

KEYWORD: Guideline H

DIGEST: The 2014 SCA was discussed in some detail in government Exhibit (GE) 2. Accordingly, evidence about this document was part of the record. Applicant did not object to the admission of GE 2 or to Department Counsel’s questions about the 2014 SCA during cross examination. Accordingly, Applicant has forfeited objection to the Judge’s consideration of the SCA. Adverse decision affirmed.

CASENO: 16-02877.a1

DATE: 10/2/2017

DATE: October 2, 2017

In Re: ----- Applicant for Security Clearance)))))))	ISCR Case No. 16-02877
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Martin L. Pitha, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 29, 2016, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline H (Drug Involvement)¹ of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On July 5, 2017, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge

¹In the most recent version of the Adjudicative Guidelines, promulgated on June 8, 2017, this Guideline is styled “Drug Involvement and Substance Misuse.”

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 issues on appeal: whether the Judge raised security concerns not fairly embraced by the SOR 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

Applicant has worked for her current employer since 2008. Applicant used marijuana once in 2009, twice in 2010, and once in 2013, all while holding a security clearance. On one occasion she purchased marijuana as well. At the time of her misconduct, Applicant was aware of DoD policy that prohibits the use of illegal drugs. She did not report her uses of marijuana to her security officer, and, in completing a 2014 security clearance application (SCA), she did not disclose the 2013 incident.² Applicant was contacted twice by investigators and asked about illegal drug use. She disclosed the 2013 use only upon suggestion that she sit for a polygraph examination.

Applicant consulted a therapist, who opined that Applicant is not a user or abuser of illegal substances or likely to become such in the future. She submitted a letter of intent to abstain from the use of illegal drugs as defined in the Directive. Applicant enjoys a good reputation for reliability, trustworthiness, honesty, and maturity.

The Judge's Analysis

The Judge concluded that Applicant's having smoked marijuana several times after having been granted a security clearance raised concerns under Guideline H. In evaluating Applicant's case for mitigation, the Judge noted favorable evidence, such as the relative age of Applicant's last use of the drug and that she had signed a letter of intent to abstain in the future. However, the Judge concluded that the favorable evidence in the record was not sufficient to outweigh concerns arising from multiple uses of an illegal drug, as well as an instance of purchase, while entrusted with national secrets. She stated that Applicant's failure to have reported her security-significant conduct showed poor judgment and a lack of reliability. She also noted that Applicant did not disclose the 2013 instance to investigators until faced with the possibility of a polygraph. The Judge stated that "Applicant's credibility is in question here." Decision at 5. Though noting Applicant's contributions to her job, she stated that Applicant made mistakes by using marijuana while holding a clearance and by not being honest with the Government about her conduct.

Discussion

Applicant contends that the Judge erred by relying on evidence of her 2014 SCA, which was not included in the record. She contends that failure to disclose security-significant conduct is a matter properly alleged under Guideline E, which was not raised in the SOR. She argues that by

²The SCA that is the basis for the current adjudication was signed in October, 2015. As will be noted below, the 2014 SCA is not in the record.

citing to this failure, both in the SCA and to investigators, the Judge raised concerns that were outside the scope of the SOR.

Applicant is correct that the 2014 SCA was not offered into evidence. However, this SCA was discussed in some detail in Government Exhibit (GE) 2, Summary of Clearance Interview, at 7. Accordingly, evidence about this document was part of the record. Moreover, Applicant did not object to the admission of GE 2 or to Department Counsel's questions about the 2014 SCA during cross examination. Tr. at 12, 46-49. Accordingly, Applicant has forfeited objection to the Judge's consideration of the SCA.

Even were this issue not forfeited, we find no error in the way the Judge treated Applicant's failure to have disclosed the 2013 use of marijuana. Conduct not alleged by the SOR may not form the basis for additional security concerns unless Department Counsel (prior to the hearing) or the Judge amends the SOR and the parties have an opportunity for further preparation. Directive ¶ E3.1.17. However, non-alleged conduct may be considered for such limited purposes as making a credibility determination; evaluating the applicant's case for extenuation or mitigation; evaluating the extent to which the applicant has demonstrated rehabilitation; and in performing a whole-person analysis. *See, e.g.*, ISCR Case No. 15-07369 at 2 (App. Bd. Aug. 16, 2017). In the case before us, the Judge did not mention Applicant's omissions in her analysis of the disqualifying conditions. Rather, she discussed the non-alleged conduct solely in terms of Applicant's case for mitigation as well as in terms of the whole-person analysis and a credibility determination. Accordingly, the Judge made proper use of Applicant's omissions and did not raise security concerns beyond those contained in the SOR.

Applicant contends that the Judge should have concluded that her drug use occurred so long ago that it no longer casts doubt upon her eligibility for a clearance. She cites to other DOHA cases in which applicants who had committed drug offenses, even while holding clearances, received favorable determinations. We give these cases due consideration as persuasive authority. However, each case must be decided on its own merits. Directive, Encl. 2, App. A ¶ 2(b). We have never established a "bright line" rule as to the recency of misconduct such as drug use. The extent to which security concerns have become mitigated through the passage of time is a question that must be resolved based on the evidence as a whole. *See, e.g.*, ISCR Case No. 14-01847 at 3 (App. Bd. Apr. 9, 2015).

In this case, the evidence and the Judge's findings establish that Applicant used marijuana four times and purchased it once while holding a security clearance. Drug involvement after having completed an SCA draws into serious question the applicant's judgment, reliability, and willingness to follow rules and regulations, insofar as it placed the applicant on notice of the consequences of such misconduct. *See, e.g.*, ISCR Case No. 14-03450 at 3 (App. Bd. Sep. 11, 2015). When Applicant's drug offenses are considered in light of the evidence underlying the Judge's adverse credibility determination, they support a conclusion that Applicant failed to meet her burden of persuasion as to mitigation. *See* Directive ¶ E3.1.15.

The balance of Applicant's brief consists of a challenge to the way in which the Judge weighed the evidence in mitigation. A disagreement with the Judge's weighing of the evidence or an ability to argue for an alternative interpretation of the record is not sufficient 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. 15-08711 at 3 (App. Bd. Aug. 24, 2017).

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). *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