DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
POST OFFICE BOX 3656
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(703) 696-4759

Date: November 28, 2022

In the matter of:	)	
-----	)	ISCR Case No. 21-00152
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Angelo Fernandez, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On March 31, 2021, DoD issued a statement of reasons (SOR) advising Applicant of the basis of that decision—security concerns raised under Guideline H (Drug Involvement and Substance Misuse) and Guideline E (Personal Conduct) of DoD Directive 5220.6 (January 2, 1992, as amended) (Directive). Applicant requested a hearing. On September 20, 2022, after the record closed, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert E. Coacher denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Under Guideline H, the SOR alleged that Applicant purchased and used marijuana from about 1994 to about 2019, that he was arrested for misdemeanor possession in 1996, that he used marijuana while granted access to classified information, and that he intends to use it in the future. These same behaviors were cross-alleged under Guideline E. The Judge found favorably for Applicant on the allegation that he used while granted access. He found adversely on the remaining Guideline H allegations and on the Guideline E allegation. The favorable finding is not

in issue. Applicant raises the following issue on appeal—whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

Discussion

Applicant has not challenged any of the Judge's specific findings of fact. Rather, he broadly contends the Judge erred in failing to comply with the provisions in Executive Order 10865 and the Directive by not considering all of the evidence, by mis-weighing the evidence, and by not properly applying the mitigating conditions and whole-person concept. In his only specific assignment of error, Applicant's counsel argues that the Judge erred in adopting his Guideline H analysis when he turned to the Guideline E allegations by stating "The analysis under Guideline H applies equally here. Personal conduct security concerns are not mitigated." Decision at 7.

> Guideline E and Guideline H have different mitigating factors; thus there can be no rational connection between the decision under Guideline H and Guideline E because different evidence is needed to support the different mitigating factors. Essentially, the [Judge] used the conclusion and analysis of Guideline H for Guideline E without balancing the evidence under Guideline E factors. [Appeal Brief at 6–7.]

To the extent that we understand counsel's argument, we are not persuaded. Contrary to counsel's assertion, different evidence is not necessarily required to establish security concerns under both guidelines. It is well-established that a judge may weigh the same evidence differently under different guidelines. *See, e.g.*, ISCR Case No. 19-03941 at 3 (App. Bd. Jan. 21, 2022). The Judge cited to the applicable mitigating conditions (MC) under both Guidelines: MC ¶¶ 26 (a) – (b) and MC ¶¶ 17 (c) – (e). Those conditions in fact closely mirror each other, and the Judge's analysis under Guideline H was equally applicable under Guideline E. It did not need to be repeated. This assignment of error is without merit.

None of Applicant's arguments are enough to rebut the presumption that the Judge considered all of the record evidence or to demonstrate the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. Moreover, the Judge complied with the requirements of the Directive in his whole-person analysis by considering all evidence of record in reaching his decision. *See, e.g.*, ISCR Case No. 19-01400 at 2 (App. Bd. Jun. 3, 2020). The Hearing Office cases that Applicant's counsel has cited are easily distinguishable, not binding precedent on the Appeal Board, and insufficient to undermine the Judge's decision. *See, e.g.*, ISCR Case No. 17-02488 at 4 (App. Bd. Aug. 30, 2018).

Applicant has failed to establish that the Judge committed any harmful error or that he should be granted any relief on appeal. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The decision is sustainable on the record. "The general standard is that a clearance may be granted only when 'clearly consistent with 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 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