

Date: September 21, 2023

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Applicant for Security Clearance)
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ISCR Case No. 22-01661

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Charles S. Elbert, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On November 7, 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) of the National Security Adjudicative Guidelines (AG) of Security Executive Agent Directive 4 (effective June 8, 2017) (SEAD 4) and DoD Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). On July 26, 2023, Defense Office of Hearings and Appeals Administrative Judge Mark Harvey denied Applicant’s security clearance eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

The SOR alleged that Applicant used marijuana and THC-enhanced gummies from about August 1999 until about July 2021, including after being granted access to classified information in September 2012. The Judge found in favor of Applicant with respect to her use after being granted access to classified information, but against her on the general marijuana use that occurred from 1999 to 2021.

On appeal, Applicant argues that the Judge failed to properly apply the Guideline H mitigating conditions, whole-person analysis, and Security Executive Agent 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. 21, 2021)

(SecEA Clarifying Guidance), rendering his adverse decision arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

Judge's Findings of Fact and Analysis

Applicant is in her mid-40s. She has been married for 17 years and has one minor child. She holds bachelor's and master's degrees. Applicant has been employed as a DoD contractor since 2001 with two consecutive employers.

Applicant used marijuana while in college in 1999 but stopped when she was hired as a DoD contractor in 2001. In 2012, Applicant was granted a security clearance; however, soon thereafter she was transferred to a different location and no longer required access to classified information. Applicant subsequently resumed her marijuana use, using the drug several times between 2012 and July 2021. In July 2021, she stopped using marijuana because she was looking for new employment, her daughter was getting older, and she had made certain lifestyle changes. Applicant stopped associating with individuals with whom she previously used marijuana, with the exception of her husband, who continues to use the drug outside of Applicant's presence and their home.

Applicant disclosed the foregoing marijuana use during her 2022 clearance reinvestigation, approximating that she used the drug ten times or less in the preceding seven years. She understood that she was not permitted to use marijuana while holding a security clearance, but she was not sure if her employment qualified as sensitive because "it depends on how the term 'sensitive' is defined." Decision at 3. During her investigation and hearing, she expressed regret for her marijuana use and submitted a signed statement of intent against such use in the future.

The Judge found that Applicant's "decision to repeatedly possess and use marijuana after being granted a security clearance is an indication that she may lack the qualities expected of those with access to national secrets." *Id.* at 7. Unable to find any of the mitigating conditions fully applicable to Applicant's marijuana use from 1999 to July 2021, the Judge concluded that "[m]ore time without marijuana use is necessary to establish [Applicant's] future abstinence from marijuana possession and use." *Id.*

Discussion

On appeal, Applicant first argues that the evidence failed to "establish a nexus between [her very limited recreational marijuana use] and Applicant's loyalty, honesty, integrity, reliability or trustworthiness." Appeal Brief at 3. Contrary to Applicant's argument in this regard, the Directive presumes there is a nexus or rational connection between proven conduct under any of the Guidelines and an applicant's security suitability. *See, e.g.*, DISCR OSD Case No. 92-1106, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

The remainder of Applicant's arguments are, generally, that the Judge erroneously overlooked certain facts that she believes "indisputably show [her] to be a person of loyalty, honesty, discretion, sound judgment, reliability and the ability to protect classified information." Appeal Brief at 14. As discussed further, below, these arguments are unpersuasive.

Marijuana Use While Holding a Security Clearance

Applicant argues that the Judge's decision is contrary to the SecEA Clarifying Guidance because the decision "made Applicant's very limited recreational marijuana use, and primarily a single use in July 2021, the determining factor in denying the security clearance." Appeal Brief at 6. Marijuana use, possession, production, and distribution remain prohibited under Federal law; however, the referenced memorandum was issued "to provide clarifying guidance to authorized adjudicative agencies relating to an individual's involvement with marijuana, particularly in response to the increase in the number of state and local governments legalizing or decriminalizing uses of marijuana." SecEA Clarifying Guidance at 1. The Guidance instructs, among other things, that "prior recreational marijuana use by an individual may be relevant to adjudications but not determinative," and reiterates the requirement that agencies utilize the Whole-Person Concept "to carefully weigh a number of 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." *Id.* at 2. Applicant relies on this guidance to argue that the Judge improperly focused on the recency of her marijuana use in making his adverse decision, and thereby failed to properly weigh that use against mitigating and whole-person factors. Appeal Brief at 7-9.

Applicant's argument focuses entirely on her position that her marijuana use was relatively limited and last occurred almost two years prior to the hearing. By doing so, her argument also overlooks not only that she used a drug that remains illegal under Federal law, but that she did so while holding a security clearance. The security significance of such conduct is well-settled. Indeed, the memorandum upon which Applicant relies acknowledges that significance by referencing the "long-standing federal law and policy prohibiting illegal drug use while occupying a sensitive position or holding a security clearance" as a basis to warn *prospective* national security workforce employees against future marijuana use. SecEA Clarifying Guidance at 2. Moreover, 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.").

Applicant acknowledged both her marijuana use while holding a security clearance and her understanding that marijuana use while holding a security clearance is prohibited. *See* Government Exhibit (GE) 1 at 28-29; GE 2 at 6. Such use was a relevant factor that the Judge could, and did, consider in weighing the evidence. *See* Decision at 7 (Applicant's "decision to repeatedly possess and use marijuana *after being granted a security clearance* is an indication that she may lack the qualities expected of those with access to national secrets.") (emphasis added). Based on our review of the record and decision, the Judge's adverse ruling regarding Applicant's marijuana use is sustainable.

Marijuana Use While Holding a Sensitive Position

The Judge found the evidence did not establish disqualification under AG ¶ 25(f) because Applicant “did not actually have access to classified information, and there is insufficient evidence that she held a ‘sensitive position.’” Decision at 5. AG ¶ 25(f) provides disqualification for “any illegal drug use while granted access to classified information or holding a sensitive position.” Regarding the condition’s first element, access to classified information requires not only eligibility (*i.e.*, a security clearance), but also a signed nondisclosure agreement and a “need to know.” *See* ISCR Case No. 20-03111 at 3 (App. Bd. Aug. 10, 2022) (citing Executive Order 13526 (Dec. 29, 2009), at § 4.1). The Judge held that the record, which was devoid of evidence of the latter two requirements, failed to establish that Applicant had access to classified information at the time of her marijuana use. The Judge’s holding regarding the access element of AG ¶ 25(f) was reasonable.

Turning to the condition’s second element, based on Applicant’s disclosure of using marijuana while holding a security clearance, the Government could have alleged, “You used marijuana while holding a sensitive position, *i.e.*, one in which you held a security clearance” to attempt to establish AG ¶ 25(f). For purposes of national security eligibility determinations, the Directive defines “sensitive position” as:

Any position within or in support of an agency in which the occupant could bring about, by virtue of the nature of the position, a material adverse effect on the national security regardless of whether the occupant has access to classified information, and regardless of whether the occupant is an employee, military service member, or contractor.

SEAD 4, ¶ D.8. This broad language is designed to be inclusive and encompass a wide range of positions, including those that require eligibility for access to classified information (*i.e.*, a security clearance). *See also* 5 C.F.R. § 1400. Additionally, the Judge could have amended the SOR to conform to the evidence. Directive ¶ E3.1.17. For whatever reason, neither did so, and the unalleged conduct could not be analyzed under AG ¶ 25(f).

That being said, it is well-established that a judge may properly consider unalleged conduct for other purposes, such as evaluating an applicant’s evidence of extenuation, mitigation, or changed circumstances, and in applying the whole-person concept. *See, e.g.*, ISCR Case No. 15-07369 at 3 (App. Bd. Aug. 16, 2017). To that end, the Judge was permitted to consider Applicant’s marijuana use while possessing a security clearance (*i.e.*, holding a sensitive position) in assessing whole-person factors, *e.g.*, “(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation,” and so forth. AG ¶ 2(d). Applicant’s use of marijuana while holding a security clearance weighs against the continuation of her clearance eligibility.

Application of Mitigating and Whole-Person Factors

Following on her argument regarding the SecEA Clarifying Guidance, Applicant also contends that the Judge “omitted material facts and did not meaningfully analyze or explain why all of the undisputed mitigation and the whole-person concept evidence did not mitigate drug involvement and substance misuse security concerns.” Appeal Brief at 6, 12. This argument is without merit.

The decision reflects that, in his mitigation and whole person analysis, the Judge identified and weighed the evidence favorable to Applicant, including that she: received multiple promotions from her first DoD employer; earned a bachelor’s degree in 2001 and subsequently earned master’s degrees in business administration and information management; received excellent performance evaluations, which included “exceeded expectations” in the areas of integrity and trust; has never been disciplined by her employers since 2001; was supported by a director at her current employment who described Applicant as an exceptional leader who is extremely talented, loyal, ethical, diligent, and trustworthy; was candid and honest in self-reporting her marijuana involvement throughout the security clearance process; did not test positive on a recent urinalysis test; and promised not to use marijuana in the future. *See* Decision at 8, 9. Despite the foregoing, the Judge ultimately concluded that the “evidence against grant of a security clearance is more persuasive at this time.” *Id.* at 8.

As previously discussed, an applicant’s use of marijuana while holding a security clearance remains significant conduct in terms of national security eligibility, which a judge may consider in reaching an eligibility determination. Applicant’s argument regarding the Judge’s application of mitigating and whole-person factors amounts 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).

Finally, Applicant’s brief relies heavily on hearing-level decisions in unrelated Guideline H cases to argue that the Judge erred in his analysis of this case. Hearing-level decisions are not binding precedent on the Appeal Board, and her reliance on those decisions is misplaced. How particular fact scenarios were decided at the hearing level in other cases is generally not a relevant consideration in our review of a case. *See, e.g.*, ISCR Case No. 19-02593 at 3 (App. Bd. Oct. 18, 2021). On appeal, Hearing Office decisions may be useful to highlight a novel legal principle; but only in rare situations – such as separate cases involving spouses, cohabitants, or partners in which drug use allegations are the same – would the adjudication outcome in another case have any meaningful relevance in our review of a case. The decisions that Applicant cites have no direct relationship or unique link to her case that would make them relevant here. Moreover, the most recent Hearing Office decision cited by Applicant was reversed by the Board. *See* ISCR Case No. 22-00392 (Apr. 20, 2023), *rev’d* (App. Bd. Jun. 1, 2023).

Applicant has not established that the Judge committed harmful error. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. 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). “Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” AG ¶ 2(b).

Order

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

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

Signed: Gregg A. Cervi
Gregg A. Cervi
Administrative Judge
Member, Appeal Board

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