DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
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Date: April 11, 2024

In the matter of:	)	
	)	
-----	)	ISCR Case No. 23-00521
	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

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

FOR APPLICANT
Pro Se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On May 24, 2023, DoD issued a Statement of Reasons (SOR) advising Applicant of the basis of that decision – security concerns raised under Guideline H (Drug Involvement) of the National Security Adjudicative Guidelines (AG) in Appendix A of Security Executive Agent Directive (SEAD) 4 (effective June 8, 2017) and DoD Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On January 12, 2024, Defense Office of Hearings and Appeals Judge LeRoy F. Foreman denied Applicant's security clearance eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

The SOR alleged that, between 2013 and 2022, Applicant purchased and used marijuana. In her response to the SOR Applicant "deni[ied] in part, that my prior legal use of medical marijuana is anyway indicative of my ability to serve the national interest in trustworthiness and reliability." She attached an *Attending Provider's Statement – Oregon Medical Marijuana Program* which, although not a prescription for the use of medical marijuana, indicated that she had been diagnosed with a medical condition that may be mitigated by the use of marijuana.

On appeal, Applicant requests "a reversal and waiver to the decision" because "a request for an appearance, or video conference … should have been emphasized & stated that the only way for the Administrative Judge could mitigate my trustworthiness and reliability 'not written out as an optional request.'" We read this statement as asserting that she was insufficiently informed regarding her choice of forum. Applicant also contends that it was error for the Judge to have concluded that the use of medical marijuana is a "reason why the judge is denying my character qualifications" for eligibility for access to classified information. Consistent with the following, we affirm.

Judge's Findings of Fact and Analysis

Applicant is a 29-year-old cybersecurity specialist who has been employed by a defense contractor since January 2022. She holds an associate's degree, a bachelor's degree, and a master's degree. She married in September 2017 and has never held a security clearance.

In her April 2022 security clearance application, Applicant disclosed that she used marijuana experimentally once in 2013, abstained until 2019, and then used it both recreationally and medically about seven times from 2019 to August 2021. She noted that she had not used since August 2021 but that she intended to use it in the future. In her May 2022 interview with a security investigator, Applicant stated that she did not plan to continue her marijuana use unless it becomes "federally legal" and she received a medical prescription for health reasons. In her answer to the SOR, Applicant admitted using marijuana, but denied that her use of medical marijuana "is any way indicative of [her] ability to serve the national interest in trustworthiness and reliability." In response to DOHA interrogatories, she acknowledged an understanding of the DoD prohibition on marijuana use but declined to sign a statement of intent not to use illegal drugs in the future. In her response to the Government's File of Relevant Material (FORM), she submitted a copy of her state-issued medical marijuana card, asked for a waiver based on her recent medical diagnosis, and promised that her use of cannabis would be strictly medical and not recreational.

The Judge concluded that Applicant's admissions and the evidence in the FORM established disqualifying security concerns under Guideline H, AG ¶ 25(a) (any substance misuse), AG ¶ 25(c) (illegal possession of a controlled substance), and AG ¶ 25(g) (expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse). The Judge concluded that no mitigating conditions were applicable inasmuch as Applicant's marijuana use was frequent, recent, and did not occur under circumstances making recurrence unlikely, and that her environment is essentially unchanged.

The Judge also addressed Applicant's request for a waiver under Appendix C to SEAD 4. He concluded that Applicant had not provided sufficient evidence to establish that her qualifications and potential contributions to national security clearly outweigh the security concerns under Guideline H.

Discussion

Forum Choice

In her brief, Applicant argues that had she known that the evidence she submitted in her SOR Answer and in response to the FORM would be insufficient to mitigate her drug use, she would not have elected that forum. Applicant requests that she now be given another opportunity to appear at a hearing. This assertion of error lacks merit.

Enclosure 3 of the Directive explains the differences between a hearing and a decision based on the written record. Directive ¶ E3.1.15 makes clear "[t]he applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Applicant was provided a copy of the Directive when she received the SOR. With this information available to her, she chose to have her case decided on the written record. Nothing in either the record or Applicant's appeal brief indicates that she lacked the mental competence or basic ability to make that decision. The totality of the circumstances reflect that Applicant made informed decisions throughout these proceedings. Merely because she now has decided that she might have presented a better case if she had proceeded differently, it does not follow that she was denied the opportunity to prepare and present her case. ISCR Case No. 00-0086 at 2 (App. Bd. Dec. 13, 2000).

If Applicant did not appreciate the gravity of her circumstances, it was not due to any defect in the guidance that DOHA provided her. *See* ISCR Case No. 20-02999 at 1 (App. Bd. May 12, 2022). Although *pro se* applicants are not expected to perform at the level of attorneys, they are required to take reasonable steps to protect their interests. *See e.g.*, ISCR Case No. 17-03689 at 3 (App. Bd. Sep. 21, 2018). Any incorrect assumptions Applicant may have made or misunderstandings she may have had regarding her rights and responsibilities under the Directive cannot fairly be placed on DOHA or other DoD officials. *See e.g.*, ISCR Case No. 15-03168 at 4 (App. Bd. Jul. 21, 2017); ISCR Case No. 19-02819 at 2 (App. Bd. Dec. 21, 2020).

After examining the record as a whole, we conclude that Applicant received adequate notice of her forum options and her right to submit evidence. *See, e.g.,* ISCR Case No. 20-01217 at 3 (App. Bd. Jul. 19, 2021). There is no assertion of a procedural irregularity, nor any indication that Applicant's choice was not freely made. She is merely second-guessing her choice. Thus, there is no basis upon which to grant Applicant's request to have her case considered a second time, nor is there a basis to provide her an opportunity to expand the record. Absent a showing of factual or legal error affecting Applicant's procedural rights, she cannot be afforded a second chance at presenting her case before a judge. Applicant was not denied the due process rights afforded by the Directive. *See* ISCR Case No. 10-06437 at 2 (App. Bd. Mar. 11, 2013).

Related is Applicant's assertion that it was error for "[m]yself not in attendance physically to mitigate the Judge's assessment of my trustworthiness and reliability." The Board has long held

that when an applicant waives a hearing and chooses to have his or her case decided by a judge based on a written record, the judge has no ability to make a credibility determination based on observation of the applicant's demeanor. *See, e.g.*, ISCR Case No. 97-0625 at 2 (App. Bd. Aug. 17, 1998). Applicant's arguments do not demonstrate error, as the perceived infirmities asserted by Applicant are the direct consequence of her choice not to have a hearing. ISCR Case No. 10-06437 at 3 (App. Bd. Mar. 11, 2013).

Medical Marijuana

Applicant challenges the judge's findings as being inconsistent with her "legal" use of marijuana pursuant to her medical cannabis card. However, as the Judge correctly noted in his mitigation discussion, "DOHA proceedings are not a proper forum to debate the pros and cons of whether marijuana should be legal for some purposes, how it should be classified as a controlled substance, or the merits of DoD policy concerning drug abuse." Decision at 5. *See also* ISCR Case No. 02-08613 at 2 (App. Bd. Jan. 6, 2005).

Under Guideline H, AG ¶ 24 of the Directive, use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. "Drugs are defined as mood and behavior altering substances, and include: (1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended, (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances.'" AG ¶ 24(a). The Directive does not distinguish between types of illegal drug use. *See, e.g.*, ISCR Case No. 12-06635 at 2 (App. Bd. Mar. 28, 2014). In particular, an "expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use" is disqualifying. AG ¶ 25(g).

The Controlled Substances Act ("CSA") categorizes marijuana as a Schedule I drug and makes it illegal under Federal law to manufacture, possess, or distribute certain drugs, including marijuana. 21 U.S.C. § 801, § 812 § 844. Notwithstanding the Federal ban on marijuana, numerous states and the District of Columbia have legalized certain marijuana-related activity, however, there is no Federal exception for state-legalized medical marijuana. The Supreme Court has ruled that, under the Commerce Clause, Congress may ban the use of cannabis even where states approve its use for medicinal purposes. *See Gonzales v. Raich*, 545 U.S. 1 (2005).

In terms of eligibility for access to classified information, the Supreme Court's decision in *Department of the Navy v. Egan.* 484 U.S. 518 (1988) provides that the grant, denial, or revocation of an industrial security clearance is the exclusive province of the Executive Branch of the Federal Government. *See also* Executive Order 10865. In *Egan*, the Supreme Court enunciated the general principle that "the grant of a security clearance to a particular [individual], a sensitive and inherently discretionary judgment call, is committed by law to the appropriate agency of the Executive Branch." *Egan* at 527. The Court reasoned that the President's "authority to classify and control access to information flows primarily from this constitutional investment of power in the

President [citing U.S. Const., Art. II, § 2] and exists quite apart from any explicit congressional grant." *Egan* at 527, *citing Cafeteria Workers v. McElroy*, 367 U.S. 886, 890 (1961). The Court stated further that "the authority to protect [national security] information falls on the President as head of the Executive Branch and as Commander in Chief." *Id*.

State laws cannot override provisions of a Federal national security program under the exclusive auspices of the Executive Branch evaluating the security implications of an individual's conduct. "[S]tate laws allowing for the legal use of marijuana in some limited circumstances do not pre-empt provisions of the Industrial Security Program, and the Department of Defense is not bound by the status of an applicant's conduct under state law when adjudicating that individual's eligibility for access to classified information." ISCR Case No. 14-03734 at 3 (App. Bd. Feb. 18, 2016). A security clearance adjudication remains a determination that must be made within the confines of the basic premise that use of marijuana remains illegal under Federal law and illegal drug use is inconsistent with holding a security clearance. *See* ISCR Case No. 20-01772 at 3 (App. Bd. Sep. 14, 2021). Simply put, there is no exception that permits security clearance holders or applicants to use marijuana or any other drug that is illegal under Federal laws, regardless of state laws that may permit such use.

Security clearance-related concerns arising from the legalization or decriminalization of marijuana in a number of states were addressed in an October 25, 2014, memo issued by the Director of National Intelligence (DNI Memo) and reiterated in clarifying guidance issued in 2021.[1] Consistent with the discussion, above, the DNI Memo unequivocally states that "changes to state laws and the laws of the District of Columbia pertaining to marijuana use do not alter the existing National Security Adjudicative Guidelines. An individual's disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations." The DNI Memo also explicitly states that "under federal law, use of marijuana remains unlawful," and "while several states have decriminalized marijuana or allowed its use for medical or recreational purposes, such use of marijuana remains subject to the applicable disqualifying conditions in the Directive." *See also* ISCR Case No. 16-00258 at fn. 2 (App. Bd. Feb. 23, 2018).

The 2014 DNI Memo confirms that DOHA's administrative judges retain significant latitude and discretion when evaluating an applicant's suitability to hold a security clearance. In terms of possible mitigation of drug use, each case is fact-specific and, "[a]s always, adjudicative authorities are expected to evaluate claimed or developed use of, or involvement with, marijuana using the current adjudicative criteria." The DNI Memo is deferential to the adjudicative process,

[1] Security Executive Agent Memorandum ES 2014-00674, *Adherence to Federal Laws Prohibiting Marijuana Use*, 25 October 2014; Security Executive Agent Memorandum ES 2021-01529, *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* December 21, 2021. *See* ISCR Case No. 14-03601 at 3 (App. Bd. Jul. 1, 2015) in which the Appeal Board cited favorably to the 2014 Memo in response to an applicant's argument that "denying a security clearance on [marijuana use] alone violates the fundamental common sense principle."

stating that the "adjudicative authority must determine if the use of, or involvement with, marijuana raises questions about the individual's judgment, reliability, trustworthiness, and willingness to comply with law, rules, and regulations, including federal laws, when making eligibility decisions of persons proposed for, or occupying, national security positions."

We have 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. *See, e.g.,* ISCR Case No. 17-04198 at 3 (App. Bd. Jan. 15, 2019). In the present case, Applicant was on notice of the incompatibility of her drug use with holding a security clearance and was given the opportunity to express an intent to refrain from future drug use. Despite acknowledging federal law and policy, she declined to do so. GE 5. The Judge specifically cited to the DNI Memo in his discussion of possible mitigation and noted Applicant's refusal to commit to complying with federal drug laws. When viewed as a totality, and in light of Applicant's statements of intended future marijuana use, the evidence that was before the Judge supports his overall adverse conclusion.

Waiver

Applicant challenges the Judge's determination that her circumstances did not warrant a waiver under Appendix C – *Exceptions* of SEAD 4. That section provides adjudicative authorities with the option to grant initial or continued eligibility for access to classified information or to hold a sensitive position despite failure to meet the full adjudicative or investigative standards. Under that provision a waiver may be "granted or continued despite the presence of substantial issue information that would normally preclude eligibility. Approval authorities may approve a waiver only when the benefit of initial or continued eligibility clearly outweighs any security concerns." This is an exception to the well-established principle that "[t]he value of an applicant's expertise to a defense contractor or a military service is not relevant or material to determining the applicant's suitability for a security clearance." ISCR Case 99-9020 at 5 (App. Bd. June 4, 2001).

In all instances, administrative judges must resolve any doubts in favor of the national security and the result must be clearly consistent with the national interest. Directive ¶ 2.(b). Judges typically reach these conclusions by weighing applicants' evidence presented in support of specific Mitigating Conditions. Within that analysis, "[a]n applicant's technical expertise (or lack thereof) is not a measure of whether the applicant is at risk of deliberately or inadvertently mishandling classified information, nor is it a measure of whether the applicant demonstrates the high degree of judgment, reliability, or trustworthiness required of persons granted access to classified information." ISCR Case No. 03-04090 at 4 (App. Bd. Mar. 3, 2005).

Appendix C, however, provides a limited option for a waiver "when the benefit of initial or continued eligibility clearly outweighs the security concerns." That is, after a judge concludes that the concerns alleged in the SOR remain unmitigated, the judge may nevertheless grant eligibility. The Directive and the Appendix are silent on the evidentiary standard of proof for a waiver, but the bar obviously cannot be so low that it can be met with the self-serving statements of an applicant or an employer. Instead, the bar must be high, as the unmitigated concerns carry

risks that extend beyond any particular project on which an applicant may currently be engaged. In these rare cases, we would expect the applicant to submit the type of evidence that allows a judge to address all of the specific risks, benefits, options, and ramifications of a waiver.

Although the Directive and the Appendix do not establish a requirement for a Government official's evaluation of an applicant's skill-value and the heightened risks attached to granting that individual access to classified information, it is difficult to imagine an appropriate case for waiver that does not include the Government's perspective and endorsement of the same. Absent evidence of such an assessment, a judge lacks the requisite evidence to make a knowing assessment of an applicant's importance to the Government relative to the risk involved. In this instance, there is no evidence other than Applicant's own proclamation of her value. The judge's denial of a waiver is supported by the record.

The remainder of Applicant's brief consists of a disagreement with the Judge's weighing of the evidence, which is not 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. 19-03344 at 3 (App. Bd. Dec. 21, 2020). There is a rebuttable presumption that the Judge considered all the record evidence unless the Judge specifically states otherwise, and Applicant's bare assertion that the Judge did not consider evidence is not sufficient to rebut that presumption. *Id.*

We have considered the entirety of the arguments contained in Applicant's appeal brief. The record supports a conclusion that the Judge examined the relevant data and articulated a satisfactory explanation for the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Judge's 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. AG ¶ 2(b).

Order

The decision is **AFFIRMED**.

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

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

Signed: James B. Norman
James B. Norman
Administrative Judge
Member, Appeal Board