

KEYWORD: Guideline H

DIGEST: A review of the Judge's decision indicates that the Judge weighed the mitigating evidence against the record evidence of the length seriousness and recency of the disqualifying conduct. Adverse decision affirmed.

CASENO: 04-08747.a1

DATE: 09/21/2007

DATE: September 21, 2007

In Re:)	
)	
-----)	ISCR Case No. 04-08747
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On May 16, 2005, DOHA issued a statement of reasons 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 March 26, 2007, after the hearing, Administrative Judge Edward W. Loughran denied Applicant’s request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge’s adverse security clearance decision under Guideline H is arbitrary, capricious, or contrary to law.

Applicant argues that the Judge should have concluded that the security concerns raised under Guideline H had been mitigated, as a matter of law, because Applicant’s drug use occurred in the past, Applicant has demonstrated that he would not use drugs in the future, and Applicant provided clear evidence of rehabilitation. In support of this argument, Applicant points to the favorable evidence in the record, including his participation in counseling, his academic achievements, his military service, his outstanding work record, and his significant community service.¹ Given the totality of the record evidence, Applicant’s arguments do not demonstrate that the Judge’s decision is arbitrary, capricious, or contrary to law.

“[T]here is a strong presumption against granting a security clearance.” *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. Directive ¶ E3.1.15. “The application of disqualifying and mitigating conditions 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* ISCR Case No. 01-14740 at 7 (App. Bd. Jan. 15, 2003). “Thus, the presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision.” *See* ISCR Case No. 05-02833 (App. Bd. Mar. 19, 2007). “As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. An applicant’s disagreement with the Judge’s weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law.” *See* ISCR Case No. 05-03143 at 3 (App. Bd. Dec. 20, 2006).

In this case, the Judge made sustainable findings as to a lengthy and serious history of improper or illegal drug use by an Applicant who was familiar with the security clearance process. That history included illegal marijuana use, sometimes on a daily basis, from approximately 1998 to at least September 2003. It also included the purchase of marijuana, three marijuana-related criminal offenses, and the illegal use of marijuana while holding a security clearance granted by the Department of Defense. A review of the decision indicates that the Judge weighed the mitigating evidence offered by Applicant against the record evidence relating to the length, seriousness and recency of the disqualifying conduct, and considered the possible application of relevant mitigating

¹There is a rebuttable presumption that a Judge considered all the record evidence unless he specifically states otherwise. *See, e.g.*, DOHA Case No. 96-0228 at 3 (App. Bd. Apr. 3, 1997). Moreover, a Judge is not required to cite or discuss every piece of record evidence. *See, e.g.*, DISCR Case No. 90-1596 at 5 (App. Bd. Sep. 18, 1992). In this case, the Judge specifically addressed favorable evidence cited by the Applicant. *See* Decision at 2, 6 and 9.

conditions and whole-person factors. The Judge reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome the government's security concerns. The Board does not review a case *de novo*. Given the record that was before him, the Judge's ultimate unfavorable clearance decision under Guidelines H is not arbitrary, capricious or contrary to law. *See, e.g.*, ISCR Case No. 04-12548 at 2-3 (App. Bd. Sep. 18, 2006).

Order

The decision of the Judge denying Applicant a clearance is AFFIRMED.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairman, Appeal Board

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

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board