

KEYWORD: Guideline H; Guideline E

DIGEST: Although the Judge found for Applicant under Guideline E, he reasonably explained why the mitigating evidence was insufficient to overcome the security concerns under Guideline H. Adverse decision affirmed.

CASENO: 10-09119.a1

DATE: 01/23/2012

DATE: January 23, 2012

In Re:

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Applicant for Security Clearance

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) ISCR Case No. 10-09119  
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**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Julie R. Mendez, Esq., Department Counsel

**FOR APPLICANT**

*Pro se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 5, 2011, DOHA 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 hearing. On November 10, 2011, after the hearing, Administrative Judge Juan J. Rivera denied Applicant’s request for a security clearance. Applicant appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether she was given adequate notice of the issues of security concern and whether the Judge’s adverse clearance decision is arbitrary, capricious or contrary to law.

Applicant argues that she was not given adequate notice of the issues of security concern to the government. Her SOR originally included six allegations under Guideline E. Three of those allegations were removed at the beginning of the hearing on a motion by the Department Counsel. Applicant argues that the original presence of the additional allegations caused her to believe that the focus of the government’s concern was Guideline E. Applicant’s argument is not persuasive. The SOR included three separate allegations under Guideline H (Drug Involvement). Applicant’s security clearance application shows that she has a Master’s degree from a well known university. She was on adequate notice that the government’s concerns included her drug history.

Applicant seeks reversal of the Judge’s adverse decision arguing that the evidence demonstrates that Applicant has mitigated the security concerns raised by her drug involvement. Applicant’s presentation does not demonstrate that the Judge’s decision is arbitrary, capricious or contrary to law.

Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. Directive ¶ E3.1.15. The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. 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*. 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. 10-00278 at 2 (App. Bd. Mar. 18, 2011).

In this case, the Judge made sustainable findings—consistent with Applicant’s own admissions—that Applicant had used marijuana from approximately 2000 to at least 2004, and used marijuana and Ecstasy at a concert in 2008. The concert took place after she had obtained a security clearance. In her brief, Applicant acknowledges that she “. . . understands that drugs are illegal and can certainly see why the government would not want to grant a clearance to someone who actively uses drugs . . .” but did not realize that one additional offense would cause her clearance to be revoked. Applicant’s Brief at 2. She also believes that the Judge’s favorable analysis under Guideline E undermines his adverse conclusions under Guideline H. Essentially, she argues

that he repeatedly concluded that she is honest and that such conclusions are not consistent with his conclusion that she might use drugs again.

A review of the decision indicates that the Judge weighed the testimony and evidence offered by Applicant and considered the possible application of relevant conditions and factors. Although the Judge found in favor of Applicant with respect to the Guideline E allegations, he reasonably explained why the mitigating evidence was insufficient to overcome the government's security concerns under Guideline H. Decision at 5-7.

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 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 unfavorable security clearance decision is sustainable.

### **Order**

The decision of the Judge denying Applicant a security clearance 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: James E. Moody  
James E. Moody  
Administrative Judge  
Member, Appeal Board