

KEYWORD: Guideline H; Guideline E; Guideline J

DIGEST: Applicant’s use of marijuana and cocaine, and his false statements on the security clearance application concerning that use, raised security concerns which Applicant failed to mitigate. Adverse decision affirmed.

CASENO: 07-16442.a1

DATE: 10/09/2008

DATE: October 9, 2008

In Re:)	
)	
-----)	ISCR Case No. 07-16442
)	
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 March 31, 2008, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline H (Drug Involvement), Guideline E (Personal Conduct) and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 11, 2008, after the hearing, Administrative Judge Noreen Lynch 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 clearance

decision under Guidelines H, E and J is sustainable.

The Judge found as follows: Applicant is a 44-year-old employee of a defense contractor. He graduated from high school in 1982 and then he enlisted in the U.S. Air Force in November of that year. When he retired in 2003, he was a master sergeant. He is married and has held a top-secret security clearance for more than 20 years. He has been with his current employer since June 2007.

Applicant received numerous medals and commendations while in the military. He received specialized training and attended the USAF NCO Academy in 1995, 1998 and 1989. During his career, he was promoted and given monetary recognition for his efforts. When he transitioned into the civilian work world, he obtained a civilian job with the federal government.

In March 1986, while in the military, Applicant received a non-judicial punishment for the Wrongful Use of Marijuana after testing positive during a drug urinalysis. He was reduced in rank and ordered to forfeit \$400. He denied any use of drugs. He was counseled by an Air Force physician due to the Article 15 on March 28, 1986. At that time, he held a top secret clearance.

In October 2006, Applicant tested positive for cocaine during a random drug testing at his place of employment. He was referred to an Air Force drug and alcohol program, but he denied the use of any drug. He held a top secret clearance at that time. Applicant resigned from his employment on January 19, 2007.

Applicant completed his security clearance application on July 31, 2007. He answered “no” to section 22 (your employment record), which has four questions concerning circumstances or unfavorable reasons that a person may have left employment. Applicant also responded “no” to section 24(b) (use of illegal drugs and drug activity at any time). He did not note the fact that he used cocaine in October 2006 and marijuana in 1986, both times while holding a top secret clearance. Thus, he failed to list his use of illegal drugs.

The Department of Defense interviewed Applicant in September 2007 as part of his security clearance investigation. Applicant told the interviewer that he left his job in 2006 because he did not relish the commute and the congested tunnel traffic. He also commented that his wife’s grandmother died and he needed to handle matters in that arena.

At the hearing, Applicant explained that after the October positive test result, he cooperated with the command. In November and December he was on paid administrative leave. He felt after the intervening months of not being in his position that he would consider leaving for a number of reasons. He consulted with his wife and decided to leave. He noted that his boss had retired. He felt that perhaps his reputation was tarnished and that his authority might be diminished. He also noted the traffic congestion as another reason to leave. In sum, he believed he would no longer be effective in his position.

Applicant described the testing procedure for the drug program to the investigator. He explained in great detail that the drug program was new and that he had helped implement the program. Applicant remarked that the restroom was dirty and the urinal and sink were taped up. He

recalled taking the test and returning the specimen.

Applicant elaborated at the hearing that he received a phone call on October 30, 2006, a few days later, from the physician at the test lab that was out of state. He was informed that the test was positive for cocaine. The physician asked questions about his health and did Applicant have any recent dental work. Applicant answered “no” and also informed the doctor that he had not used cocaine. Applicant was given an opportunity at that point to request a recheck of the sample. The fee was \$150. Applicant had 72 hours to decide if he wanted this done. Applicant declined the offer.

Applicant testified that on October 31, 2006, he told his captain that he had been in the Air Force for 20 years and that he had not used cocaine. Applicant claimed that the captain filed a complaint against the lab for calling Applicant directly instead of calling the Command.

Applicant’s current employer rates him as a successful contributor. He is a competent performer and valued team player. He is valued for his leadership qualities. Decision at 2-3.

On appeal, Applicant gives a detailed summary of the testimony that he provided at the hearing, reiterates that he has not used drugs, and asserts that the positive drug tests to the contrary are erroneous. Applicant’s arguments do not demonstrate that the Judge erred.

The Board’s review of a Judge’s findings 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 same record. *See* 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 finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 620 (1966).

After reviewing the record, the Board concludes that the Judge’s findings are based on substantial evidence, or constitute reasonable characterizations or inferences that could be drawn from the record. Applicant has not identified any harmful error likely to change the outcome of the case. Considering the record evidence as a whole, the Judge’s material findings of security concern are sustainable. *See, e.g.*, ISCR Case No. 06-21025 at 2 (App. Bd. Oct. 9, 2007).

Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. 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*. *See, e.g.*, ISCR Case No. 06-10320 at 2 (App. Bd. Nov. 7, 2007). 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, e.g.*, ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

In this case, the Judge weighed the mitigating evidence offered by Applicant against the

length and seriousness of the disqualifying conduct and considered the possible application of relevant mitigating conditions and factors. She found in favor of Applicant as to one of the SOR allegations. However, the Judge reasonably explained why the evidence which Applicant had presented in mitigation was insufficient to overcome the government's security concerns. The Board does not review a case *de novo*. After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for her decision, "including a 'rational connection between the facts found and the choice 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)). Therefore, the Judge's ultimate unfavorable security clearance decision under Guidelines H, E and J is sustainable.

Order

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

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