

KEYWORD: Guideline H

DIGEST: Applicant’s last use of marijuana occurred after Applicant had been hired for a job requiring a trustworthiness designation. Any error in the Judge’s decision concerning the number of times Applicant used marijuana is harmless, given the totality of the record evidence. Adverse decision affirmed.

CASE NO: 08-05539.a1

DATE: 08/06/2009

DATE: August 6, 2009

In Re:)	
)	
-----)	ADP Case No. 08-05539
)	
Applicant for Public Trust Position)	

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 trustworthiness designation. On November 19, 2008, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—trustworthiness 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 May 26, 2009, after the hearing, Administrative Judge Henry Lazzaro denied Applicant’s request for a trustworthiness designation. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether certain of the Judge's findings of fact were supported by substantial record evidence and whether the Judge's adverse trustworthiness determination is arbitrary, capricious, or contrary to law. Finding no error, we affirm.

The Judge made the following pertinent findings of fact: Applicant is a manager of billing and enrollment for a defense contractor. He began using marijuana while in college. From early 1993 until about December 1996, he smoked marijuana approximately two or three times a week. He also admitted to using marijuana infrequently from 1996 until 2007. He stated that, during that time, there were "some years" in which he did not use marijuana at all. Decision at 2. "In the Questionnaire for Public Trust Positions Applicant executed on November 16, 2007, he admitted he used marijuana four times between November 2006 and November 2007." *Id.* His last reported use of marijuana occurred at his going-away party from his previous employer. During the party he went outside with band members and shared a joint they were passing around.

Applicant contends that the Judge erred in finding that he had used marijuana four times from November 2006 to November 2007. He stated that, rather, he had taken three to five hits from a marijuana cigarette on one occasion in November 2007. Applicant contends that this purported error impaired the Judge's analysis and resulted in an erroneous decision. The Board has considered this argument in light of the record evidence. The Board concludes that the challenged finding is supported by substantial record evidence. *See* Directive ¶ E3.1.32.1. (Substantial evidence is "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."). Even if the Judge had made findings consistent with Applicant's argument on appeal, however, there is little likelihood that the Judge would have decided the case differently, given the totality of the record evidence. *See, e.g.*, ISCR Case No. 03-23829 at 3 (App. Bd. Apr. 27, 2007) ("[E]ven if these two challenged observations had not been included in the Judge's decision, it is not reasonably likely that the outcome of the case would be different.").

In holding that Applicant had failed to meet his burden of persuasion as to mitigation, the Judge noted matters which Applicant submitted in his own behalf, including a letter of reference attesting to his trustworthiness and a letter for his employer in which Applicant renounces the future illegal use of controlled substances. However, the Judge also considered, *inter alia*, evidence that Applicant's last use of marijuana occurred after he had been hired for a job requiring a trustworthiness designation.¹ He also considered Applicant's age at the time of his last use (32) and that this use occurred despite his having been a long-time employee of his previous place of work. The Board concludes that the Judge has "articulate[d] a satisfactory explanation for his conclusions, including a rational connection between the facts found" and his ultimate adverse decision. *See* ADP Case No. 06-12901 at 4 (App. Bd. Jul. 31, 2007). The Judge's decision is sustainable on this record.

¹"Applicant had been interviewed and hired by his present employer at the time of his last reported use of marijuana and was aware he would have to apply for a public trust position." Decision at 3. The Board also notes record evidence that, at the time of Applicant's last use, he had already taken a pre-employment drug test. Tr. at 33. *See* ISCR Case No. 06-18270 at 3 (App. Bd. Nov. 7, 2007) ("As a matter of common sense, one would expect that a person who had taken a drug test as a condition of employment would understand the importance of future abstention.")

Order

The Judge's adverse trustworthiness designation is AFFIRMED.

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