

KEYWORD: Guideline H; Guideline E

DIGEST: We find no reason to conclude that the Judge exhibited bias against Applicant. For example, her negative credibility determination was founded upon substantial record evidence of Applicant's inconsistent statements rather than upon inexplicable animus. We have long noted that inconsistent statements can impugn a witness's credibility. Moreover, there is no error in the Judge's having declined to extend significant weight to AE H, insofar as its conclusions reasonably appear to have relied upon a deliberate minimization of Applicant's security significant conduct. In any event, the Judge's analysis certainly does not constitute an attack upon Applicant for merely having submitted the document in the first place. One need not resort to allegations of judicial bias in order to account for adverse findings and conclusions that are consistent with the evidence viewed as a totality. Finally, we find nothing significant in the Judge's use of the word "claims" to describe some of Applicant's testimony. Adverse decision is affirmed.

CASENO: 18-02722.a1

DATE: 01/30/2020

DATE: January 30, 2020

_____)	
In Re:)	
)	
-----)	ISCR Case No. 18-02722
)	
)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Jeffrey D. Billett, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On December 14, 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) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On November 13, 2019, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Nichole L. Noel 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 erred in finding that Applicant had lied to her substance abuse counselor, whether the Judge was biased against her, 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 2010 in a position that requires access to classified information. She first received a clearance in 2008, in the course of a prior employment. Applicant’s SOR alleged that she used marijuana with varying frequency from 2002 to 2005 and later from 2010 to 2015, including use after having been granted access to classified information.

Applicant used marijuana in college from 2002 to 2005. In her 2008 SCA and at the hearing she admitted that she used it eight times and stopped in order to improve her chances of getting a Government job or a job that required a clearance. She abstained for about five years but claimed that she accidentally ingested some marijuana at a friend’s party in 2010. She admits that she resumed using marijuana in social settings and stopped in 2015. The Judge found that it was not clear how many times Applicant used marijuana between 2010 and 2015, noting that in her 2017 SCA she estimated about “10 to 15 times within the last 10 years.” Decision at 2. Applicant held a clearance during her second period of use and worked on classified projects during that time. Applicant is not aware of whether her employer has a policy regarding illegal drug use and claimed that she did not know that she should report illegal drug use to the security officer.

Applicant claims that she does not associate with friends who use marijuana. Her hearing witnesses testified as to her drug-free life style and good character. She signed a statement of intent not to use drugs in the future and has sought information about any possible drug testing program her employer might provide. She has received laudatory performance reviews and awards.

Prior to the hearing, Applicant underwent a voluntary substance abuse evaluation. The clinician, a licensed clinical social worker, interviewed Applicant, performed a screening test, reviewed the SOR, and reviewed the Adjudicative Guidelines. This person did not, however, examine Applicant's SCAs. During the interview, Applicant stated that she only used marijuana three times between 2002 and 2005. Concerning the use between 2010 and 2015, Applicant disclosed only three instances of marijuana use, two of which she described as accidental. The clinician described Applicant as remorseful and concluded that Applicant required no treatment.

The Judge's Analysis

The Judge noted favorable evidence, such as Applicant's life style changes, her abstinence since 2015, her work performance, and her character references. However, the Judge concluded that these matters were not sufficient to mitigate the concerns arising from Applicant's misconduct. She stated specifically that Applicant's marijuana use after assuming professional responsibilities was intentional and that her use after receiving a clearance impugned her good judgment.

The Judge concluded that Applicant was lacking in credibility. She found that Applicant lied about her drug history during the course of her substance abuse evaluation, concluding that the inconsistencies between the clinician's report and Applicant's statements in her SCA and at the hearing could not be attributed simply to faulty memory. Rather, the Judge concluded that Applicant's statements to the clinician were "a purposeful effort to characterize her drug use as reluctant and accidental." Decision at 5. She stated that these inconsistencies are troubling because of the voluntary nature of Applicant's drug evaluation, which was a circumstance of her own making. The Judge concluded that "[t]he only reasonable explanation [for her false statements to the clinician] is to ensure she received the desired diagnosis and prognosis." *Id.*

Discussion

Allegation of Factual Error

Applicant challenges the Judge's finding that she lied during the course of her drug evaluation. Among other things, she argues that the actual contents of the underlying interview are not available, so that the Judge's findings about her disclosures to the clinician are merely speculative. She also contends that the Judge erred regarding the number of marijuana uses that Applicant disclosed during the evaluation. 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 does not controvert the Judge’s findings that in her 2008 SCA she admitted to eight instances of marijuana use between 2002 and 2005; that she stopped using in order to improve her chances at Federal employment; and that she admitted to ten to fifteen uses of marijuana during the ten years preceding her 2017 SCA. These findings are supported by Applicant’s SCA answers, her clearance interview, and her hearing testimony. Government Exhibit (GE) 1, 2017 SCA, at 46; GE 2, 2008 SCA at 39-40; GE 3, Security Clearance Interview Summary, dated January 31, 2018, at 3; Tr. at 34, 39, 56, 62-63, 70.

As noted, Applicant discussed her marijuana use with her clinician during the course of her post-hearing drug evaluation. The evaluation report described the extent of Applicant’s marijuana use as follows:

[Applicant] reported that while a student at [college] she was exposed to a student body that used marijuana to “self-medicate” . . . [She] reported that she did not readily try marijuana. She reported that she declined its use for some time, but peer pressure and fellow students insisting “this was the best thing ever” along with some curiosity, led her to try the substance. [Applicant] reported that she tried it twice: both times she took “a few puffs” but had no reaction to the substance at all . . . On the third occasion, [Applicant] reported that she did have a reaction that was not pleasant or comfortable. She reported that her friends told her she had smoked “too much,” and at another social gathering she tried it again. [Applicant] reported that again, the experience was “not great.”

A period of five years ensued wherein [Applicant] did not consume marijuana . . . [She] reported that between 2005 and 2010 she did not engage in any consumption of marijuana.

In October 2010, [Applicant] . . . was hired by [employer] . . . She reported that she once again found herself in a culture where marijuana consumption was “the norm” even among those young professionals who held a security clearance. [Applicant] reported that she had friends at the time that engaged in cannabis use, to include “edible” marijuana.

She reported that on two occasions she was unwittingly given foods that contained marijuana. She did not consume the products with any awareness that cannabis was present and reported that in fact she had made it clear to her friend that she did not want to partake of any product that contained cannabis.

[Applicant] reported that the last time she consumed marijuana was in September 2015 at a vacation . . . She reported that [she] took a couple of puffs, felt “high” and waited for the effect to end. After that experience, [Applicant] stated that she stopped “hanging out with those friends” because it “seemed like they always had pot” and she no longer felt comfortable with the activities they engaged in. Applicant Exhibit (AE) H, Drug Evaluation dated January 25, 2019, at 2-3.

A reasonable person would likely find significant differences between the clinician's report and the other record evidence referenced above. As the Judge found, Applicant disclosed to her clinician only a few instances of marijuana use during the time frames at issue, two of the more recent ones unknowing, in contrast to her admissions elsewhere of eight uses between 2002 and 2005 and ten to fifteen in the decade preceding the most recent SCA. Indeed, at the hearing, Applicant acknowledged that this number could possibly even be a bit higher. Tr. at 62-63. The report states that the clinician interviewed Applicant, consulted the SOR, and conducted screening tests. There is no reason to believe that this person had access to any other evidence, such as Applicant's SCAs, her clearance interview summary, or the substance of her hearing testimony. Accordingly, the facts upon which the clinician based her evaluation appear to have come solely from Applicant. If the recital of facts contained in AE H was not complete, Applicant could have so notified the Judge. The Judge erred in one respect, by finding that Applicant had disclosed to her clinician only three marijuana uses in 2002 - 2005, whereas the report makes reference to four. However, this error was harmless because it did not likely affect the outcome of the case. *See, e.g.*, ISCR Case No. 18-02302 at 3 (App. Bd. Jun. 26, 2019). On the larger point at issue, however, we conclude that the Judge's findings of a significant inconsistencies between the factual assertions in Applicant's SCA, clearance interview, and hearing testimony on one hand and her post-hearing drug evaluation on the other are sustainable.

Given the totality of the evidence, the Judge's conclusion that Applicant deliberately minimized her misconduct in hopes of securing a favorable diagnosis is a reasonable inference from the record evidence. The contrast between the clinician's report and the other evidence is sufficiently great that it did not likely result simply from faulty memory or honest mistake. Moreover, the circumstances under which Applicant made the statements contained in the report were part of an effort to obtain evidence in hopes of securing a favorable decision. Accordingly, a reasonable person could conclude that Applicant deliberately minimized her misconduct in her statements to the clinician in order to enhance the likelihood that the clinician would enter a favorable diagnosis and, therefore, assist Applicant in meeting her burden of persuasion that she should have a clearance. We resolve this assignment of error adversely to Applicant.

Allegation of Bias

Applicant contends that the Judge exhibited bias against her. She argues that the Judge's credibility determination, coupled with an "inappropriate attack" on her for submitting AE H, evidence a lack of impartiality. She also cites to the Judge's reference to her "claims" about unknowing ingestion and other aspects of her conduct, contending that the word "claims" is, under the facts of this case, pejorative and indicative of bias. There is a rebuttable presumption that a Judge is impartial and unbiased, and a party seeking to overcome that presumption has a heavy burden of persuasion. *See, e.g.*, ISCR Case No. 16-04112 at 3 (App. Bd. May 28, 2019). Adverse rulings alone do not demonstrate judicial bias. *See, e.g.*, ISCR Case No. 15-05047 at 3 (App. Bd. Nov. 8, 2017).

We have reviewed the evidence, paying particular attention to the manner in which the Judge conducted the hearing as reflected in the transcript. We find no reason to conclude that the Judge

exhibited bias against Applicant. For example, her negative credibility determination was founded upon substantial record evidence of Applicant's inconsistent statements rather than upon inexplicable animus. We have long noted that inconsistent statements can impugn a witness's credibility. *See, e.g.*, ISCR Case No. 15-03778 at 3 (App. Bd. Aug. 4, 2017). Moreover, there is no error in the Judge's having declined to extend significant weight to AE H, insofar as its conclusions reasonably appear to have relied upon a deliberate minimization of Applicant's security significant conduct. In any event, the Judge's analysis certainly does not constitute an attack upon Applicant for merely having submitted the document in the first place. One need not resort to allegations of judicial bias in order to account for adverse findings and conclusions that are consistent with the evidence viewed as a totality. Finally, we find nothing significant in the Judge's use of the word "claims" to describe some of Applicant's testimony. There is nothing in the record or in the Judge's analysis that would likely persuade a reasonable person that she lacked the requisite impartiality. Applicant has failed to meet her heavy burden of persuasion on this issue.

In summary, the Judge made sustainable findings that Applicant used marijuana eight times from 2002 until 2005; that she ceased using marijuana in order to enhance her chances for employment; that she resumed smoking marijuana in 2010 after having been granted a security clearance, using it ten to fifteen times until 2015; and that she made significantly inconsistent statements about her misconduct, to the detriment of her credibility. The record supports a conclusion that the Judge examined the relevant data and articulated a satisfactory explanation for the decision. 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.'" *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**.

See Separate Opinion _____

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

Separate Opinion of Administrative Judge Michael Y. Ra'anan

I concur in the disposition of the case. However, I am concerned about the Judge's conclusion that Applicant lied during her substance abuse evaluation.

Discrepancies between an Applicant's statements of record and a third party's out of court recitation of Applicant's non-record statement are worthy of note and would likely detract from any beneficial weight from the recitation. It is certainly possible that such discrepancies resulted from deliberate dishonesty by Applicant. However, there are also several other explanations that might be at issue in case such as this: The Social Worker may have erred either in listening, recording or regurgitating Applicant's description of her history. The dialogue between Applicant and the Social Worker might have resulted in a misunderstanding between them. Applicant might have made inconsistent statement without malicious intent. The Social Worker might have minimized Applicant's drug usage as a mistaken effort to help her. The Judge's conclusion that Applicant lied in an out of court situation in order to influence the DOHA proceeding might be correct but I think it would have been more prudent to observe the (relatively minor) discrepancies and adjust the weight attendant to the substance abuse evaluation accordingly.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan
Administrative Judge
Chairperson, Appeal Board