

KEYWORD: Guideline H

DIGEST: Concerning the comment in Applicant's interview summary, this represents Applicant's response to the investigator's questions, not the investigator's considered opinion as to Applicant's eligibility for a clearance. Even if an investigator offered such an opinion it would not bind DOHA in its evaluation of a case. Adverse decision is affirmed.

CASE NO: 19-00821.a1

DATE: 01/23/2020

DATE: January 23, 2020

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In Re:)	
)	
-----)	ISCR Case No. 19-00821
)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Charles E. Walton, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On April 10, 2019, 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 hearing. On November 15, 2019, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Noreen A. Lynch 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 contained errors 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 is an employee of a Defense contractor, a position he has held for about three years. He attended college but did not obtain a degree. He has held a security clearance since September 2016. Decision at 2. Applicant was briefed by his various employers regarding the use of illegal drugs.

Applicant admitted in his security clearance application (SCA) that he used marijuana, infrequently, from 2000 through mid-2018. He obtained his first clearance in 2016. Applicant was aware that illegal drug use was forbidden. He stated that his last use of marijuana was in 2018 in celebration of his birthday. Applicant has never tested positive for illegal drugs and presented a letter of intent not to use drugs in the future. He claims that he has stopped associating with people who use marijuana.

In his Answer to the SOR, Applicant stated that his admission to drug use in 2018 was not correct and that it should have been 2016. In his hearing testimony, however, he stated that 2018 was indeed the correct date of his last drug use and that he had provided incorrect information in his Answer due to nervousness. In his clearance interview, he stated that he could not remember the number of times in which he used marijuana after having received a clearance. In 2012, Applicant was arrested for possession of marijuana. The court dismissed the case after he completed community service. Applicant testified that his next use was in 2015 in a music studio. He was working for a contractor at the time and knew that the use of marijuana was against Federal law.

After he received the SOR, Applicant consulted a psychologist, whose report states that there is nothing in Applicant’s character to dissuade a prospective employer from hiring him. Applicant describes himself as a mature man who made a mistake. He ventured that the decriminalization of marijuana in his locality have influenced his conduct. Applicant’s character references describe him as honest and trustworthy, a good worker with sound judgment. His evaluations laud his job performance. None of the persons who wrote the character letters appear to know about the marijuana use.

The Judge's Analysis

The Judge concluded the time that had elapsed since Applicant's last instance of misconduct was too brief to establish rehabilitation. She noted his consultation of a psychologist and that he no longer associates with drug-using friends. "However, his ever-changing dates of use listed in his SCA and his answer provide me with great doubts about his veracity." Decision at 5. In the whole-person analysis, the Judge cited to Applicant's excellent reputation among his friends and colleagues, his lack of positive drug tests, and his psychological counseling. She cited, however, to Applicant's inconsistent statements about the dates of his drug use and his admission in his interview that he could not recall the number of times that he had used marijuana after having been cleared. She stated that Applicant knew that marijuana use was not legal at the time of his misconduct and that he had changed the dates of his use at the hearing. "He tried to explain that he was confused because it was becoming decriminalized in [local jurisdiction] I did not find his testimony credible, but rather self-serving." Decision at 6.

Discussion

Applicant contends that the Judge's findings of fact contained errors and that the findings failed to address significant record evidence, such as the number of times he has been tested for drug use without a positive result. We evaluate a Judge's findings of fact to see if they are supported by substantial evidence, that is, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." Directive ¶ E3.1.32.1. *See* ISCR Case No. 18-01564 at 3 (App. Bd. May 30, 2019).

Applicant states that the Judge erred in finding that none of his character references were aware of his security-significant conduct. In fact, Applicant himself testified that none of these persons knew that he has ever used marijuana, which would appear to support the challenged finding. Tr. at 68. However, one of the letters contained in Applicant Exhibit (AE) B2 states that Applicant had disclosed his marijuana use to the writer and another expressed awareness of Applicant's arrest for marijuana possession. Another character reference, included in AE I, states that the writer was not aware of anyone in Applicant's circle who uses marijuana, suggesting at least some level of awareness of Applicant's security concerns. Therefore, the challenged finding is erroneous. However, it did not likely affect the outcome of the case and, therefore, is harmless. *See, e.g.*, ISCR Case No. 18-02302 at 3 (App. Bd. Jun. 26, 2019).

Applicant also challenges the Judge's finding that he was a contractor at the time of his 2015 marijuana use. There is no evidence that Applicant's employer at this time was a Federal contractor. He testified that it provided financial services to states and municipalities. Tr. at 32. However, Applicant also testified that this employer had an anti-drug policy and that he knew that marijuana use was against Federal law. Tr. at 81. To the extent that there is an error in this finding, it is harmless. After considering Applicant's arguments as a whole, we conclude that the Judge's material findings of security concern are supported by substantial evidence or constitute reasonable inferences that could be drawn from the evidence. *See, e.g.* ISCR Case No. 17-01680 at 3 (App. Bd. Jul. 19, 2019).

Applicant challenges the Judge's analysis of his evidence in mitigation. He cites to a number of things that he contends the Judge did not address to the detriment of her analysis, such as his having candidly disclosed his marijuana use, his claim to have been confused over the extent to which his conduct was lawful in the jurisdiction where he resides, a comment in his clearance interview summary that he is not subject to blackmail or coercion, etc. He argues that the Judge's adverse decision rested on two points: first, that he did not have a firm recollection regarding the date of his marijuana use in the music studio and second, that the Judge found him to be lacking in credibility. Appeal Brief at 7. He argues that these matters are not sufficient to support a clearance denial.

Concerning the comment in Applicant's interview summary, this represents Applicant's response to the investigator's questions, not the investigator's considered opinion as to Applicant's eligibility for a clearance. Even if an investigator offered such an opinion it would not bind DOHA in its evaluation of a case. *See, e.g.*, ISCR Case No. 18-02158 at 3 (App. Bd. Aug. 7, 2019). Moreover, while Applicant did contend that he was confused about the legal status of marijuana in his place of residence, he otherwise testified unequivocally that he was aware that such conduct violated Federal law. Tr. at 84, 92.

On the larger point regarding the basis for the Judge's overall decision, the gravamen of her analysis was Applicant's having used marijuana for several years despite knowing its Federal illegality and its incompatibility with his employer's policies, and his having used it at least once after having been granted a clearance/position of trust. As he notes, the Judge also concluded that Applicant's presentation was lacking in credibility. We give deference to a Judge's credibility determinations. Directive ¶ E3.1.32.1. The Judge's comments that Applicant had made significantly inconsistent statements about his marijuana use are consistent with the record that was before her, and such statements can indeed impugn the credibility of a witness. *See, e.g.*, ISCR Case No. 15-03778 at 3 (App. Bd. Aug. 4, 2017). Based upon our review of the entire record, we find no reason to disturb the Judge's credibility determination. Applicant's arguments that the Judge did not consider or that she mis-weighed certain pieces of evidence are not enough to rebut the presumption that the Judge considered all of the evidence in the record or to show that she weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 18-01482 at 2 (App. Bd. Sep. 6, 2019).

Applicant argues that the Judge did not explicitly address the various whole person factors listed in Directive, Encl. 2 App. A ¶ 2(d). However, a Judge is not required to discuss all of the analytic factors set forth in the Directive. *See, e.g.*, ISCR Case No. 17-02236 at 2 (App. Bd. Jul. 2, 2018). Contrary to Applicant's argument, the Judge's whole-person analysis complied with the requirements of the Directive in that she evaluated Applicant's case in light of the totality of the evidence. ISCR Case No. 17-00506 at 3 (App. Bd. Aug. 7, 2018). We find no reason to conclude that the Judge's analysis of Applicant's case for mitigation was erroneous.

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 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