

KEYWORD: Guideline H

DIGEST: Errors that Applicant identified in the Judge’s findings of fact were harmless. Applicant has not rebutted the presumption that the Judge was unbiased. Applicant failed to show that the Judge mis-weighed the evidence. Adverse decision affirmed.

CASE NO: 12-06707.a1

DATE: 09/18/2014

DATE: September 18, 2014

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In Re:)	
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-----)	ISCR Case No. 12-06707
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Cheryl Van Ackeren, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On November 19, 2013, DoD 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 June 25, 2014, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge David M. White 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 decision is 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 findings: Applicant is 54 years old. He started using marijuana while in the Army. He first tested positive on a urinalysis test in 1982 and was referred to a rehabilitation program, which he successfully completed. He then transferred to overseas duty, became disillusioned with his prospects for future service, and resumed his marijuana use. He bought and supplied marijuana to his fellow soldiers but never sold it. When he refused additional drug rehabilitation after testing positive for marijuana again, he was discharged from the Army in 1984.

Applicant regularly smoked marijuana on a recreational basis once or twice a month from 1980 until he tested positive for it on a company-directed urinalysis test in 2011. He testified that there were some unspecified periods during those 31 years where he did not smoke marijuana each month. He admitted knowing that his marijuana use violated his employer's drug-free workplace policies, was illegal, and was not permitted while holding a security clearance. Applicant attended three hour-long counseling sessions beginning in early 2014 because he knew that it would help with the security clearance process. He found the counseling useful. Applicant's counselor is not a staff member of a recognized drug treatment program, although he did work as a substance abuse counselor at a substance abuse recovery and treatment center from 2007 to 2009. The counselor said that Applicant did not meet the criteria for drug abuse or dependence, but needed assistance with coping skills for stress. Applicant is not participating in a drug treatment program nor is he subject to urinalysis testing. He submitted a signed statement of intent to refrain from illegal drug use. He stated that most of his time is now spent on assignment in a state distant from the one where he lives and where he used marijuana, so he no longer spends much time with former drug-using associates. Applicant testified that he has not used marijuana since October 2011.

The Judge reached the following conclusions: Applicant admitted purchasing the marijuana he used and sharing it with others, which is distribution regardless of whether he received money in return. Applicant held a security clearance throughout the more than 30 years that he used marijuana, while knowing that it was both illegal and contrary to security guidelines. He failed to convincingly demonstrate that his drug use is unlikely to recur or does not cast doubt on his current reliability, trustworthiness, or judgment. Applicant claims that his move to another state for work caused disassociation from his drug-using contacts, but admitted that he returns home to be around them frequently. There is no evidence of drug use after October 2011, but with a history of regular use over more than 30 years this period of abstinence is not compelling or persuasive. Applicant has not undergone any drug treatment program, and his recently begun counseling program is not under the care of a duly qualified medical professional. The counseling is a positive step, but insufficient to establish a mitigating condition. Applicant failed to convincingly establish either remorse for, or mitigation of, his disregard for the security implications of regular drug abuse while holding a security clearance.

Applicant argues that certain findings and conclusions of the Judge are erroneous and not supported by the record. His claims have mixed merit.

Applicant asserts that the Judge erred by finding that Applicant regularly used marijuana on a once or twice monthly basis from 1980 until 2011. He states that the Judge's finding failed to include repeated, lengthy periods of abstinence during the 30 year period. The Judge's finding is based on statements made by Applicant to an interviewer during his security clearance investigation. At the hearing, Applicant indicated that there were periods where he abstained from marijuana use for months and years at a time and stated that, "I think I was a little overtruthful in the statements when I said twice a month." However, the Judge also acknowledged in his findings that Applicant testified that there were some unspecified periods during the 30 year time frame where he did not smoke marijuana. On balance, it does not appear to the Board that the Judge erroneously exaggerated the extent of Applicant's marijuana use. The Judge's findings on this point are reasonably supported by the record evidence.

Applicant asserts that the Judge erred by making his finding that he "distributed" marijuana. The Judge acknowledged that Applicant was not in the business of selling the drug for money, but he nevertheless supplied marijuana to others by regularly sharing it with them. This finding by the Judge put Applicant's actions into proper context, and do not include any suggestion that Applicant was in the business of dealing the drug. The Judge's characterization of Applicant's acts as "distribution" was not erroneous.

The record evidence indicates that, after failing a drug test with his employer, Applicant was required to take a follow-on test by a certain date. Applicant did not test on or before that date, but did take and pass a drug test approximately 30 days after the cut-off date established for the follow-on test. The Judge found that the reasons for the delay were "unexplained." Applicant points to record evidence that he was deployed to a remote location during the period in question, thus preventing him from taking the test. Applicant now argues that the Judge's finding implies that Applicant intentionally avoided taking the follow-on test for likely fear of failing the test. Given the evidence of record, the Judge's finding that the delay was "unexplained" is error. However, there is nothing in the decision to suggest the Judge implied that Applicant delayed over fears of a positive drug test. The Judge's error was harmless.

Applicant points out that the Judge made a finding that he returned to his former home on frequent occasions to be around drug using contacts, thus negating the possibility that Applicant no longer associated with the friends he formerly met to smoke marijuana. Applicant insists that he has disassociated himself from his drug-using contacts and states that the record evidence does not indicate that he visits his old contacts. Applicant has established error. There is nothing in the record to support the Judge's conclusion that Applicant returns to the place of his former residence and continues old associations with drug users. Nevertheless, there is no indication that the Judge relied on this conclusion to any significant extent when making his ultimate decision in the case. After a review of the record, and the entirety of the Judge's decision, the Board concludes that the Judge's error did not affect the final result of the case. Therefore the error is harmless.

Applicant points to the alleged errors in the preceding paragraphs in claiming that the Judge was biased against him. The fact that the claims of harmful error are, for the most part, groundless significantly undercuts Applicant's claim of bias. Moreover, there is a rebuttable presumption that a Judge is impartial and unbiased, and a party seeking to overcome that presumption has a heavy burden of persuasion. *See, e.g.*, ISCR Case No. 07-02253 at 3 (App. Bd. Mar 28, 2008). Applicant does not overcome that presumption here. In his decision the Judge indicated that on certain points, he did not find Applicant credible, but a finding of lack of credibility does not rise to the level of bias on the part of the Judge.

Applicant argues that the Judge erred in his application of the mitigating factors. He emphasizes his three years of abstinence, his voluntary submission to regular drug testing, the negative results of those tests, his seeking of counseling regarding his drug use, and his establishment of new routines to support his sobriety. Applicant's assertions do not establish error on the part of the Judge. The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. *See, e.g.*, ISCR Case No. 06-25157 at 2 (App. Bd. Apr. 4, 2008). 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).

The gravamen of the Judge's decision is the fact that the period of abstinence established by the evidence is not compelling in terms of mitigation when considered in the context of Applicant's 30 year history of marijuana use, especially when that use took place despite Applicant's knowledge that it was illegal and contrary to the Government's and his subsequent employers' drug-free policies. When concluding that mitigation had not been established, the Judge also emphasized the fact that Applicant has not undergone a drug treatment program, nor is his recently begun counseling regimen under the supervision of a duly qualified medical professional. These conclusions are sustainable. The Board finds no reason to believe that the Judge did not properly weigh the evidence or that he failed to consider all the evidence of record. *See, e.g.*, ISCR Case No. 11-06622 at 4 (App. Bd. Jul. 2, 2012).

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 Ra'anan
Michael 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