

KEYWORD: Guideline H

DIGEST: Applicant argues that the Judge used his request for a decision on the written record “as a reason to doubt [his] credibility and sincerity.” He contends that the Judge should not have used that request to evaluate his credibility and states that he “was not exempt from having a potential hearing if requested by the [J]udge assigned to the case.” These arguments lack merit. First, the Directive provides that a hearing may be requested by the applicant or by Department Counsel. There is no provision for a Judge to convene a hearing on his own motion. Second, there is no basis for concluding that the Judge used Applicant’s forum choice as a factor in making his credibility determination. In his whole-person analysis, the Judge stated that, because no hearing was held in this case, he “had no opportunity to evaluate [Applicant’s] credibility and sincerity based on demeanor.” We find no error in the Judge’s statement. Third, the Judge also noted that Applicant’s varying positions regarding his future use of marijuana and his admitted falsification of his drug use on his Security Clearance Application. These were matters the Judge could properly consider in making a credibility determination. Adverse decision affirmed.

CASENO: 18-02250.a1

DATE: 05/23/2019

DATE: May 23, 2019

)	
In Re:)	
-----)	
)	ISCR Case No. 18-02250
)	
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 October 31, 2018, 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) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On March 14, 2019, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge LeRoy F. Foreman 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

Applicant is a 26-year-old employee of a Federal defense contractor. He received a bachelor’s degree in 2015. He has not previously held a security clearance. He admitted the SOR allegation that he used marijuana with varying frequency from the fall of 2011 to mid 2017. He denied the allegation that he intends to use marijuana in the future. In his 2016 security clearance application (SCA), he answered “no” to the question that asked whether he used any illegal drugs or controlled substances in the last seven years. During a background interview, he told the investigator that he used marijuana once or twice a week during college, that he purchased marijuana at least once, and that he stopped using marijuana in 2015 while looking for employment. About six months after obtaining his current job, he resumed using marijuana and used it within 30 days of the interview.

During the background interview, Applicant also told the investigator that he had no immediate plans to stop using marijuana and intended to move to a location where it is legal. After being advised that marijuana use is a violation of Federal law, he indicated he would cease using it if he had to do so in order to hold a security clearance. Additionally, he told the investigator that he failed to disclose his marijuana use on his SCA because he was trying to hide it. In his response to Department Counsel’s File of Relevant Material (FORM), he indicated that he has abstained from marijuana since his interview, that he has disassociated from his college crowd, and that he now associates with professionals. He submitted a statement of intent to refrain from illegal drugs in the future and acknowledged that further drug involvement would be grounds for revoking his security clearance. In a urinalysis conducted in January 2019, he tested negative for illegal drugs.

The Judge’s Analysis

Applicant’s drug use is recent, frequent, and did not occur under circumstances making it unlikely to recur. He has not corroborated his claims of disassociating with marijuana-using college associates and becoming involved in other social circles. The Judge indicated that he was not satisfied that Applicant’s assertions were credible, noting that Applicant appeared to be willing to say what was necessary to obtain a security clearance. The Judge also noted that, while falsification

was not alleged, Applicant's admitted SCA falsification could be used for certain limited purposes such as assessing his credibility. Applicant failed to mitigate the Guideline H security concerns.

Discussion

Applicant challenges the Judge's credibility determination. He argues that the Judge used his request for a decision on the written record "as a reason to doubt [his] credibility and sincerity." Appeal Brief at 1. He contends that the Judge should not have used that request to evaluate his credibility and states that he "was not exempt from having a potential hearing if requested by the [J]udge assigned to the case." *Id.* These arguments lack merit. First, the Directive provides that a hearing may be requested by the applicant or by Department Counsel. Directive ¶¶ E3.1.4; E3.1.7. There is no provision for a Judge to convene a hearing on his own motion. *See, e.g.*, ISCR Case No. 15-05047 at 3 (App. Bd. Nov. 8, 2017). Second, there is no basis for concluding that the Judge used Applicant's forum choice as a factor in making his credibility determination. In his whole-person analysis, the Judge stated that, because no hearing was held in this case, he "had no opportunity to evaluate [Applicant's] credibility and sincerity based on demeanor." Decision at 6, *citing* ISCR Case No. 01-12350 at 3-4 (App. Bd. Jul. 23, 2003). We find no error in the Judge's statement. Third, the Judge also noted that Applicant's varying positions regarding his future use of marijuana and his admitted falsification of his drug use on his SCA. These were matters the Judge could properly consider in making a credibility determination. Fourth, the Directive provides that the Appeal Board shall give deference to a Judge's credibility determination. None of the issues raised by Applicant are sufficient for us to set aside that deference.

In his appeal brief, Applicant also contends the Judge erred in his whole-person analysis. He argues that his behavior has changed and that the Judge focused on his past, as opposed to his more recent conduct. In his argument, he highlights, for example, that he had a negative urinalysis test in early 2019, he has changed his social circles, and he has signed a statement of intent to abstain from illegal drug involvement. These points amount to a disagreement with the Judge's weighing of the evidence. It is well established that 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. 15-00650 at 2 (App. Bd. Jun. 27, 2016).

Applicant has failed to establish that the Judge committed any harmful error. 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 F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board

Signed: Charles C. Hale
Charles C. Hale
Administrative Judge
Member, Appeal Board