

KEYWORD: Guideline H

DIGEST: Once Applicant admitted the SOR allegations, none of the alleged facts remained controverted and the Government no longer had the burden of production. At that point, she became responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate the resulting security concerns. Furthermore, in a signed statement, Applicant admitted she knowingly used another individual's medical marijuana. Applicant's security specialist position and her security responsibilities were appropriate factors for the Judge to consider in determining her security clearance eligibility in that they bear upon her knowledge of the security significance of her conduct. Adverse decision affirmed.

CASENO: 18-00896.a1

DATE: 03/01/2019

DATE: March 1, 2019

In Re:))	
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))	ISCR Case No. 18-00896
Applicant for Security Clearance))	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Ryan C. Nerney, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On April 19, 2018, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline H (Drug Involvement and Substance Misuse) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On October 26, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Darlene D. Lokey Anderson denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Government established that Applicant used marijuana and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge’s Findings of Fact and Analysis

Applicant is 40 years old, divorced, and has two children. She has worked in the industrial security field for the past 16 years. She also currently serves in the Army National Guard. She admitted using marijuana while holding a security clearance from about 2014 to 2016. She resigned from a Navy civilian security specialist position when she learned of a proposal to remove her from that position due to complaints about her marijuana use. She was well aware of the rules and regulation governing security clearances, including the zero-tolerance policy for drug abuse. Her current employer is aware of her past illegal drug use. She attributed her drug involvement to her divorce in 2014 and loss of contact with her children. Later that year, she started another relationship with an individual who had a medical marijuana card and access to marijuana oils and similar products. This friend introduced her to marijuana to help her relax and sleep. Applicant used it about five times. The last use occurring in 2016. When she terminated that relationship, the ex-friend submitted an IG complaint detailing Applicant’s use of marijuana oils. Applicant no longer associates with anyone who uses illegal drugs. She has signed a statement of intent to abstain from illegal drugs. In 2016, 2017, and 2018, she underwent drug tests that were all negative. A licenced professional evaluated her and concluded she demonstrated no evidence of an alcohol or substance use disorder.

Applicant willingly disregarded the law. She made poor decisions that raise questions about whether she will properly protect national secrets. While she is remorseful for her misconduct, insufficient time has passed to establish her misconduct will not be repeated. She has not mitigated the alleged security concerns.

Discussion

Applicant contends the Government never established that she actually used marijuana. She argues she used CBD oil (Cannabidiol) in which the presence of THC (Tetrahydrocannabinol) was uncertain. This argument is not persuasive. In responding to the two SOR allegations, Applicant stated:

I admit that I used marijuana with a varying frequency in 2014 through at least 2016. I would like to clarify that I only swallowed the marijuana oil a total of five times or less.

I admit my use of an illegal drug as set forth in subparagraph 1.a occurred after I had been granted a Department of Defense Security Clearance in November 2012. I am very regretful of my actions to use the marijuana oil, this was a lapse in judgment that is very embarrassing and out of character. Below I have addressed the mitigating factors as suggested by [a DoD employee].¹

Once Applicant admitted the SOR allegations, none of the alleged facts remained controverted and the Government no longer had the burden of production. At that point, she became responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate the resulting security concerns. Directive ¶¶ E3.1.14 and E3.1.15. Furthermore, in another signed statement,

¹ Applicant's SOR Response is dated April 30, 2018. In her appeal brief, Applicant claims she stated in her SOR Response and in her hearing testimony that she was unsure CBD oil contained THC. We are unable to find that statement in her SOR Response. In discussing the mitigating conditions, her SOR Response does indicate, "I had only known that the CBD oil was said to not make you feel high and it was NOT a psychoactive." Such a statement, however, does not amount to a renunciation or repudiation of her SOR admissions. Additionally, while she testified equivocally about whether she knew use of CBD oil was legal or not, she never requested that her SOR admissions be retracted. Tr. at 64-66 and 84-93. For example, she testified as follows:

[Applicant]: . . . And I definitely understand that as part of our Adjudicative Guidelines, you know, I definitely broke a rule. And I'm very regretful for that.

[Applicant's Counsel]: Okay, so the Statement of Reasons -- I'll go into that -- says that -- "You used marijuana with varying frequency from about 2014 to 2016, all while holding a Department of Defense Security Clearance." Is that accurate?

[Applicant]: Yes.

[Applicant's Counsel]: Okay. Now, was it -- how did you use the marijuana? Was it smoking or was it edibles? What was it?

[Applicant]: It was through the cannabis oils -- CBD oils -- cannabis oil. I was, honestly, at that time, unsure whether it was illegal or not. And it's been a weird phase where it's legal or not legal. I see it sold over the counter in different kinds of health and holistic foods. I was honestly unsure. It still does not take away from it being a mistake. But it was through the oil form. [Tr. at 65.]

Applicant also testified:

[Department Counsel]: Okay. Is it -- is it the truth that the only time, in your belief that you used what you believe to be a controlled substance, was in the form of CBD oil?

[Applicant]: Yes. [Tr. at 83.]

Applicant admitted she knowingly used another individual's medical marijuana.² From our review of the record, the Judge's material findings about Applicant's marijuana use were based upon substantial evidence, *i.e.*, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." Directive ¶ E3.1.32.1. *See, e.g.*, ISCR Case No. 16-04094 at 2 (App. Bd. Apr. 20, 2018).

Applicant also contends that the Judge applied an erroneous standard. She argues the Judge applied a higher standard to Applicant than other individuals when she stated: "As a security specialist, Applicant is not only required to follow all security rules and regulations, but is required to ensure that other employees are equally as diligent." Appeal Brief at 11-12, citing from Decision at 6. This argument lacks merit because it is based on an incorrect premise. The quoted sentence was not used by the Judge as a "standard" for determining Applicant's security clearance eligibility,³ instead it was merely a conclusion she reached based upon the record evidence. Under the adjudicative guidelines, a Judge is tasked to consider, among other matters, "the nature, extent, and seriousness of the conduct" and "the circumstances surrounding the conduct, to include knowledgeable participation." Directive, Encl. 2, App. A ¶ 2(d)(1) and (2). Applicant's security specialist position and her security responsibilities were appropriate factors for the Judge to consider in determining her security clearance eligibility in that they bear upon her knowledge of the security significance of her conduct.

Applicant further contends the Judge did not consider all of the evidence, mis-weighted the evidence, and did not properly apply the mitigating conditions and whole-person concept. In her arguments, she emphasizes, for example, the amount of time that has passed since her last alleged drug use, her ceasing to associate with anyone who uses illegal drugs, and her submission of a letter of intent with automatic revocation of her security clearance for any further illegal drug use. Applicant's arguments, however, are neither sufficient to rebut the presumption that the Judge considered all of the evidence in the record nor enough to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 17-02488 at 3-4 (App. Bd. Aug. 30, 2018). We give due consideration to the Hearing Office case that Applicant has cited, but it is neither binding precedent on the Appeal Board nor sufficient to undermine the Judge's decision. *Id.* Additionally, the Judge complied with the requirements of the

² In Government Exhibit 4, Applicant stated:

With these medical issues such as back pain, [Applicant's friend] was approved for a medical marijuana card. [The friend] began to use her prescriptions on a regular basis. Her prescriptions consisted of marijuana in the plant form, and in the form of an oil. I did not completely understand the contents in the oil or the ratio of THC in it. The only thing I knew about was that it was also said to help with anxiety. I was not sleeping at night, and having serious anxiety. . . . I have never been exposed to marijuana before in this manner except while I was with [the friend]. Between the years of 2014 and 2016 I tried the medical marijuana that [the friend] had approximately five times.

³ The Decision reflects the Judge correctly applied the "clearly consistent with national interest" standard to determine Applicant's security clearance eligibility. *See*, Directive ¶ 2.3 and Encl. 2, App. A ¶ 2(c) as well as Decision at 7.

Directive in her whole-person analysis by considering the totality of the evidence in reaching her decision.

The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. An applicant's misuse of drugs while knowing such conduct was incompatible with security clearance eligibility raises questions about his or her judgment and reliability. *See, e.g.*, ISCR Case No. 16-03460 at4 (App. Bd. May 24, 2018). The decision 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). *See also* Directive, Encl. 2, App. A ¶ 2(b): "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

Order

The Decision is **AFFIRMED**.

Signed: Michael Ra'anan
Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: James E. Moody
James E Moody
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board