

KEYWORD: Guideline H

DIGEST: In light of Applicant’s use of a hallucinogenic drug after he had been granted an interim security clearance and after he had completed his security clearance application, the Judge’s conclusion that Applicant had failed to demonstrate mitigation is sustainable. Some of the Judge’s statements appear inconsistent with his unfavorable decision. However, viewed in light of the record as a whole, these inconsistent statements are harmless error. Adverse decision affirmed.

CASE NO: 10-03232.a1

DATE: 05/24/2011

DATE: May 24, 2011

In Re:)	
)	
-----)	ISCR Case No. 10-03232
)	
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 September 17, 2010 DOHA issued a statement of reasons (SOR) 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 7, 2011, after the hearing, Administrative Judge Arthur E. Marshall, Jr. denied Applicant’s request for a security clearance. Applicant appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issue on appeal: whether the Judge's adverse security clearance decision was arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge's unfavorable decision.

The Judge made the following pertinent findings of fact: Applicant is 24 years old, has a bachelor's degree and is currently enrolled in a master of science program. He is single and has no children. Applicant first experimented with drugs in high school, when he used marijuana a few times with friends at boarding school. He ceased using drugs and graduated in June 2005. As a college freshmen he used marijuana on a couple of occasions. In his sophomore year, he was in an "experimental" mood and he tried marijuana again three or four times. In sum, Applicant used marijuana about a dozen times between the ages of 15 or 16 and 21. He bought it about two times. Applicant describes his use as stupid immaturity. In 2008 Applicant started his senior year of undergraduate school after a summer internship with his current employer. He believes he may have signed an acknowledgment of an anti-drug policy, but is unsure. He knew that he should not use illegal drugs during his internship and did not use them that summer.

During the 2008-2009 academic year, Applicant was under considerable study related stress. Feeling he needed to pull an all-nighter on occasion, he looked into Adderall, a prescription medication. It was available from campus peers. Applicant purchased the medication on three different occasions from peers who had been prescribed it. He feels that his use of the substance was immature and wasn't really worth it. In March 2009, Applicant and some friends went to a popular spring-break venue before graduation. While there, Applicant used psilocybin mushrooms and experienced hallucinogenic effects of up to four hours. Applicant had also used inhalants, largely in the form of a pressurized air duster, on rare occasions since 2002. He quit using inhalants upon graduating from undergraduate school in 2009. In June 2009, Applicant started his current position. In October 2009, Applicant completed a security clearance application in which he completely divulged his past drug use. In November 2009, Applicant returned to his alma mater to attend a party. When psilocybin mushrooms were produced, he again tried the drug. Since making that decision, Applicant has expressed great regret about it.

Appreciative of the fact that drug use is incompatible with his profession, Applicant made immediate changes in his life and gave up on the party scene. He entered a competitive master's degree program and became absorbed in his work. Applicant has received performance awards and is given high praise by his superiors. He has not used illegal drugs since November 2009 and has no interest in using them again. He no longer associates with the undergraduate crowd with whom he once used drugs. His current ties to his college do not involve persons or activities where drugs are present. Applicant's girlfriend is now drug-free, and she encourages Applicant to lead a drug-free lifestyle. Applicant submitted a signed statement confirming that he has not used, bought, or sold any controlled substances since November 2010. It is his intention to not use any controlled substance in the future, and he is aware that he will immediately forfeit any security clearance granted should he again use drugs. He knows his employer has a no-drug policy. His contrition for his past drug use and his November 2009 lapse is genuine. He was highly credible in his expressed intent to refrain from illegal drugs.

The Judge reached the following conclusions: While Applicant's attempts at rehabilitation over the past year are highly impressive, there is presently insufficient evidence to establish that the

behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment.¹ Since November 2009, Applicant has refrained from the use of drugs, and has redirected his focus on his career, health, social activities, graduate education, and other alumni activities. He has changed his ways. He has disassociated himself from drug-using associates and has avoided the prior environments where drugs were used. Applicant has been drug-free for less than 16 months. Given his age, contrition, personal accomplishments, and impressive record for taking rehabilitative action during that time with regard to his past drug use, his past use might otherwise be mitigated as immature folly subsequently overcome by the rigors and responsibilities of maturity. However, his use of a hallucinogen within a month of applying for, and being granted, a security clearance for a position at a major company with an anti-drug policy gives considerable pause. More time than almost 16 months is needed to demonstrate that an appropriate period of abstinence applies to his November 2009 lapse. It is clear that Applicant will not do anything more to jeopardize his job or career, which can be sufficient by itself to insure that an applicant will not abuse drugs in the future. Applicant has submitted a signed statement pledging not to use drugs, and he is sincere in its expression. His description of what he has done to rehabilitate himself since quitting illegal drugs provided sufficient mitigation for his high school and collegiate drug use. His use of a hallucinogen immediately after receiving a security clearance, however, is cause for lingering concern about his commitment and ability to remain drug-free. Accordingly, Guideline H of the SOR is concluded against Applicant.

Applicant argues that the Judge did not fully take into sufficient account the mitigating evidence in the case and that the Judge's rhetoric in discussing various matters in mitigation should have been the basis for a favorable decision. Applicant asserts that the Judge improperly focused on the lapse of time since his last drug use to the detriment of numerous other matters in mitigation. While Applicant's arguments point to a flaw in the Judge's decision, the Judge did not commit harmful error and his ultimate decision in the case is sustainable.

The gravamen of the Judge's ultimate decision was his unease in the face of Applicant's use of a hallucinogen in November 2009 after he had left the college environment, entered the work force, and had been granted an interim security clearance after completing a security clearance application on which he was required to completely divulge his prior drug use. The Judge discussed matters in mitigation extensively in his decision, and, in essence, concluded that, but for Applicant's November 2009 lapse, he had overcome the Government's concerns about his drug use. The lapse, coupled with the 16-month passage of time since the incident, provided a reasonable basis for the Judge to conclude that Applicant had fallen short in his burden to overcome the Government's case.

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). A party'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).

¹Adjudicative Guideline ¶ 26(a).

In this case, the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the significant disqualifying conduct of relatively recent drug use following the granting of a security clearance, and considered in detail the possible application of relevant conditions and factors, both disqualifying and mitigating. On these facts, under the *Egan* standard, the Board is not prepared to conclude that the Judge was required to find that Applicant had overcome the Government's security concerns.

Applicant mentions the Judge's rhetoric employed in the analysis portion of his decision and suggests that, given this rhetoric concerning matters in mitigation, the Judge should have viewed his case more favorably. A review of the Judge's analysis reveals the Judge reached conclusions that are inconsistent. The Judge's overarching conclusion that an insufficient amount of time has passed for Applicant to demonstrate a commitment not to use drugs is difficult to square with his statement, "It is clear that he (Applicant) will not do anything more to jeopardize his job or career, which can be sufficient by itself to insure that an applicant will not use drugs in the future."² Likewise, the Judge's conclusion regarding an insufficient period of time since the 2009 lapse is arguably at odds with his statement, "Applicant has demonstrated contrition over his past drug use, successful personal rehabilitation, and notable maturation since November 2009."³ However, the Board does not measure a Judge's decision against a standard of perfection. *See, e.g.*, ISCR Case No. 96-0608 at 4 (App. Bd. Aug 28, 1997). Additionally, when reviewing a Judge's decision, the Board does not consider individual sentences in isolation from the rest of the decision; rather, the Board considers the decision in its entirety to discern what the Judge found and concluded. *See, e.g.*, ISCR Case No. 02-05009 at 3 (App. Bd. Dec. 18, 2003). When the Judge's decision is considered as a whole, these inconsistencies do not detract significantly from the Judge's overall conclusions which are reasonably consistent and reasonably based on the record evidence. These inconsistencies, therefore, constitute harmless error.⁴

The Board does not review a case *de novo*. The favorable evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-11172 at 3 (App. Bd. Sep. 4, 2007). After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for his 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)). "The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Order

²Decision at 8.

³Decision at 9.

⁴Compare this decision to the decisions in ISCR Case No. 09-00306 (App. Bd. Nov. 19, 2010) and ISCR Case No. 97-0351 (App. Bd. Dec. 22, 1997), where the Board concluded that inconsistencies in the Judges' conclusions, combined with other issues, constituted harmful error.

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

Signed: Jeffrey D. Billett
Jeffrey D. Billett
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