

KEYWORD: Guideline E

DIGEST: Absent a showing of error Applicant cannot be afforded a second chance to present his case to a Judge. Adverse decision affirmed

CASENO: 10-06437.a1

DATE: 03/11/2013

DATE: March 11, 2013

In Re:)
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 -----) ISCR Case No. 10-06437
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 Applicant for Security Clearance)
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)

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Paula W. Phinney, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On May 24, 2012, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline H (Drug Involvement) and Guideline E

(Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a determination without a hearing. On January 4, 2013, after the close of the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Carol G. Ricciardello denied Applicant's request for a security clearance. Applicant appealed, pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

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

The Judge made the following pertinent findings of fact: Applicant is 52 years old, married, and has two adult children. He has held a security clearance since May 2007. Applicant has admitted he began using marijuana in 1979 while in high school. From 1979 to 1981, he used marijuana about once a week at parties. After high school he used it three or four times a year at social gatherings. He never purchased it. He used it until sometime after he had children, between 1983 and 1986. Applicant failed a drug test, administered by his employer, sometime in the 1990's. The use occurred at a social gathering in his neighborhood. He was told to attend drug counseling, which he did. He completed the requirements of the counseling.

On his March 2010 security clearance application, Applicant admitted that in August 2009, he engaged in casual, infrequent use of marijuana a couple of times. These occurred at social gatherings in his neighborhood. He believed he had three to four beers before he used marijuana and admitted his judgment was impaired. Subsequently, Applicant failed an employer administered drug test. Applicant held a security clearance during this period. At the request of his employer, he attended group drug counseling sessions once a week from September 2009 to November 2009. He completed the program. A prognosis or diagnosis from the counseling center was not provided. Applicant indicated that he has not used marijuana since August 2009, and he does not intend to use marijuana in the future.

Applicant disputed that he was charged in June 1979 for possession of marijuana. He stated that he was at a party on this date and marijuana was found in the house. He stated that he was not in possession and was not guilty. His arrest record shows the charge was dismissed. Applicant admitted he was arrested in June 1979 for DUI. He also stated that in September 1981 he was charged with possession of a controlled substance and operating a motor vehicle under the influence of alcohol. He indicated that the marijuana found in the car did not belong to him and was not over 25 grams. He pled guilty to the charges.

The Judge reached the following conclusions: Applicant used marijuana on two occasions while holding a security clearance in August 2009 and had a positive test result. He used it earlier in the 1990s while working for a federal contractor. There is no evidence to conclude he has disassociated himself from the people and the place where he used illegal drugs in the past. Applicant attended drug counseling after he tested positive for illegal drugs in the 1990s. There is evidence of recurrence of illegal drug use when he smoked marijuana twice in 2009. There is no evidence that Applicant received a favorable prognosis by a duly qualified medical professional after

either of his drug counseling programs. His actions cast doubt on his reliability, trustworthiness, and good judgment. There is insufficient evidence to conclude Applicant has demonstrated his intention not to abuse drugs in the future. Regarding Guideline E, the same analysis applies to his personal conduct. Applicant's actions were not minor, and there is no evidence that his actions happened under unique circumstances, or that they are unlikely to recur. Applicant was a mature man when he was granted a security clearance. He failed to act responsibly. Applicant failed to mitigate the security concerns arising under Guideline H and Guideline E.

At the outset of his appeal, Applicant requests that the case be remanded to the Judge for a hearing on the merits and for the opportunity to submit additional evidence at that hearing. Absent a showing of factual or legal error affecting Applicant's procedural rights, Applicant cannot be afforded a second chance at presenting his case before a Judge. Applicant had the opportunity to respond to the SOR and he did so. At the same time Applicant was required to elect between a hearing and an adjudication of his case based on the written record. He chose the latter. There is no assertion of a procedural irregularity, nor any indication that Applicant's choice was not freely made. Thus, there is no basis upon which to grant Applicant's request to have his case considered a second time, nor is there a basis to provide him an opportunity to expand the record.

Applicant asserts that because there was no hearing in the case, the Judge was not able to make credibility determinations, which Applicant states are essential in drug and personal conduct cases. He also states that had he been able to testify or had counsel to advise him, he would have been able to expound on the very large gaps in time between marijuana uses. These arguments do not demonstrate error, as the perceived infirmities asserted by Applicant are the direct consequence of his choices not to have a hearing or to hire counsel. Inasmuch as there is nothing in the case file to indicate that Applicant's decision to forgo a hearing was the product of any procedural error, Applicant's assertions do not provide the basis for any relief.¹

Applicant argues that the Judge did not consider the whole of the record evidence. He acknowledges the rebuttable presumption that the Judge has considered all the evidence and also the maxim that a Judge need not mention or discuss every piece of record evidence, but goes on to assert that the presumption is effectively rebutted when the record clearly demonstrates that the Judge failed to consider all relevant and material information. Applicant does not indicate what parts of the record the Judge failed to consider. There is no presumption of error below, and the appealing party has the burden of raising and demonstrating factual or legal error by the Judge. *See, e.g., ISCR Case No. 00-0339 at 3 (App. Bd. Mar. 22, 2001)*. The appealing party must set forth its claims of error with specificity. *See, e.g., ISCR Case No. 00-0429 at 3 (App. Bd. Jul. 9, 2001)*. In this case, Applicant's blanket assertion that the Judge did not consider the entire record lacks the requisite specificity. Applicant has not demonstrated error.

Applicant argues that the government's concerns should have been mitigated because the behavior was infrequent, happened under circumstances unlikely to recur, Applicant attended drug

¹Applicant was provided an opportunity to submit written materials in response to the File of Relevant Material submitted by Department Counsel. He did not submit a response.

counseling programs, and he stated in his security interview that he had no intent to use marijuana in the future. 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). Applicant's appeal brief essentially argues for an alternate interpretation of the record evidence. The Judge offered a narrative explanation as to why the disqualifying conduct was not mitigated. Central to her analysis was her conclusion that Applicant's use of marijuana while holding a security clearance and after undergoing drug counseling was indicative of irresponsible conduct, especially when his age was considered. Applicant's assertion that his drug use occurred under circumstances unlikely to recur runs contrary to the Judge's conclusion that there was no evidence that Applicant had disassociated himself either from his neighbors or the areas they frequented when using marijuana. The Judge's conclusion is supported by the record. Applicant also argues that his statement to an investigator that he no longer intended to use marijuana should be sufficient to mitigate drug concerns. The Judge concluded that Applicant's use of marijuana after failed drug testing and after counseling cast doubts on his ability to change his behavior. This conclusion is also supported by the record.

In support of his appeal, Applicant points to decisions by the Hearing Office which he argues support his request for a favorable determination. The Board gives due consideration to those cases. However, each case "must be decided upon its own merits." Directive, Enclosure 2 ¶ 2(b). Nothing in the decisions cited by Applicant demonstrate error on the part of the Judge in this case.

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 the 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). Therefore, the Judge's ultimate unfavorable security clearance decision is sustainable.

Order

The decision of the Judge is AFFIRMED.

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

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

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board