

KEYWORD: Guideline H

DIGEST: The Judge's error in his findings of fact was not harmful. Had he not made the error the Judge would still have decided the case the same way. Adverse decision affirmed.

CASENO: 14-04570.a1

DATE: 10/16/2015

DATE: October 16, 2015

In Re:)
)
)
-----) ISCR Case No. 14-04570
)
)
Applicant for Security Clearance)
)
)

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Carolyn Tatum Roddy, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On January 28, 2015, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that

decision—security concerns raised under Guideline H (Drug Involvement) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On July 29, 2015, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert Robinson Gales 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 works for a Defense contractor. He received a bachelor’s degree in 2011 and is pursuing a master’s degree. He has never held a security clearance. Applicant began smoking marijuana in late 2010, when he reconnected with an old high school friend (A). Although he began using marijuana in his friend’s apartment, he eventually used it alone in his own apartment. In his security clearance application, he acknowledged having used it approximately 250 times until early 2014. He stated that since the beginning of 2014 he has used marijuana on only one occasion, focusing his attention instead upon his job.

In his security clearance interview, he stated that he had purchased marijuana from another person, B. He stated that, in March 2014, he smoked marijuana for two to three hours a day for seven straight days in his parents’ house during Spring break. During this time, he obtained the drug from a third person, C. “Applicant also purchased marijuana from two other individuals (Messrs. D and E).” Decision at 3.

Applicant stated that he used marijuana because it enabled him to relax. He stopped using it because he does not want to lose his job, which requires a clearance. Applicant does not question that his drug use violated state and Federal laws, and he regrets his misconduct as irresponsible. He signed a statement of intent to refrain from illegal drug use, with an automatic revocation of clearance should he fail to honor the promise.

Of his former acquaintances, A lives in another state, and B is deceased (from drug-related causes). Applicant comes into contact with C once every six months and keeps in close personal contact with D and E. Applicant’s character references include his former scoutmaster, who opines that he has grown into a responsible adult. He enjoys a good reputation for honesty, professionalism, and hard work.

The Judge’s Analysis

The Judge concluded that Applicant’s drug use was recent, frequent, and did not occur under unusual circumstances. Though citing Applicant’s statement of intent not to use marijuana in the future, the Judge found that there is little evidence that he has changed or avoided circumstances

where drugs are used. He stated that Applicant still has encounters with persons involved in drugs, in that he associates with C once every six months and has close contact with D and E. The Judge concluded that Applicant's abstinence since early 2014 was not sufficient to overcome the security concerns arising from his drug use.

In the whole-person analysis, the Judge cited to favorable aspects of Applicant's case, such as his character references, his abstinence, and a lack of evidence that he has ever been diagnosed as a substance abuser or as drug-dependent. However, he found the reason for denying a clearance to be more compelling than those for granting one. He stated that holding a clearance requires a willingness to abide by rules and regulations, to exert control over one's impulses, and the ability to make commitments over time. Applicant's drug use displayed shortcomings in at least some of these qualities, in that he failed to respect authority and to exercise self control. The Judge concluded that Applicant had failed to mitigate the concerns raised by his marijuana use.

Discussion

Applicant contends that the Judge erred in some of his findings of fact. Specifically, he states that the Judge erred in finding that he had obtained marijuana from D and E. He argues that this error affected the overall outcome of the case, given the Judge's conclusion that Applicant's continued association with these two individuals showed that he had not disassociated himself from those who use illegal drugs. We evaluate a Judge's findings of fact to see if they are based upon "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.

We find Applicant's argument to be persuasive. Applicant mentioned four persons in his clearance interview, two of whom provided him with marijuana and another two who were aware of his marijuana use but were not described as users or suppliers. The first two appear to correspond with B and C in the Judge's findings and the other two with D and E. In his testimony, Applicant described D and E as close friends who themselves were not involved with drugs. There is nothing in the record that would support a finding that the persons identified as D and E ever provided Applicant with marijuana or used it with him. Therefore, the Judge's finding that Applicant obtained marijuana from these two persons was erroneous.

Having found error, we must address whether it was harmful or not. A harmful error is one that, had it not occurred, the case might have been differently decided. *See, e.g.*, ISCR Case No. 11-11920 at 3 (App. Bd. Nov. 24, 2014). We note first of all that the Judge's finding that Applicant still associates with those who supplied him with drugs is supported by evidence that he has contact with C twice a year. Moreover, the Judge's overall adverse conclusion rested not only on Applicant's continued personal associations but on his extensive history of misconduct that raises questions about his "willingness to comply with laws, rules, and regulations." Directive, Enclosure 2 ¶ 24. Indeed, in the whole-person analysis, the Judge did not mention C, D, or E at all, focusing instead on the nature and extent of Applicant's conduct. Examining the record as a whole, we conclude that, even if he had not made the factual error identified here, the Judge would have decided the case in the same way. The error in the Judge's findings of fact is harmless.

The Judge examined the relevant data 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, Enclosure 2 ¶ 2(b): “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.”

Order

The Decision is **AFFIRMED**.

Signed: Michael Ra’anan
Michael Ra’anan
Administrative Judge
Chairperson, Appeal Board

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

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