

Date: April 18, 2023

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Applicant for Security Clearance)
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ISCR Case No. 22-00657

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro Se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On June 1, 2022, 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) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 21, 2023, after the close of the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Richard A. Cefola denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30. Department Counsel cross-appealed pursuant to Directive ¶ E3.1.28.

Under Guideline H, the SOR alleged and Applicant admitted that she used marijuana with varying frequency from 2008 to March 2021, including after being granted access to classified information in August 2018. The SOR further alleged under Guideline E that Applicant deliberately failed to disclose the foregoing marijuana use on her 2017 and 2021 security clearance applications (SCAs) and failed to disclose her use while possessing a security clearance on the latter SCA. In her Response to the SOR, Applicant denied that her omissions were intentional. The Judge found in favor of Applicant with respect to the Guideline H allegations, but against her on the Guideline E allegations.

On appeal, Applicant argues that the Judge failed to properly apply the Guideline E mitigating conditions and whole-person analysis. In its cross-appeal, the Government argues that the Judge's application of the Guideline H mitigating conditions was arbitrary, capricious, and not supported by the record evidence. For the reasons stated below, we affirm the Judge's ultimate adverse decision.

Discussion

Applicant is in her early 30s. She works for a Defense contractor and has held a security clearance since August 2018. In completing her 2017 SCA, Applicant answered "No" to the question seeking disclosure of any drug use in the prior seven years. Decision at 3. During the corresponding interview in 2018, Applicant eventually disclosed that she had "arguably" used marijuana illegally but averred that she did not intend to use the drug again in the future. Government Exhibit (GE) 3 at 14. When pressed regarding her use of the word "arguably" to describe the illegal drug use, Applicant explained that marijuana use was legal in many states and "things have a time and place and laws change." *Id.* She described her use as recreational, while "with friends hanging out watching television or while on hikes," and acknowledged that she omitted the information from her 2017 SCA because she "[p]erceived this question to be insignificant." *Id.*

Applicant completed a new SCA in March 2021, wherein she again answered "No" to the question regarding drug use in the prior seven years and also denied any illegal drug use while holding a security clearance. Decision at 2. During her subject interview later in March 2021, however, Applicant disclosed that she had continued to use marijuana, including into the current month during a hike on a family trip. She explained that she had not disclosed the information in her SCA three weeks earlier because it was discussed during her prior clearance investigation and because she did not realize that marijuana use was prohibited because she resided in California at the time. *Id.* Applicant asserted that she "rarely consumed [marijuana] for recreational purposes," but it was usually for "relief from intense menstrual cramps." *Id.*

Applicant's Appeal: Guideline E

The Judge found Applicant's responses to all three of the SCA questions to be willful falsifications and concluded that none of the relevant Guideline E mitigating conditions applied. Decision at 2, 6. On appeal, Applicant contends that the Judge erred by not properly applying the mitigating conditions and Whole-Person Concept.

Applicant's arguments on appeal amount to a disagreement with the Judge's weighing of the evidence, which is not sufficient to demonstrate that the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.,* ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007). For example, Applicant argues that Mitigating Condition 17(a) applies because she "voluntarily self-reported marijuana use during [her] interview immediately upon receiving clarification from the interviewer." Appeal Brief at 1. She also argues that the Judge overlooked factors in applying the Whole-Person Concept, citing professional achievements and recommendation letters that highlight her security awareness, ethics, and

integrity.¹ *Id.* “The security concerns raised by an applicant’s falsifications are not necessarily mitigated by the fact that the information was subsequently disclosed” or “by an applicant’s favorable professional and work record.” ISCR Case No. 02-29952 at 4 (App. Bd. Jul. 26, 2005). Here, the Judge was not swayed by Applicant’s explanation that she “didn’t understand marijuana to be an illegal drug” when completing her 2017 SCA, or that she *still* “didn’t understand . . . that [marijuana use] was illegal and something to report” when she completed her 2021 SCA. Tr. at 30-32. Instead, the Judge concluded that Applicant “falsified her [SCA] in 2017 as to her past drug involvement, and continued this ruse by falsifying her 2021 [SCA].” Decision at 6.

The Appeal Board gives deference to a Judge’s credibility determination (Directive ¶ E3.1.32.1), and we find no reason to disturb the Judge’s unfavorable credibility determination in concluding that Applicant deliberately falsified her SCAs. The Judge’s material Guideline E findings are based upon substantial record evidence or constitute reasonable inferences or conclusions that could be drawn from the evidence.

Applicant has not established that the Judge committed harmful error. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision under Guideline E, and the Judge’s ultimate adverse 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). “Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” Directive, Encl. 2, App. A ¶ 2(b).

Government’s Cross-Appeal: Guideline H

The Judge found that the Government presented sufficient evidence to establish a *prima facie* case under Guideline H. Decision at 4. Thereafter, the burden shifted to Applicant to present evidence of refutation, extenuation, mitigation, or changed circumstances sufficient to overcome the case against her. *See, e.g.*, ISCR Case No. 02-30587 at 5 (App. Bd. Jun. 15, 2005) (citing Directive ¶ E3.1.15). Applicant explained that she used marijuana beginning in 2008 recreationally and to treat menstrual pain, but asserted that she last used the drug in March 2021. At hearing, she provided a Statement of Intent against future illegal drug use and submitted three negative drug test results from June and September 2022. Decision at 2. Relying on mitigating conditions 26(a) and 26(b), the Judge concluded that Applicant’s past marijuana use was “not of present security significance” because the “last marijuana usage was . . . 14 months prior to the issuance of the SOR” and Applicant “provided a signed statement of intent to abstain from future drug involvement and three negative drug tests.” Decision at 5. On cross-appeal, the Government argues that the Judge’s analysis under Guideline H, and specifically his application of the mitigating conditions, did not consider significant contrary evidence. Cross-Appeal Brief at 9-10. We agree.

A Judge’s decision can be found to be arbitrary or capricious if it “fails to examine relevant evidence, fails to articulate a rational connection between the facts found and the choice made, fails to be based on a consideration of relevant factors, involves a clear error of judgment, fails to

¹ Applicant attached to her appeal two documents that were submitted at hearing as Applicant Exhibits K and L, which she believes may have been overlooked by the Judge in his whole-person analysis. Both documents, however, were included in the record below.

consider an important aspect of the case, or is so implausible as to indicate more than a mere difference of opinion.” ISCR Case No. 94-0215 at 4-5 (App. Bd. Apr. 13, 1995) (citing *Motor Vehicle Mfr. Ass’n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983)).

In reaching his favorable decision under Guideline H, the Judge failed to address several concerning and conflicting aspects of the case. For instance, the Judge failed to address how Applicant’s continued marijuana use after completing her initial SCA and while holding a security clearance was mitigated, other than by generally citing the 14 months of abstinence that Applicant claimed prior to the SOR being issued. The Appeal Board has “long held that applicants who use marijuana after having been placed on notice of the security significance of such conduct may be lacking in the judgment and reliability expected of those with access to classified information.” ISCR Case No. 20-01772 at 3 (App. Bd. Sep. 14, 2021). *See also* ISCR Case No. 21-02534 at 4 (App. Bd. Feb. 13, 2023) (“[A]fter applying for a security clearance and being adequately placed on notice that such conduct was inconsistent with holding a security clearance, an applicant who continues to use marijuana demonstrates a disregard for security clearance eligibility standards, and such behavior raises substantial questions about the applicant’s judgment, reliability, and willingness to comply with laws, rules, and regulations.”). Here, Applicant’s marijuana use continued not only after completing her 2017 SCA and being placed on notice that such use was inconsistent with holding a security clearance, but it continued during the intervening four years when she was granted her clearance *and* when she began her 2021 reinvestigation.

Moreover, Applicant’s marijuana use continued despite her previous assertion that she had no intent to use illegal drugs in the future. To that end, the Judge’s analysis also failed to address why he found Applicant’s recent Statement of Intent to abstain from future drug use credible considering the similar broken promise Applicant made during her 2017 investigation. *See, e.g.*, ISCR Case No. 19-02499 at 5 (App. Bd. Jul. 7, 2021) (reversing a favorable Guideline H decision where the Judge “did not provide a meaningful analysis of [the applicant’s drug counseling, religious involvement, current sobriety, and his promise to refrain from drug use in the future] in light of the countervailing evidence . . . , particularly Applicant’s failed prior promises to abstain.”).

Finally, the Judge failed to explain how he was able to find Applicant’s Statement of Intent credible while simultaneously finding her credibility to be in question due to falsifying her 2017 and 2021 SCAs. As already stated, the Board typically gives deference to a Judge’s credibility determination (Directive ¶ E3.1.32.1); however, that deference is not without limits. When the record contains a basis to question an applicant’s credibility, the Judge “should address that aspect of the record explicitly,” explaining why he finds an applicant’s explanation to be trustworthy. ISCR Case No. 07-10158 at 5 (App. Bd. Aug. 28, 2008). Here, the basis to question Applicant’s credibility rested in the Judge’s unfavorable findings under Guideline E. It is well settled that falsification of a security questionnaire constitutes misconduct that casts serious doubt on an applicant’s judgment, reliability, or trustworthiness. *See, e.g.*, ISCR Case No. 01-06852 at 3 (App. Bd. Aug. 21, 2002); ISCR Case No. 02-07555 at 4 (App. Bd. Jul. 19, 2004) (“An applicant who deliberately tries to deceive or mislead the federal government does not demonstrate the high degree of judgment, reliability, and trustworthiness that must be expected of persons granted access to classified information.”). Having found that Applicant deliberately falsified not one, but two security clearance applications, the Judge implicitly opined about Applicant’s lack of

trustworthiness and should have explained his reasons for believing her most recent claim of abstinence and the promises advanced in her Statement of Intent.

Considering the record as a whole, we conclude that the Judge's Guideline H decision is arbitrary and capricious. The Judge's Guideline H analysis fails to articulate a rational connection between the facts found and the choice made, fails to consider important aspects of the case, and runs contrary to the weight of the record evidence. The decision is not sustainable. Accordingly, we affirm the Judge's adverse findings under Guideline E and reverse his favorable findings under Guideline H.

Order

The Judge's adverse security clearance decision is **AFFIRMED**.

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

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

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