

KEYWORD: Guideline H

DIGEST: Applicant began using marijuana in 1980. He used marijuana about two or three times a week for about 40 years, in order to address anxiety disorder. He sought professional help regarding anxiety in the mid-1990s, his provider prescribing a legal drug that had possible long-term side effects. He reduced his ingestion of the prescription drug and continued using marijuana. In 2011, he obtained a prescription for medical marijuana at a state-sanctioned dispensary. Prior to that, he obtained marijuana from persons with similar needs. Favorable Decision Reversed.

CASE NO: 19-02499.a1

DATE: 07/07/2021

DATE: July 7, 2021

In Re: ----- Applicant for Security Clearance)))))))	ISCR Case No. 19-02499
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel
Aubrey DeAngelis, Esq., Department Counsel

FOR APPLICANT

Sean M. Bigley, Esq.
Jeffrey D. Billett, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On

November 15, 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 March 29, 2021, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert Tuider granted Applicant’s request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: whether the Judge’s decision is unsupported by the greater weight of the record evidence and, therefore, is arbitrary, capricious, or contrary to law. Consistent with the following, we reverse.

The Judge’s Findings of Fact

Applicant is in his mid-50s. He has been employed by a Defense contractor since late 2017. This is his first application for a security clearance. He holds bachelor’s and master’s degrees. Married, he has two adult children.

Applicant began using marijuana in 1980. He used marijuana about two or three times a week for about 40 years, in order to address anxiety disorder. He sought professional help regarding anxiety in the mid-1990s, his provider prescribing a legal drug that had possible long-term side effects. He reduced his ingestion of the prescription drug and continued using marijuana. In 2011, he obtained a prescription for medical marijuana at a state-sanctioned dispensary. Prior to that, he obtained marijuana from persons with similar needs.

Over time, Applicant shifted away from the use of drugs, legal or otherwise, due to the influence of his religious beliefs. In April 2019, on Easter Sunday, he made a commitment to develop strategies for controlling his anxiety without the use of drugs. He now pursues a regimen of exercise and good diet and has been meeting with a psychologist. He also attended Narcotics Anonymous (NA) in mid-to-late 2020, and it has been two years since he has used marijuana.

Applicant completed his security clearance application (SCA) in October 2017, disclosing his past marijuana use. He had no prior experience with the security clearance process. In November 2018 Applicant underwent a clearance interview, admitting his marijuana use up until that date. His use of marijuana continued for about six months thereafter. He does not associate with persons who use marijuana, and he understands that the use of illegal drugs is not tolerated at his place of employment and/or while he holds a clearance.

Applicant’s psychologist has extensive experience in evaluating security clearance applicants. This provider did not diagnosis Applicant with a drug use disorder but, rather, with Social Anxiety Disorder. He concluded that Applicant does not meet any of the criteria for substance use disorder and that Applicant ““is free from any problems of drug or alcohol use and pose[s] no risk to the national security as a result of his prior usage.”” Decision at 4.

Applicant is considered to be diligent and a person of integrity. His most recent work

performance review rated him as exceeding expectations.

The Judge's Analysis

The Judge concluded that Applicant's last instance of marijuana use, which took place twenty months before the hearing, was not recent within the meaning of the Directive. Moreover, he concluded that Applicant's record was "replete with compelling evidence that Applicant has turned the corner on achieving marijuana abstinence." Decision at 8. He cited to Applicant's dedication to being a good husband and father and to Applicant's recognition that drug use is not compatible with the standards expected of him by his employer.

The Judge stated that Applicant no longer associates with persons who use marijuana and has abstained since April 2019, as noted above. The Judge also cited to the opinions expressed by Applicant's psychologist and his character reference, as well as to evidence of Applicant's excellent work performance. The Judge stated that he evaluated Applicant's demeanor, candor, and reputation, concluding that Applicant's assertion that he will no longer use illegal drugs is credible.

Discussion

A Judge is required to "examine the relevant data and articulate 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 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). "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." Directive, Enclosure 2, App. A ¶ 2(b). The Appeal Board may reverse the Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶¶ E3.1.32.3 and E3.1.33.3.

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). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. *See* Directive ¶ E3.1.15. "The application of disqualifying and mitigating conditions and whole person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole." *See, e.g., ISCR Case No. 05-03635 at 3* (App. Bd. Dec. 20, 2006).

In deciding whether the Judge's rulings or conclusions are erroneous, we will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary

to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See, e.g.*, ISCR Case No. 14-02563 at 3 (App. Bd. Aug. 28, 2015).

Department Counsel argues that the Judge's favorable decision does not reflect a reasonable interpretation of the record viewed as a whole, citing to testimony and to various pieces of evidence that he contends undermine the Judge's decision. We find Department Counsel's arguments to be persuasive. Drug abuse "can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations." Directive, Encl. 2, App. A ¶ 24. We note the following, drawn from the Judge's findings as well as the record evidence.

Applicant began using marijuana in about 1980. Although he did so initially due to peer pressure, he found that it was helpful in relieving anxiety. He used marijuana two or three times a week. Decision at 2; Government Exhibit (GE) 1, 2017 SCA, at 36-37; Tr. at 19-23.

When he entered his 30s, Applicant sought professional care in addressing his problems with anxiety. The doctor prescribed an anxiety medication for Applicant. However, he continued using marijuana after he began taking the prescribed drug. Tr. at 24-25.

In September 2017, a prospective employer rescinded a job offer to Applicant due to Applicant having failed a drug test. GE 2, Interrogatories, at 5; Clearance Interview, included in GE 2, at 14.

In October 2017 Applicant completed his SCA. Applicant stated in his SCA that he did not intend to use marijuana in the future. Decision at 4; GE 1 at 37.

In November 2018, Applicant underwent a clearance interview, which "had an impact on him." During this interview, he acknowledged his continued use of marijuana after completion of his SCA. He told the investigator that he did not intend to be involved with marijuana again. Decision at 4; Clearance Interview at 13.

Applicant continued using marijuana after his clearance interview. He stopped using marijuana in April 2019. Decision at 3-4; Tr. at 45.

Applicant testified that his use of marijuana was "calculated, strategic." Tr. at 51. He admitted that when he completed his SCA he understood that state law did not affect Federal drug laws to the contrary. Tr. at 55.

We have considered Judge's decision and the entirety of the record evidence, noting in particular Applicant's anxiety disorder, the favorable opinion of his psychologist, his character reference, and his testimony about his life-style changes and his religious convictions. However,

evidence cited above shows that Applicant continued using an illegal substance after having been placed on notice of the significance of such conduct. This raises serious questions about Applicant's judgment, trustworthiness, and reliability. Applicant's misconduct persisted even after he had been denied employment due to a failed drug test; after his completion of his SCA which, he testified, made him aware that marijuana use is a violation of Federal law (Tr.at 55); and after discussion of his marijuana use during his clearance interview. *See, e.g.*, ISCR Case No. 17-04198 at 2 (App. Bd. Jan. 15, 2019)(An applicant's use of illegal drugs after having completed an SCA or after otherwise having been placed on notice of the incompatibility of drug abuse and clearance eligibility raises questions about his or her judgment, reliability, and willingness to comply with rules and regulations). Indeed, Applicant described his security-significant conduct as calculated and strategic, foreclosing reliance upon mistake of fact or law and underscoring the knowing and willful quality of his behavior.

Moreover, there is substantial evidence that Applicant made two promises nearly a year apart to the DoD that he would refrain from illegal drug use in the future, promises which he failed to keep. This is of particular significance, given that Applicant's presentation at the hearing consisted in large measure upon a similar promise, one that the Judge found credible. As noted above, in a DOHA proceeding the applicant bears the burden of persuasion that he or she should have access to classified information, viewed in the context of the standard set forth in *Egan, supra*. The Directive places upon an applicant the responsibility to present evidence of rehabilitation and mitigation, and we give deference to a Judge's credibility determination. That deference, however, is not without limits. When the record contains a basis to question an applicant's credibility, the Judge should address that aspect of the record explicitly, explaining why he or she finds applicant's version of events to be worthy of belief. Failure to do so suggests that the Judge has merely substituted a favorable impression of an applicant's demeanor for record evidence. *See, e.g.*, ISCR Case No. 18-01926 at 4 (App. Bd. Sep. 20, 2019).

The Decision fails adequately to explain why Applicant's evidence that he will remain drug free is of sufficient credibility as to meet that burden. In the Analysis portion of the Decision, the Judge cited to Applicant's drug counseling, religious involvement, current sobriety, and his promise to refrain from drug use in the future. He did not provide a meaningful analysis of these matters in light of the countervailing evidence listed above, particularly Applicant's failed prior promises to abstain. We conclude that Applicant's security significant conduct—viewed cumulatively—is inconsistent with the Judge's credibility determination and weighs heavily against Applicant's effort to demonstrate rehabilitation. Even if Applicant has, indeed, remained drug free for twenty months, the predictive power of such a circumstance must be evaluated in light of Applicant's forty years of marijuana use, which persisted during the pendency of his clearance investigation. Such conduct is at substantial variance with the requirement that holding a security clearance must be "clearly consistent with the interests of the national security." *See Egan, supra*. We conclude that the record as a whole supports Department Counsel's argument that the Judge appears to have substituted a favorable impression of Applicant's demeanor for record evidence.

Given the record before us, we conclude that the Judge's favorable decision does not meaningfully address all relevant factors and runs contrary to the weight of the record evidence. The record as a whole does not support the Judge's favorable decision.

Order

The Decision is **REVERSED**.

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