

Applicant failed to disclose his marijuana use on his 2015 SF 86 and that he intentionally concealed his drug use from his Facility Security Officer in 2017 after becoming aware of his duty to self-report. Applicant admitted all allegations. The Judge found in favor of Applicant on the Guideline H, D, and J allegations and against him on the Guideline E allegations. The Judge's favorable findings were not raised as an issue on appeal.

Applicant raised the following issue on appeal: whether the Judge failed to properly consider all available evidence, rendering his adverse decision arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact and Analysis

Applicant is 32 years old. After securing his current job with a defense contractor in 2015, Applicant submitted a Questionnaire for National Security Position (SF 86), in which he intentionally failed to disclose that he used marijuana between 2007 and 2009 and again between 2014 and 2015. After receiving his security clearance in 2015, Applicant continued to use marijuana irregularly. His last use of marijuana was in October 2016, at which time he also consumed psilocybin mushrooms. Since that occasion, Applicant has used no illegal substances.

In July 2017, Applicant applied for a position that required a top secret clearance. In the course of that job application process, Applicant was alerted to the gravity of his continued drug use and to his affirmative duty to self-report. He delayed reporting to his Facility Security Officer (FSO) in order to complete a project, but then self-reported in October 2017.

In November 2017, Applicant submitted another SF 86, in which he fully reported his illegal drug use, estimating that he used marijuana fewer than 20 times between 2007 and 2016. In 2018, Applicant met with a background investigator, confirmed the drug use, and further disclosed that he had paid for the services of prostitutes in Mexico in 2015 and 2016. In his July 2019 response to DOD interrogatories, Applicant reported that he had engaged the services of a prostitute in Amsterdam the prior month.

Prior to his hearing, Applicant was evaluated by a licensed clinical social worker (LCSW), with whom he discussed his substance abuse and encounters with prostitutes. She concluded that there was no diagnosis and that Applicant was not at risk of relapse. Applicant's statements to the LCSW about his drug use and involvement with prostitutes were, in pertinent details, inconsistent with his testimony at the hearing and his earlier disclosures.

The Judge found in favor of Applicant on the Guideline D, Guideline H, and Guideline J allegations, concluding that the behaviors of concern were mitigated by the passage of time and unlikely to recur. Under Guideline E, however, the Judge found against Applicant on all allegations: his drug use and solicitation of prostitutes, his falsification of the 2015 SF 86, and his failure to self-report drug use to his FSO:

There is a common thread running through Applicant's misconduct: poor judgment and dishonesty. He lied about his drug use on his SF 86, and then continued to use illegal drugs while holding a security clearance. He discussed his involvement with

prostitutes during his June 2018 background interview, and then he engaged the services of a prostitute in Amsterdam in June 2019. He was less than candid in how he reported his conduct to the LCSW during his evaluation, and I have good reason to question his credibility. While I believe that specific conduct (drugs, prostitutes) is unlikely to recur, I am unable to conclude that other problematic conduct is unlikely to recur. The . . . mitigating conditions are insufficient to overcome ongoing concerns about Applicant’s judgment, reliability, trustworthiness, and honesty. [Decision at 10.]

Discussion

Applicant has not challenged any of the Judge’s specific findings of fact. Rather, he contends that the Judge erred in two regards: first, under Guideline E, he failed to apply the mitigation evidence that he considered favorably under Guidelines D, H, and J; and, second, he failed to properly apply the whole-person concept. Consequently, Applicant argues, the Judge’s decision on the Guideline E allegations was arbitrary, capricious, and contrary to law. As an example, Applicant argues that the Judge found the security concerns under Guidelines D, H, and J to be mitigated in part due to the passage of time, but “refused to use this pattern of reasoning” when considering the Guideline E concerns. Appeal Brief at 8. Applicant contends that “[p]er the directive, the very mitigating circumstances included for Guidelines D, H, and J are also applicable to Guideline E.” *Id.* However, it is well-established that a Judge may weigh the same evidence differently under different Guidelines. *See, e.g.,* ISCR Case No. 16-02483 at 2 (App. Bd. Jun. 11, 2018). Moreover, a finding of mitigation under one Guideline does not compel a similar finding under another. *See, e.g.,* ISCR Case No. 13-01281 at 4 (App. Bd. Aug. 4, 2014).

In considering an applicant’s claim that a Judge has treated two or more Guidelines inconsistently, we examine the record and the Directive to determine if there is a rational basis for the Judge’s decision. In this case, the Judge’s favorable conclusion under Guidelines D, H, and J rested on evidence that the drug use and solicitation of prostitutes was attenuated by time and that Applicant had matured and was unlikely to return to such behaviors. Under Guideline E, however, the Judge focused on a “common thread” of poor judgment and dishonesty that ran through all of Applicant’s misconduct, to include not only the drug use and solicitation, but a falsification and failure to report. Decision at 10. This focus was reasonable, as judgment and candor are qualities explicitly addressed under Guideline E. Applicant has not shown the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. Neither has he rebutted the presumption that the Judge considered all of the evidence in the record. *See, e.g.,* ISCR Case No. 19-01400 at 2 (App. Bd. Jun. 3, 2020).

This record supports a conclusion that the Judge examined the relevant data and articulated 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 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**.

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Chairperson, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

Signed: Moira Modzelewski
Moira Modzelewski
Administrative Judge
Member, Appeal Board