

KEYWORD: Guideline E; Guideline H

DIGEST: First, even in the absence of any security violations, the Government can deny or revoke access to classified information based on the existence of facts and circumstances that indicate an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. Second, the conclusions of DOHA Judges are often subjective in nature. As we have noted in the past, security clearance decisions are not an exact science but rather are predictive judgments about a person's security suitability in light of that person's past conduct and present circumstances. Adverse decision affirmed.

CASENO: 17-02225.a1

DATE: 06/25/2019

DATE: June 25, 2019

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In Re:)	
-----)	ISCR Case No. 17-02225
)	
Applicant for Security Clearance)	
)	

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 July 28, 2017, 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 May 10, 2019, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Michael H. Leonard denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: 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 and Analysis

Applicant is a 48-year-old employee of a defense contractor. He was granted a security clearance in 2006. He was arrested for possession of drug paraphernalia in 1992 and for possession of marijuana in 1995. The Judge found in favor of Applicant on those two drug-related arrests.

In early 2017, Applicant smoked marijuana at a party that he attended without his wife. Later that month, he tested positive for marijuana during a random drug screening, and his employer suspended him without pay. He did not report his marijuana use before the drug test. His employer allowed him to continue his employment contingent on him successfully completing a substance abuse program. Shortly after completing the substance abuse program, he passed a drug test and returned to work under a last-chance agreement.

Applicant attributed his latest drug incident to a lapse in judgment. He indicated that he has no intention of using illegal drugs in the future. He submitted a signed statement of intent to abstain from drug involvement, acknowledging that future use would be grounds to revoke his national security eligibility.

Although Applicant presented a “good case in reform and rehabilitation,” the Judge concluded that he was not an acceptable security risk. The Judge noted that Applicant used marijuana as a security clearance holder who was subject to random drug tests, that such use demonstrated a willingness to engage in high-risk behavior, and that such use most likely would not have come to light absent the random drug test. “[Applicant’s] reluctance to voluntarily self-report such adverse information further undermines his suitability for a security clearance.” Decision at 6.

Discussion

In his appeal brief, Applicant does not challenge any of the Judge’s findings of fact. Rather he challenges the Judge’s conclusions regarding his security clearance suitability. For example, he argues “[t]he judge came to his conclusion based on a subjective opinion of my future character and integrity that is contrary to my thirteen year career holding a clearance.” Appeal Brief at 1. In

support of his arguments, he highlights, among other matters, the duration of time that has passed since his last marijuana use, his good record for protecting classified information, his honesty and openness during the investigative process, and the Judge's comments that he understands the seriousness of the latest incident and presented a good case of reform and rehabilitation. We do not find Applicant's arguments persuasive. First, even in the absence of any security violations, the Government can deny or revoke access to classified information based on the existence of facts and circumstances that indicate an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. *See, e.g.*, ISCR Case No. 99-0462 at 4-5 (App. Bd. May 25, 2000). Second, the conclusions of DOHA Judges are often subjective in nature. As we have noted in the past, security clearance decisions are not an exact science but rather are predictive judgments about a person's security suitability in light of that person's past conduct and present circumstances. *See, e.g.*, ISCR Case No. 02-11489 at 4 (App. Bd. Sep. 11, 2003), citing *Department of Navy v. Egan*, 484 U.S. 518, 528-529 (1988). From our review of the record, the Judge's material findings and conclusions of a security concern in this case are based on substantial evidence or constitute reasonable inferences that could be drawn from the evidence. *See, e.g.*, ISCR Case No. 12-03420 at 3 (App. Bd. Jul. 25, 2014). Third, Applicant's arguments essentially amount to a disagreement with the Judge's weighing of the evidence. The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. A party's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate 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. 16-00276 at 5 (App. Bd. Oct. 30, 2017).

Applicant has failed to establish that the Judge committed any harmful error. 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.'" *Egan*, 484 U.S. at 528. *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