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

Date: February 22, 2024

In the matter of:	)	
	)	
-----	)	ISCR Case No. 22-02601
	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Julie R. Mendez, Esq., Chief Department Counsel

FOR APPLICANT
Kristin D. Figueroa-Contreras, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On February 9, 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) and Guideline E (Personal Conduct) 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 November 15, 2023, Defense Office of Hearings and Appeals Administrative Judge Pamela C. Benson denied Applicant's security clearance eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Under Guideline H, the SOR alleged that Applicant used marijuana once in the spring of 2020 after being granted access to classified information in March 2018. The SOR further alleged under Guideline E that Applicant deliberately failed to disclose the foregoing marijuana use, including her use while holding a security clearance, on her July 2022 security clearance application (SCA). In response to the SOR, Applicant admitted the single use of marijuana in 2020, explaining that it was a one-time, isolated occurrence. She denied intentionally omitting the information from the SCA and explained that she self-reported the use during her subsequent

security clearance interview in September 2022. The Judge found against Applicant on all allegations.

Judge's Findings of Fact and Analysis

Applicant is in her early 30s. She earned a bachelor's degree in 2013 and has been married since 2017. Applicant was previously employed by a government contractor from 2017 to 2021 and was granted a Secret security clearance in 2018. In about the spring of 2020, while holding her clearance, she used marijuana on one occasion. At the time, Applicant resided in a state where marijuana was legal under state law.

In February 2021, Applicant was hired by her current government contractor employer. In conjunction with her new position and requirement for a Top Secret security clearance, she completed a new SCA on July 29, 2022, wherein she disclosed no illegal drug use. When Applicant realized she had incorrectly answered the drug-related questions, she discussed the matter with a friend and decided she would correct her mistake during her upcoming security clearance interview. On September 20, 2022, Applicant disclosed the omitted drug information to the investigator, explaining that she took "about two puffs" from her husband's joint. She further explained that she did not report her drug use to her employer because she was not aware that she was required to do so, and she clarified that she had overlooked the drug questions on her 2022 SCA because the questionnaire populated answers from her previous SCA and she only briefly looked over the updated SCA before submitting it.

At hearing, Applicant testified that she never used marijuana or any other illegal drug before or after the single incident in 2020. She explained that she had consumed two alcoholic beverages before her 2020 marijuana use, which she described as a minor lapse in judgment. Applicant was aware that marijuana use was illegal under Federal law and incompatible with holding a security clearance. She denied knowing that she was supposed to report any illegal drug use to her employer while possessing a security clearance; however, she acknowledged receiving annual security briefings during which this topic was likely discussed. Applicant testified that she failed to disclose the 2020 marijuana use on her 2022 SCA because it slipped her mind. She did not immediately report her omission to her facility security officer (FSO) because, at the time, she was not aware of one. Applicant also did not report her omissions to her program manager, despite their prior communications about Applicant needing to complete the new SCA.

The Judge concluded that Applicant's marijuana use casts doubt on her suitability to hold a clearance. The Judge further concluded that Applicant deliberately falsified her 2022 SCA. Citing Applicant's "testimony and other record statements replete with inconsistencies," the Judge determined that Applicant was not a credible, reliable, or trustworthy source, and that she failed to mitigate the Guideline H and Guideline E security concerns.

Discussion

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 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)). On appeal, Applicant argues that the Judge's treatment of the Guideline H and E mitigating conditions was not supported by the totality of the record evidence. We find this argument persuasive and, for the reasons stated below, reverse the Judge's adverse decision.

Guideline H

The Judge found mitigating conditions AG ¶¶ 26(a) and (b) potentially applicable, but ultimately held that neither fully applied. Applicant argues that the Judge failed to properly apply the Guideline H mitigating conditions, noting that Applicant "took responsibility for her one-time marijuana use, which consisted of nothing more than a puff of a joint over 3.5 years ago, in a state where recreational marijuana use was legal at the state level." Appeal Brief at 10. Applicant's argument in this regard has merit.

AG ¶ 26(a) affords mitigation where "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." The Directive is silent on what constitutes a sufficient period of reform and rehabilitation. That silence, however, does not relieve a judge of the obligation to construe and apply pertinent provisions of the Directive in a reasonable, common-sense way. *See* ISCR Case No. 02-08032, 2004 WL 1434394 at *5 (App. Bd. May 14, 2004). The Board has repeatedly held that, if the record reflects a significant period of time has passed without misconduct by an applicant, then the judge must articulate a rational basis for concluding why that time does not demonstrate changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation. *Id*.

Here, Applicant's only marijuana use occurred in mid-2020, more than two years before she submitted her latest SCA and over three years prior to her security clearance hearing. Moreover, other than *never* having used the drug and thereby obviating a Guideline H discussion entirely, it would be impossible for Applicant's marijuana use to be any more infrequent than the single occurrence. Despite the foregoing, after finding AG ¶ 26(a) potentially applicable, the Judge summarily concluded that the condition was not fully applicable without providing any analysis. The Judge's failure to articulate a sustainable rationale for discounting the mitigative effect of AG ¶ 26(a) constitutes harmful error. *See, e.g.*, ISCR Case No. 04-09239, 2006 WL 4078449 at *3 (App. Bd. Dec. 20, 2006).

Considering the record as a whole, we conclude that the Judge's Guideline H decision is arbitrary and capricious because it fails to articulate a rational connection between the facts found

and the choice made and runs contrary to the weight of the record evidence. The Guideline H decision is not sustainable.

Guideline E

Falsification of a security clearance application raises serious questions about a person's judgment, reliability and trustworthiness and is clearly relevant to assessing an applicant's security eligibility. *See* ISCR Case No. 03-06016, 2005 WL 1382029 at *3 (App. Bd. Jan. 11, 2005). The more complicated issues on appeal stem from the Guideline E case, including questions of whether the falsification allegations were established and, if so, were they mitigated.

Intentional Omissions

Throughout her security clearance investigation and hearing, Applicant consistently denied that she intentionally omitted her 2020 drug use from her 2022 SCA, and therefore the Government had the burden of proving falsification. Directive ¶ E3.1.14. Although it is clear that Applicant did not disclose the drug use on her SCA, proof of an omission alone does not establish an applicant's intent or state of mind when the omission occurred. *See* ISCR Case No. 02-23133, 2004 WL 2152744 at *4 (App. Bd. Jun. 9, 2004). *See also* ISCR Case No. 14-05005, 2017 WL 4476434 at *4, n.3 (App. Bd. Sep. 15, 2017) (to establish a falsification, an applicant's answers must have been deliberately false, not simply untrue). Rather, a judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred.

The Judge found that Applicant's "testimony and other record statements [were] replete with inconsistencies" and therefore concluded that she "is not a credible, reliable, or trustworthy source." Decision at 9. As a result of these perceived inconsistencies, the Judge largely discounted Applicant's case in mitigation under Guidelines E and H. On appeal, Applicant argues that "[t]he statements which [the Judge] perceived to be inconsistent were not truly inconsistencies, but rather a conflation of [Applicant's] testimony with her witness." Appeal Brief at 10. This argument is of mixed merit.

Based on our review of the record and in particular the hearing transcript, we agree that some of the purported inconsistencies more accurately reflect an unclear record than actual discrepancies. For example, the Judge found that "[a]lthough [Applicant] admitted she had thoroughly reviewed the [SCA] online for accuracy and completeness," it was not until she submitted it and printed a hard copy that she realized she had incorrectly answered two of the illegal drug questions. Decision at 2. The first part of this finding is incorrect. Applicant testified that it was *after* she submitted the SCA and later printed it that she reviewed her responses thoroughly and thereby discovered the inaccuracies. Tr. at 18-19. The incorrect finding is not obviously harmless because the idea that Applicant thoroughly reviewed her SCA, including the incorrect drug use responses, prior to submitting it suggests that she would have noticed an inaccuracy at that time were it unintentional. This is not, however, what the record reflects occurred. The Judge also found inconsistent that Applicant told the investigator she only briefly reviewed the 2022 SCA before submitting it, but later testified that she had taken a week to prepare

the questionnaire. Decision at 4. Contrary to the Judge's finding, these facts are not necessarily inconsistent. It is possible, and indeed appears throughout the record, that Applicant spent about a week *completing* her SCA (*see, e.g.*, Tr. at 17, 44-45) and only briefly *reviewed* her responses online before submitting it. *See, e.g.*, Government Exhibit (GE) 2 at 5; Tr. at 35.

The Judge also found inconsistent, however, Applicant's explanation for *why* she failed to disclose her 2020 marijuana use on the 2022 SCA. Decision at 4, 7. Specifically, the Judge found that Applicant explained during her interview that the "information was omitted from the [SCA] because [she] overlooked the question" and "clarified that the information populated from her previous investigation and that she briefly looked over the questionnaire prior to submitting it." GE 2 at 5. At hearing, Applicant testified that the one-time use "slipped [her] mind" because she does not use drugs and had not used them in the past. Tr. at 19-20, 35-36. She also testified, albeit with some apparent confusion, that the drug use questions did not automatically populate on her 2022 SCA and she had to specifically answer them (*id*. at 45-46), which she acknowledged doing in the negative. *Id*. at 17-18.

Based largely on this perceived inconsistency, the Judge concluded that "Applicant deliberately falsified her July 2022 SCA by intentionally failing to disclose her 2020 use of marijuana while holding a DOD security clearance." Decision at 8. Between her interview summary and responses provided at hearing to questions from three different sources, Applicant's explanation for her SCA omission is not a picture of clarity; however, Applicant bore the burden of persuasion as to mitigation and had multiple opportunities at hearing to clarify what she now contends are misinterpretations of her own evidence. We therefore find – somewhat reluctantly – that the Judge's conclusion regarding the intentionality of Applicant having omitted her drug use from the SCA was reasonable, and we will not disturb that conclusion on appeal.

Prompt, Good-Faith Effort to Correct Omission

Following a conclusion that Applicant intentionally falsified her 2022 SCA, the question remains whether her subsequent disclosure during the security clearance interview was sufficient to mitigate the concern via application of AG ¶ 17(a).[1] Here, the Judge found that "Applicant's failure to immediately report her omissions to her FSO or program manager and deciding to wait until she was interviewed by a DOD authorized investigator does not demonstrate a prompt, good-faith effort to correct her previous omissions." Decision at 8. This conclusion is problematic for several reasons.

The words "prompt" and "good faith" are not defined in the Guidelines, and the Board has declined to establish a bright line definition of either term as they relate to Guideline E. *See* ISCR Case No. 99-0201, 1999 WL 1442346 at *3 (App. Bd. Oct. 12, 1999). We have, however, interpreted "prompt" to mean acting within a reasonable time. *Id*. A reasonable time does not mean "immediate."

[1] AG ¶ 17(a) – "the individual made prompt, good faith efforts to correct the omission, concealment, or falsification before being confronted with the facts."

Turning to the second element of the mitigating condition, the concept of "good faith" requires a showing that a person acts in a way that reflects reasonableness, prudence, honesty, and adherence to duty or obligation. *See* ISCR Case No. 99-0201 at *3. Just as with the term "prompt," what constitutes a "good faith" effort will depend on the particular facts of the case.

Applicants have a duty to provide full, frank, and truthful answers to relevant and material questions during a security clearance investigation. Directive ¶ 6.2. It is *preferable* that applicants self-report any omission, falsification, or concealment of requested information through the appropriate channel sooner versus later. We are aware of no DoD rule, however, that imposes an obligation or duty on an applicant to self-disclose an SCA omission at a particular time or through a particular channel outside of the investigation and adjudication processes. Absent evidence that an applicant had such a formal duty, his or her correction of the omission at the initial security clearance interview, done prior to being confronted with the information, should be afforded significant weight in mitigation.

Here, Applicant submitted her SCA in July and participated in her interview in September, about seven weeks later. GE 1; GE 2. With respect to why she failed to report her omission to anyone prior to the interview, her unrebutted testimony was that a program manager directed her via email to complete a new SCA, that she was unaware of having an FSO, and that upon realizing the error of her SCA, she was unsure of what to do and decided the best course of action was to report the omission during her upcoming interview. Tr. at 21, 38-39, 47-48. As an initial matter, there is no evidence to suggest that her program manager was an appropriate person to receive information concerning security incidents. Rather, the Defense Counterintelligence and Security Agency advises contractor employees to self-report *certain* life events and security incidents to their FSO.[2] Any negative inference drawn from Applicant's failure to report her omission sooner to her program manager is baseless.

Additionally, while Applicant *could have* reported the omission sooner to her FSO, she was not obligated to and, again, appears to have been unaware of having such a resource. Simply put, there is no evidence that Applicant knew of an opportunity to correct her omission prior to her interview. Considering the foregoing, the record does not support the Judge's conclusion that Applicant should have corrected her omission prior to her interview. Applicant's decision to wait what was ultimately seven weeks to report the omission during her interview was not in conflict with any known duty to self-report, was reasonable considering the circumstances, and amounts to a prompt, good-faith correction that should have been afforded mitigation under AG ¶ 17(a).

We conclude that the Judge's decision is arbitrary and capricious as it runs contrary to the weight of the record evidence. Based on the record as a whole, Applicant's conduct is mitigated due to the isolated and dated nature of her marijuana use and her prompt, good faith effort to correct omitting said use from her SCA. The adverse clearance decision is not sustainable.

[2] *See, e.g.*, Defense Counterintelligence and Security Agency, *Report A Security Change, Concern, Or Threat*, www.dcsa.mil/mc/pv/mbi/self_reporting (last visited Feb. 15, 2024).

Order

The decision is **REVERSED**.

Signed: Moira Modzelewski
Moira Modzelewski
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