

KEYWORD: Guideline H

DIGEST: Examining the record as a whole, the Board has no reason to conclude that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. Adverse decision affirmed.

CASENO: 12-11110.a1

DATE: 07/12/2013

DATE: July 12, 2013

In Re:)
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-----) ISCR Case No. 12-11110
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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

Kevin Kloster, Personal Representative

The Department of Defense (DoD) declined to grant Applicant a security clearance. On November 27, 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 hearing. On April 24, 2013, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Jennifer I. Goldstein denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge’s decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge’s Findings of Fact

The Judge found that Applicant had experiment with marijuana during his college years from 2003 to 2007. In 2008, he submitted a security clearance application (SCA), in which he answered “no” to a question inquiring if he had, within the previous seven years, used illegal drugs, to include marijuana. In 2009, he submitted another SCA, this time applying for special access with another Government agency (AGA). One section of the SCA inquired if, within the previous seven years, Applicant had used illegal drugs, to include marijuana. Applicant answered this question “yes,” disclosing “infrequent recreational marijuana use” between 2003 and 2007.

Prior to Labor Day of 2009, Applicant was interviewed in connection with his most recent SCA. In this interview, he discussed his marijuana use during his college years. After this interview, Applicant visited a friend over the Labor Day weekend. By this time, he possessed a DoD security clearance based on his 2008 SCA. Over the weekend, Applicant smoked marijuana on three consecutive evenings. He knew at the time that marijuana use was a violation of federal law, national security regulations, and his company’s own policies. He later stated that he was “not thinking” and that he “wasn’t considering the consequences.” Decision at 3.

In October 2009, a government agent questioned Applicant further about his drug use between 2003 and 2007. He testified that, at the end of the interview, he volunteered information about his use of marijuana over the previous Labor Day weekend. AGA denied Applicant a clearance, based solely upon drug involvement. The letter explaining the denial addressed, *inter alia*, his October 2009 re-interview.

During an October 2009 telephone interview with a security representative you initially reaffirmed your illegal drug use as listed on you [SCA] and discussed during your [background investigation]. However, after you were advised there may be additional security processing to include a polygraph examination, you changed your dates and amounts of illegal drug use. You added that you smoked marijuana two to four times between 04 September and 08 September 2009. When you were asked why you used marijuana while holding a security clearance, you stated that you believe smoking marijuana is harmless although “irresponsible.” Decision at 4, internal citation omitted.

Applicant subsequently signed a statement of intent not to use drugs in the future. He stated that he has not used illegal drugs since September 2009 and that he no longer associates with those who do. He enjoys an excellent reputation as to his character, trustworthiness, integrity, and work performance.

The Judge's Analysis

The Judge concluded that Applicant's circumstances raised security concerns under the Guidelines alleged. She also concluded that Applicant had failed to meet his burden of persuasion as to mitigation. Concerning Guideline H, she cited to evidence that Applicant has abstained from marijuana use for over three years, ceased associating with friends who use drugs, has a family, and signed a statement of intent not to use drugs. However, she concluded that other evidence weighed more heavily against approving a clearance. She stated that Applicant had used marijuana in 2009 while holding a clearance and after having stated that he intended never to use drugs in the future. She stated that his latest use occurred despite his existing responsibilities to his wife and to his job. She stated that, under the circumstances, she could not "afford much weight" to his signed statement of intent, concluding that the passage of more time was necessary to demonstrate rehabilitation.

Regarding Guideline E, she concluded that Applicant had been repeatedly dishonest about the full extent of his drug use and that he intentionally failed to disclose his September 2009 marijuana use in a timely manner when interviewed in October of that year. His use of marijuana, including the instance while holding a clearance, were also alleged under Guideline E, and the Judge concluded that this drug use demonstrated a lack of judgment concerning rules and regulations. She further stated that his eventual disclosures of his marijuana use were not sufficient to mitigate concerns arising from his poor judgment. In the whole-person analysis the Judge again referred to Applicant's having used marijuana despite a prior promise to refrain from doing so.

Discussion

Applicant challenges the statement in the Analysis that he had made a prior promise to abstain from using drugs. He stated that he had never previously signed a written statement of intent and that it was "somewhat disingenuous" for the Judge to state otherwise. We note the letter from AGA advising Applicant that his application for special access had been denied. Government Exhibit 3, Interrogatories. This document advised Applicant that, during the interview prior to Labor Day 2009, he had acknowledged that marijuana use was illegal and that he had stopped using marijuana because of its illegality and incompatibility with his job. This document went on to state: "You said you had no intentions of using illegal drugs in the future." Although this statement by Applicant was apparently made verbally rather than in writing, it supports the challenged comment by the Judge.

In support of his appeal, Applicant has submitted several Hearing Office decisions which he believes support his case for a clearance. We give due consideration to these decisions. However, Hearing Office decisions are not binding on other Hearing Office Judges or on the Appeal Board. *See, e.g.*, ISCR Case No. 11-02234 at 5 (App. Bd. May 15, 2013). Applicant has challenged the

Judge's application of the mitigating conditions. For example, he contends that his history of drug use is relatively minor and that the over three years that have elapsed since his last instance of misconduct demonstrate that he has been rehabilitated. His arguments consist in large measure of a challenge to the Judge's weighing of the evidence, which is not enough to demonstrate harmful error. *See, e.g.*, ISCR Case No. 12-11097 at 2 (App. Bd. Jun. 20, 2013). Examining the record as a whole, we find no reason to conclude that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law.

The Judge examined the relevant data and articulated a satisfactory explanation for the decision. Drug use after completing an SCA and after having promised a Government investigator that Applicant would abstain from drugs "raises a substantial question as to whether [Applicant] has demonstrated a serious intent to obey the law . . ." ISCR Case No. 07-00852 at 3 (App. Bd. May 27, 2008). 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