KEYWORD: Guideline E; Guideline H

DIGEST: The Appeal Board examines a Judge's findings of fact to see if they are supported by substantial record evidence. Error in the Judge's findings was harmless. Applicant failed to rebut the presumption that the Judge considered all of the evidence. Applicant failed to show that the Judge mis-weighed the evidence. Adverse decision affirmed.

CASE NO: 11-13948.a1

DATE: 02/26/2014

DATE: February 26, 2014

In Re:	)	
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	)	
	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On July 23, 2013, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under Guideline E (Personal Conduct) and Guideline H (Drug Involvement) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On December 13, 2013, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Darlene D. Lokey Anderson 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's findings of fact contained errors and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant has worked in the Defense industry for nearly 30 years. He completed his first security clearance application (SCA) in 1986. He was granted clearances three times since then. Furthermore, he was granted access to sensitive compartmented information (SCI) in 2007.

Applicant began using marijuana when he was 11 or 12 years old. During high school he used marijuana twice a week, and he also used LSD. He continued using marijuana while in college, though less frequently, possibly twice a month. He also used cocaine while in college. Applicant's last use of marijuana was in 2010. He was on a vacation, and, while sitting at a campfire, he accepted marijuana from his brother. Over the past 24 years, while working for the Defense industry and while holding a security clearance, Applicant has "sporadically used marijuana about 250 times." Decision at 3. Applicant knew that marijuana use was illegal and against the policies of the DoD and of his employer. Applicant's wife is aware of his drug use, but his children are not.

In SCAs completed over a 24-year period, Applicant has consistently denied any use of illegal drugs. In a SCA completed in 2006, Applicant was asked if he had engaged in illegal drug usage during the prior 7 years. Applicant answered "no," failing to disclose his use of marijuana in about 2004 and 2005.

The same SCA inquired if he had ever illegally used a controlled substance while holding a security clearance, among other things. Applicant answered "no," failing to disclose marijuana use after he had been granted a clearance. The Judge noted that the SOR alleged that these two answers were deliberately false and that Applicant admitted the allegations.

Applicant testified that what led to him admit his marijuana use was a security investigation. He stated that he realized that it was foolish for a man as old as he was to use marijuana. He submitted a letter of intent not to use illegal drugs in the future on pain of automatic revocation of his clearance.

After the hearing, Applicant disclosed his security-significant conduct to his supervisor. Applicant enjoys an excellent reputation for his duty performance and sense of responsibility.

The Judge's Analysis

The Judge concluded that there was a nexus between Applicant's admitted and proven conduct and his security eligibility. Regarding mitigation, the Judge stated that even the three years that had elapsed between Applicant's last use of marijuana and the close of the record were not sufficient to demonstrate that his misconduct is unlikely to recur, given evidence of his extensive, long-standing use. She also stated that Applicant's drug use reflected poorly on his reliability,

trustworthiness, and judgment. She concluded that none of the mitigating conditions applied to his failure to have disclosed his drug use, given the number of SCAs that he had completed over the years. She stated that the totality of Applicant's conduct, when viewed in light of the Guidelines, supports a whole-person assessment of poor judgment, untrustworthiness, unreliability, lack of candor, and unwillingness to comply with rules and regulations.

Discussion

Applicant challenges the Judge's findings of fact. Specifically, he contends that the Judge's finding that over a period of 24 years and while holding a clearance he "sporadically used marijuana about 250 times" was in error, in that it presented a false picture of his drug use. Citing to an affidavit he prepared regarding his drug use, he states that most of this conduct occurred in high school and college and that it became more isolated as he grew older.[1] We examine a Judge's findings to see if they are supported by substantial record evidence. *See, e.g.*, ISCR Case No. 09-06691 at 3 (App. Bd. May 16, 2011). *See also* ISCR Case No. 05-02422 at 2 (App. Bd. Apr. 9, 2007) (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 record.")

We find Applicant's argument to be persuasive. His hearing testimony and his 2011 written affidavit assert that the 250 figure represented his total lifetime usage over a 30 to 40 year period. Other evidence in the case clearly shows that his 250 uses include his high school and college years, which precede any use while he was employed in the defense industry. There is no evidence in the record that contradicts those assertions. Nevertheless, the Decision, viewed as a whole, does not present a distorted picture of Applicant's overall conduct. A more accurate finding regarding the circumstances of 250 times of use would not reasonably be likely to change the outcome of the case, given the total extent of the misconduct alleged. *See, e.g.*, ISCR Case No. 01-23362 at 3 (App. Bd. Jun. 5, 2006). Applicant has not demonstrated a harmful error in the Judge's findings.

Applicant contends that the Judge did not properly weigh evidence that was favorable to him, noting his performance reports and a letter of reference from his supervisor. He states that he has demonstrated his trustworthiness and reliability, challenging the Judge's conclusion that the evidence supports a whole-person assessment of poor judgment, etc. A Judge is presumed to have considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 08-09986 at 2 (App. Bd. Mar. 18, 2010). The Judge made findings about the evidence Applicant has cited and addressed those findings in her analysis. Applicant has not rebutted the presumption that the Judge considered all of the evidence. Moreover, given the nature and extent of Applicant's security-significant conduct, we cannot say that the Judge weighed the evidence in a manner that was arbitrary, capricious, or

[1]Government Exhibit (GE) 2, Affidavit, dated May 4, 2011, at p. 3: "I estimate that I have used marijuana over 250 times total. Since college until 06/10, my marijuana usage had been only on an occasional basis . . . There were years when I would use marijuana three or four times total and there were years when I did not use it at all."

contrary to law.[2] *See, e.g.*, ISCR Case No. 04-12778 at 2 (App. Bd. Mar. 19, 2007). The Judge's adverse decision was consistent with the record that was before her.

The Judge examined the relevant data and articulated a satisfactory explanation for the decision. The decision is sustainable on this record. "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). *See also* Directive, Enclosure 2 ¶ 2(b): "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security."

Order

The Decision 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

[2] *See* Directive, Enclosure 2 ¶ 15: "The following will normally result in an unfavorable clearance action . . . (b) refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination."