

KEYWORD: Guideline H

DIGEST: The specific criteria the Judge utilized in evaluating the recency of Applicant's drug use were set forth in guideline no longer in force. The judge's new decision should rely explicitly on guidelines current at the time the SOR was issued. Favorable decision remanded.

CASENO: 05-16318.a1

DATE: 06/21/2007

DATE: June 21, 2007

In Re:)	
)	
-----)	
SSN: -----)	ISCR Case No. 05-16318
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Fahryn Hoffman, Esq., Department Counsel

FOR APPLICANT

Andrew F. Reish, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On January 24, 2006, 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 October 31, 2006, after the hearing, Administrative Judge Christopher Graham granted Applicant's request for a security clearance. Department Counsel filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Judge erred by relying on outdated policy guidance in reaching his decision; and whether the Judge's decision was arbitrary, capricious, and contrary to law. Finding error, we remand the case to the Judge.

Whether the Record Supports the Judge's Factual Findings

A. Facts

The Judge made the following pertinent findings: Applicant used marijuana with varying frequency between 1994 and 2004. He has also abused Ritalin and Percocet, twice used cocaine, and has used hashish. Additionally, he has used ecstasy twice and psilocybin (mushrooms) and/or LSD at least five times.

Applicant's drug abuse occurred most frequently while he was in high school and college. After graduating, he used only marijuana. He used drugs in social settings, was never impaired by drugs for the performance of his work duties, and has used no drugs at all since August 2004. Applicant was promoted at work. He credited that promotion, and the responsibilities it entailed, with the decision to stop using drugs.

B. Discussion

The Appeal Board's review of the Judge's findings of facts is limited to determining if they are supported by substantial evidence—such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record.” Directive ¶ E3.1.32.1. “This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620-21 (1966). In evaluating the Judge's findings, we are required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1. Department Counsel has not challenged the Judge's findings. Therefore, they are not at issue in this appeal.

Whether the Record Supports the Judge's Ultimate Conclusions

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 choices 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 national security.’” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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.

In analyzing Applicant's case, the Judge quoted a 1992 Department of Defense PERSEREC report related to revising the adjudicative guidelines for alcohol abuse, drug abuse and mental/emotional disorders:

Consider a person drug-free for at least two years, marijuana was used regularly, or any other drug was used occasionally, and there are no aggravating circumstances. There was no evidence of psychological or physical dependence at the time subject was using drugs, and subject has demonstrated a stable life style with satisfactory employment record since then.¹

The Judge went on to observe, "Applicant fits this profile. Applicant's use of marijuana fell between occasional and frequent use. All other drugs were experimental use."

Department Counsel argues on appeal that the Judge's use of the above referenced criteria, *sua sponte*, was error. Also, "the 1992 material upon which the Administrative Judge's analysis relied was outdated and irrelevant to the case at hand because it addressed the highly specific definitions that were contained in a set of adjudicative guidelines that are no longer in effect." Applicant replies that Department Counsel has not established that the criteria quoted above are in fact outdated. Applicant further argues that, in any event, it was not error for the Judge to rely on those criteria, since they are readily available under the auspices of the U.S. Army.²

Department Counsel's position is correct. The specific criteria which the Judge utilized in evaluating the recency of Applicant's drug use were set forth in guidelines no longer in force. Under policy in effect at the time Applicant's SOR was issued, Judges are not to apply rigid time standards but rather are to "evaluate the record evidence as a whole and reach a reasonable conclusion as to the recency of an applicant's conduct." *See, e.g.*, ISCR Case No. 03-02374 (App. Bd. Jan. 26, 2006). It is axiomatic that "a Judge cannot rely on . . . an earlier version of the Directive to justify the Judge's decision and that an applicant's security clearance eligibility must be adjudicated under current DoD policies and standards, not past ones." ISCR Case No. 02-17369 at 3-4 (App. Bd. May 23, 2006). The fact that these criteria are still available on line in the Supplemental Information to the Adjudicative Desk Reference is of no consequence, since that publication is not U.S. policy and is not a legal basis for evaluating an applicant's suitability for a clearance.³ We conclude that, in light of the Judge's use of outdated criteria, the case should be remanded to him for a new decision which relies explicitly on those guidelines current at the time Applicant's SOR was issued.

¹Decision at 5.

²Applicant cites to the Adjudicative Desk Reference, Supplemental Information, found at www.smdc.army.mil. This document was prepared by the Defense Personnel Security Research Center in Monterey CA.

³See the introductory comments to the ADR: "[T]he Supplemental Information is not U.S. policy and may not be cited as authority for denial or suspension of access."

Order

The Judge's decision granting Applicant a clearance is REMANDED.

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

Signed: Michael D. Hipple
Michael D. Hipple
Administrative Judge
Member, Appeal Board

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