again challenging the same questions on various constitutional grounds, and both parties moved for summary judgment. While the action was pending, the DD Forms were superseded by Standard Form (SF) 86 effective January 1, 1996. Notably, the SF 86 provided that answers to the drug use question would not be used in subsequent criminal proceedings, and it limited inquiries regarding financial history, drug use, and mental health to the most recent seven years. In granting summary judgment for the plaintiffs, the district court held, in pertinent part, the illegal drug use question on the SF 86 would not violate the Fifth Amendment because it contained the equivalent of a use immunity statement. Because the DD Forms did not contain such a statement, the district court held that their use was unconstitutional. The Government appealed, and the D.C. Circuit consolidated the DoD plaintiffs' case with a challenge brought by HUD employees as the two cases presented the same issues of constitutional law.

In reversing the district court's grant of summary judgment for the plaintiffs, the Court held that the DD FORMs did not violate the employees' Fifth Amendment right against self-incrimination, explaining—

> The district court held that because the DD Forms do not guarantee that answers to the substance abuse question would not be used against the employee in subsequent criminal proceedings, the questions were unconstitutional under the Fifth Amendment. We disagree. As we held in *Greenberg*, the privilege against self-incrimination must be invoked. 983 F.2d at 291. "The Fifth Amendment does not forbid the government from asking questions and it does not forbid the government from taking answers." *Id*. Instead, the Fifth Amendment prohibits use of that information in a subsequent criminal proceeding. There is no indication in the record that the employees have a reasonable basis for a fear of criminal prosecution based on their answers to the DD Forms.

Am. Fed'n of Gov't Emps. v. HUD, 118 F.3d 786, 794-95 (D.C. Cir. 1997). To summarize, in the case relied upon by Applicant, the Court ultimately found that the drug use questions at issue—which asked about *lifetime* drug use and offered *no* use immunity—did not implicate the Fifth Amendment because 1) the employees did not invoke; and 2) they had no reasonable basis for a fear of criminal prosecution based on their answers.

In light of that history, we turn to Applicant's case and some of the many reasons why his Fifth Amendment challenge fails. First, and most importantly, Section 23 of his SCA (an SF 86), which inquires into illegal drug use, clearly advises that "neither your truthful responses nor information derived from your responses to this section will be used as evidence against you in a

subsequent criminal proceeding." GE 1 at 44. That same assurance regarding the drug use section is repeated in the general instructions for completing the SCA. *Id.* at 2. That language, which Applicant's counsel fails to acknowledge or address in her brief, serves as a pre-emptive grant of use immunity on Applicant's derivative drug use disclosures during the adjudication of his national security eligibility. The Court in *Am. Fed'n of Gov't Emps.* found no Fifth Amendment violation even absent use immunity language. Where such language has been added, as here, clearly no risk of criminal prosecution arises from questions about drug use or truthful answers thereto.

Second, Applicant did not invoke the privilege as required. Represented by counsel at hearing, Applicant apparently made the purposeful decision not to assert the privilege but instead to respond to the Government's question by stating "I decline to answer that question." Tr. at 27. That does not suffice. As the Government highlights in its Reply Brief, the requirement to expressly invoke serves multiple judicial purposes. Reply Brief at 10 (citing *Salinas vs. Texas*, 570 U.S. 178, 183-84 (2013)). Among them, Applicant's failure to invoke denied the Government clear notice of his claim of privilege, which they would have opposed at the hearing itself. As a general proposition, the rule also ensures a contemporaneous record of a party's refusal to answer upon which a judge can rule. In the context of this case, had Applicant forthrightly invoked the Fifth Amendment, the Judge would have had the opportunity to remind him of the language in Section 23 and to assure him that he had no valid self-incrimination concerns.

Applicant cites to *Salinas* for the proposition that he was not required to invoke the Fifth Amendment to now enjoy its protection. His reliance on *Salinas* is as misplaced as his reliance on *Greenberg.* In *Salinas,* the Court highlighted various scenarios in which an individual need not expressly invoke the privilege because some form of official compulsion denies him a free choice to admit, to deny, or to refuse to answer. The Court went on to find, however, that "[p]etitioner cannot benefit from that principle because it is undisputed that his interview with police was **voluntary**," which "places petitioner's situation outside the scope of . . . cases in which we have held that various forms of governmental coercion prevented defendants from voluntarily invoking the privilege." *Salinas,* 570 U.S. at 185 (emphasis added). This brings us to the third reason why Applicant's challenge fails—Applicant requested this hearing, rather than electing a resolution on the written record, and his attendance was indisputably voluntary. As the Court found in *Salinas,* it would have been "a simple matter" for Applicant to say that he was not answering the Government's question on Fifth Amendment grounds. *Id.* at 186. Applicant's failure to invoke the privilege in this voluntary setting is fatal to his claim.[2]

Finally, despite Applicant's claims of a fear of prosecution, there is nothing in this record that indicates he had a reasonable basis for such a fear. In his SCA, Applicant disclosed four uses of marijuana edibles between March and October 2022. In his November 2023 Answer, Applicant asserted that he had not used marijuana for over a year and attached a statement of intent to abstain. At hearing, he testified that he ingested the edibles while at social gatherings with friends and that he was not an avid or habitual user. In the context of this record, the risk of self-incrimination is not "real and appreciable" but is instead "so improbable that no reasonable man would suffer it to

[2] As a separate and fundamental issue, Applicant was clearly not entitled to take the stand and testify on the issue of his drug use and then refuse to answer questions on cross-examination directly related to his testimony. *Brown v. United States*, 356 U.S. 148, 155-156 (1958).

influence his conduct." *Greenberg*, 983 F.2d at 293 (citation omitted.). Neither the Government's nor the Judge's questions to Applicant about his drug use can possibly be considered unconstitutional when Applicant did not *reasonably* believe that his answer would subject him to criminal liability.

One last note. In Applicant's brief, he cites briefly[3] to the Procedures provision of the Directive, which reads in pertinent part:

> The applicant may elect on constitutional or other grounds not to comply; but refusal or failure to furnish or authorize the providing of relevant and material information or otherwise cooperate at, any stage in the investigation or adjudicative process may prevent the DOHA from making a clearance decision. If an applicant fails or refuses to:
>
> . . .
>
> Follow directions of an Administrative Judge or the Appeal Board; then the Director, DOHA, or designee, may revoke any security clearance held by the applicant and discontinue case processing. Requests for resumption of case processing and reinstatement of a security clearance may be approved by the Director, DOHA, only upon a showing of good cause.

Directive ¶¶ 6.2, 6.2.3. From his brief, we are unclear whether Applicant is challenging the constitutionality of this portion of the Directive in addition to challenging the Judge's disposition of his case. Assuming arguendo that is his purpose, it is well-established that the Appeal Board has no jurisdiction over claims regarding the legality or constitutionality of the Directive,[4] and we decline to entertain this ambiguous challenge as well outside our lane of authority.

Applicant has not established that the Judge's adverse decision was arbitrary, capricious, or contrary to law. Our review of the record confirms 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.'" *Dep't of 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).

[3] Appeal Brief at 2, 10.

[4] *E.g.*, ISCR Case No. 99-0457 at 4 (App. Bd. Jan. 3, 2001).

Order

The decision in ISCR Case No. 23-01403 is **AFFIRMED**.

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