

KEYWORD: Guideline H

DIGEST: In this instance it was not unreasonable for the Judge to find mitigation after a period of over four years of abstinence from marijuana. Favorable decision affirmed.

CASENO: 07-03596.a1

DATE: 03/07/2008

DATE: March 7, 2008

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| In Re: |) | |
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| ----- |) | ISCR Case No. 07-03596 |
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| Applicant for Security Clearance |) | |
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Paul M. DeLaney, Esq., Department Counsel

FOR APPLICANT

Kathleen E. Voelker, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 10, 2007, 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, 2007, after the hearing, Administrative Judge Christopher Graham granted Applicant’s request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

On appeal, Department Counsel raised the following issue on appeal: whether the Judge’s application of Guideline H mitigating conditions and his whole-person analysis are arbitrary, capricious, or contrary to law. Finding no error, we affirm.

The Judge made the following pertinent findings of fact: Applicant is 26 years old. He holds a bachelor’s degree and has completed 70% of the requirements for a master’s degree. Applicant smoked marijuana 16 times between May 1995 and May 2003, including three times after he received a security clearance in January 2002. Applicant has not used marijuana since May 2003. He has changed his lifestyle since that time and avoids situations and persons that would bring him into contact with drug use. Applicant now has a stable relationship with a successful career woman and is pursuing an advanced degree. He is focused on his career and his future. Applicant expressed remorse and stated his intent not to use drugs in the future. Three character witnesses testified to his character and reliability.

In finding favorably for Applicant under Guideline H, the Judge applied ¶ 26(b) of the Revised Adjudicative Guidelines in mitigation of the government’s security concerns.¹ The factual findings above cover three of the mitigating conditions in ¶ 26(b). With reference to the “appropriate period of abstinence,” the Board has not articulated a “bright-line rule” for a required period of abstinence. *See, e.g.*, ISCR Case No. 98-0611 at 2 (App. Bd. Nov. 1, 1999). In this instance, it was not unreasonable for the Judge to find mitigation after a period of over four years of abstinence. The Judge’s conclusions regarding mitigation are consistent with a reasonable interpretation of the record evidence and are neither arbitrary, capricious, nor contrary to law.

Likewise, the Judge’s whole-person analysis is supported by the record evidence. Examining the Judge’s decision in light of his findings and the record as a whole, the board concludes that he articulates “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)). We hold that the Judge’s favorable security clearance decision is neither arbitrary, capricious, nor contrary to law.

Order

The Judge’s favorable security clearance decision is AFFIRMED.

¹“a demonstrated intent not to abuse drugs in the future, such as: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation;” Directive, Revised Adjudicative Guidelines, ¶ 26(b).

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

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

Dissenting Opinion of Jeffrey D. Billett, Board Member

I respectfully dissent from my colleagues' decision to affirm the Judge's decision in this case. Because I believe that the Judge's favorable credibility assessment of Applicant was flawed, and because I believe that credibility assessment looms large in the Judge's ultimate disposition of the case, I vote to remand the case.

In the "Conclusions" portion of his decision, the Judge offered the following: "Applicant listed his drug use in his security clearance application. This is positive because candor with the government about a person's negatives is the crux of a trustworthiness determination. If a person discloses the adverse information about himself, it supports the notion of trustworthiness." A reading of the Judge's decision as a whole indicates that his acceptance of Applicant's testimony and statements about his regrets concerning his past marijuana use, the adjustments he made to avoid his past lifestyle, and his intent not to use drugs in the future were based, to a significant degree, upon his favorable credibility assessment of Applicant. As the preceding quoted language from the decision indicates, the Judge specifically pointed to the fact that Applicant had been forthright in his disclosure of his past marijuana use when responding to government inquiries about that use. This finding of forthrightness in turn provided the basis for the Judge's conclusion that Applicant was entirely credible and trustworthy.

The Judge's conclusions notwithstanding, when the detailed evidence in the record is considered, it indicates that Applicant may have been less than completely forthright when revealing his marijuana use. On a 2002 security clearance application, Applicant revealed only marijuana use between 1995 and 1998. In a subsequent security clearance application completed in 2006, Applicant reveals, for the first time, multiple marijuana uses that took place in 2001. Additionally, Applicant eventually admitted to illegally using marijuana a total of 16 times from 1995 to 2003,

while he disclosed only a total of 11 marijuana usages on the two security clearance applications he submitted and in his answers to interrogatories concerning his drug use.

These omissions are more than minor discrepancies, especially in the context of a Judge's decision that specifically touts Applicant's credibility based on his truthfulness in revealing his marijuana use to the government. The objective evidence suggests the real possibility that Applicant was less than truthful with the government, yet the Judge does not mention the omissions or discrepancies in his decision. I would remand this case to the Judge and require him to reevaluate his favorable credibility assessment of Applicant in light of the evidence suggesting a lack of candor, and then require him to reconsider his overall favorable security clearance decision.

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board