

KEYWORD: Guideline H: Guideline E; Guideline G

DIGEST: The Government must present substantial evidence in regard SOR allegations that have been controverted. Once it has done so, it has no further burden. The burden of persuasion shifts to Applicant to mitigate the security concerns in his case. Adverse decision affirmed.

CASE NO: 11-00391.a1

DATE: 12/01/2011

DATE: December 1, 2011

In Re:)	
)	
-----)	ISCR Case No. 11-00391
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Palmer A. Hoovestal, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On April 14, 2011, 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 G (Alcohol Consumption) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On September 14, 2011, after the hearing, Administrative Judge Edward W. Loughran denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge failed properly to weigh

the record evidence and whether the Judge's adverse security clearance decision was arbitrary, capricious, or contrary to law. The Judge's favorable findings under Guidelines E and G are not at issue in this appeal. Consistent with the following, we affirm the Judge's decision.

The Judge made the following pertinent findings of fact: Applicant is an employee of a Defense contractor. Married with two grown children, he has a bachelor's degree.

Applicant smoked marijuana "a few times a year from 1978 to June 2010." Decision at 2. This use normally occurred at his family's cabin. He would smoke marijuana with his siblings. He sometimes went for as long as a year without using marijuana, and he never purchased it.

Applicant submitted a security clearance application (SCA) in 1996 and subsequently was awarded a security clearance. After receiving his clearance, Applicant continued to smoke marijuana. He left his job in 2001 and took another that did not require a clearance.

In 2008, Applicant tested positive on a random drug screening by his employer. He kept his job, but he was required to sign a document acknowledging that another positive drug test would result in loss of his job. Applicant was also subjected to additional drug tests. Later that year, Applicant was assessed by a licensed addiction counselor (LAC), who concluded that Applicant had abused marijuana but that he was not dependent on the drug.

In June 2010 Applicant smoked marijuana during a visit to the family cabin. He tested positive for the drug and was dismissed from his job. He submitted to counseling by another LAC, who recommended, *inter alia*, that Applicant "achieve and maintain abstinence from marijuana[.]" *Id.* at 3.

Applicant has not used marijuana since his last positive drug test. He has not discontinued associating with his siblings, one of whom may still smoke marijuana, and he still goes to the family cabin.

Applicant enjoys an excellent reputation for his job performance, responsibility, reliability, trustworthiness, and judgment. His colleagues recommended him for a clearance.

In the Analysis, the Judge noted favorable evidence, such as Applicant's expressed intent to remain drug free and his absence of drug use since 2010. However, the Judge also noted that Applicant had previously signed a document stating his understanding that future use would result in a loss of employment and yet smoked marijuana anyway. The Judge stated that Applicant's history of drug use "continues to cast doubt on his reliability, trustworthiness, and good judgment." *Id.* at 6. The Judge stated that the record left him "with questions and doubts as to Applicant's eligibility and suitability for a security clearance." *Id.* at 9.

Applicant contends that the Judge erred in his application of the mitigating conditions, arguing that the Judge mis-weighed the record evidence. Applicant argues that the Government's failure to rebut Applicant's character witnesses and other evidence constituted a failure to meet its burden of production under Directive ¶ E3.1.14. Applicant contends that his un rebutted evidence of good character and security worthiness supported a favorable decision and that the Judge's

adverse holding was founded upon his failure properly to weigh this evidence.

The Guideline H security concern is as follows:

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. Directive, Enclosure 2 ¶ 24.

By the very language of the Directive, illegal drug use is a matter of security concern, not simply because a person under the influence of drugs might fail to protect classified information but because such use calls into question the person's possession of the very qualities of judgment and reliability that are essential to protecting national security.

We have considered Applicant's brief and are not persuaded by his argument regarding the Government's burden of production. The Government is required to present substantial evidence of those allegations in the SOR that are controverted.¹ That is, the Government's burden extends only to those SOR allegations which the applicant has denied. In this case, however, Applicant admitted all the allegations, relieving the Government of any burden of production. Nevertheless, at the hearing the Government presented Applicant's current SCA and a previous one, as well as his answers to DOHA interrogatories. Accordingly, even without considering Applicant's admissions to the SOR, the record contained substantial evidence of security concerns under Guideline H. The passage of the Directive upon which Applicant relies does not place a further burden on the Government to present rebuttal evidence following Applicant's case or at any other point in the hearing.

Once an applicant's SOR admissions and/or the Government's evidence raise a security concern, the burden of persuasion shifts to the applicant to mitigate the concern. The governing standard is set forth in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988): "[A] clearance may be granted only when 'clearly consistent with the interests of the national security.'" The Directive requires a Judge to resolve any doubt in favor of national security. Directive, Enclosure 2 ¶ 2(b). In this case, having properly concluded that Applicant's case raised security concerns under Guideline H, the Judge evaluated the evidence in light of Applicant's burden of persuasion.

While the Judge discussed the evidence favorable to Applicant, he plausibly explained his conclusion that Applicant had not met his burden of persuasion. The Judge noted that Applicant had used marijuana while holding a security clearance. He also appeared to give weight to evidence that Applicant used marijuana despite having been placed on notice that such behavior was not compatible with his continued employment. Such evidence could suggest to a reasonable person that Applicant lacks a sufficient willingness to follow rules as to justify entrusting him with national

¹See, e.g., ISCR Case No. 08-06859 at 4 (App. Bd. Oct. 29, 2010), stating that, in a DOHA hearing, the Government's burden is to present substantial evidence regarding any controverted allegation. 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." Directive ¶ E3.1.32.1.

security information.² Considering the record as a whole, we find no reason to disturb the Judge’s weighing of the evidence. The mere absence of Government evidence rebutting Applicant’s character witnesses does not undermine the Judge’s decision.

The record supports a conclusion 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 Judge’s adverse decision is sustainable on this record.

Order

The Judge’s adverse security clearance decision is AFFIRMED.

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

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

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

²*See, e.g.*, ISCR Case No. 07-00852 at 3 (App. Bd. May 27, 2008): “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. That Applicant used marijuana after such a test raises a substantial question as to whether she has demonstrated a serious intent to obey the law[.]” *See also* ISCR Case No. 09-07472 at 2 (App. Bd. Feb. 24, 2011), in which the Judge based his adverse decision, *inter alia*, “on the fact that Applicant’s drug use while holding a security clearance constituted a serious breach of trust [and that] Applicant knew that marijuana use and possession were proscribed[.]”