

KEYWORD: Guideline E; Guideline H; Guideline J

DIGEST: In the case before us, the Judge’s conclusion that Applicant had not met his burden of persuasion is sustainable. An applicant who uses marijuana after having been placed on notice of its security significance, such as using after having completed a clearance application, may be lacking in the qualities expected of those with access to national secrets. Adverse decision affirmed.

CASENO: 17-03191.a1

DATE: 03/26/2019

DATE: March 26, 2019

In Re:

Applicant for Security Clearance

)
)
)
) ISCR Case No. 17-03191
)
)
)

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 November 6, 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), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On December 17, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Roger C. Wesley 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’s findings of fact were based upon substantial evidence and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. The Judge’s favorable findings under Guideline E are not at issue in this appeal. Consistent with the following, we affirm.

The Judge’s Findings of Fact

Applicant’s SOR alleged numerous instances of illegal drug use, criminal conduct, and professional difficulties (a performance plan due to illegal drug use). The allegations that the Judge found against Applicant consist of the following: Under Guideline H, Applicant used marijuana with varying frequency from about 1974 until about 2016, and he sold and purchased marijuana from about 1981 until about 1985. Applicant’s most recent uses of marijuana occurred in 2016, during which time he held a security clearance. Regarding Guideline J, Applicant was arrested, charged, and/or convicted of criminal offenses regarding his drug involvement, such as possession of marijuana and drug paraphernalia; felony possession and distribution of marijuana; and burglary and possession of marijuana. In addition, Applicant’s instances of drug misuse were cross alleged under Guideline J.

Because of his 2016 arrest for possession of illegal drugs and drug paraphernalia, Applicant’s employer placed him on a performance plan. He was required to seek substance abuse counseling, maintain a drug-free lifestyle, and pass random drug tests. Applicant’s drug tests yielded negative results. He has not used marijuana since September 2016, and he has disassociated himself from persons who use illegal drugs.

Applicant enjoys an excellent reputation for the quality of his duty performance. He is considered to be a strong worker who is thoughtful and trustworthy. He provided vital support to modernizing a company project, enabling his employer to stay abreast of the newest technologies and protocols.

The Judge’s Analysis

As noted above, the Judge resolved many of the allegations in Applicant’s favor, principally non-drug criminal conduct that he found to have been mitigated by the passage of time. However, he entered adverse findings regarding Applicant’s use and possession of marijuana and for his drug-related criminal conduct. He noted evidence that Applicant had resumed marijuana use in 2016 after

a nearly 20-year period of abstinence. Because of this, the Judge concluded that Applicant's much briefer period of abstinence since 2016 is not sufficient to show that his security concerns have been resolved through attenuation. He noted that several of Applicant's drug-related criminal infractions were old, but he concluded that they form part of a pattern of misconduct that extends to 2016, when Applicant used marijuana while holding a security clearance.

Discussion

Applicant's brief includes matters from outside the record, which we cannot consider. Directive ¶ E3.1.29. Applicant argues that the Judge's findings contained errors, for example in the nature and disposition of several of his criminal charges. We have examined the Judge's findings in light of the record. We conclude that the Judge's material findings of security concern are based upon substantial evidence or constitute reasonable conclusions that could be drawn from the evidence. Many of the Judge's findings were based on the answers Applicant provided to his interviewer and on his testimony at the hearing. Applicant has cited to no error in the Judge's findings that likely affected the outcome of the case. *See, e.g.* ISCR Case No. 16-02640 at 3 (App. Bd. Jul. 2, 2018).

Applicant contends that the processing of his case took too long. He argues that if he were truly a security risk his adjudication would have been accomplished more expeditiously. We have no authority to rule on the manner in which officials conduct clearance investigations and adjudications. *See, e.g.*, ISCR Case No. 14-04186 at 3-4 (App. Bd. Oct. 28, 2015). Applicant has not demonstrated that the time it took to process his case resulted in identifiable prejudice to him.

The balance of Applicant's brief constitutes a challenge to the manner in which the Judge weighed the evidence in mitigation. He argues that he has overcome the concerns raised in the SOR and that "I am a reasonable person and I deserve this mitigation." Appeal Brief at 4. He argues that some of the concerns raised under Guideline J are redundant with those under Guideline H. He also contends that the Judge did not consider his favorable evidence, such as his character references.

The Supreme Court has held that no one has a right to a security clearance. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). In fact, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). Once the Government presents evidence of security concern, the applicant assumes responsibility for demonstrating mitigation. Directive ¶ E3.1.15. In the case before us, the Judge's conclusion that Applicant had not met his burden of persuasion is sustainable. An applicant who uses marijuana after having been placed on notice of its security significance, such as using after having completed a clearance application, may be lacking in the qualities expected of those with access to national secrets. *See, e.g.*, ISCR Case No. 17-04198 at 2 (App. Bd. Jan. 15, 2019). Applicant has not rebutted the presumption that the Judge considered all of the evidence in the record, nor has he shown that he Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *Id.* Concerning Applicant's redundancy argument, the Government can allege the same conduct under different Guidelines and weigh the evidence differently. *See, e.g.*, ISCR Case No. 13-01281 at 4 (App. Bd. Aug. 4, 2014).

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, supra*. 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 Y. Ra’anan
Michael Y. 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