

KEYWORD: Guideline H; Guideline E

DIGEST: The Board does not share Applicant’s interpretation of Guideline E that there must be several instances of misconduct. Rather, the Guideline only requires that the misconduct fall under several adjudicative areas. Adverse decision affirmed.

CASENO: 13-01281.a1

DATE: 08/04/2014

DATE: August 4, 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**

Jeffrey S. Gard, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On December 30, 2013, 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 29, 2014, after the hearing, Defense Office

of Hearings and Appeals (DOHA) Administrative Judge Nichole L. Noel 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 erred in concluding that the case raised security concerns under Guideline E and whether the Judge erred by failing to apply the Guideline E mitigating conditions (MC). The Judge's favorable findings under Guideline H are not at issue in this appeal. Consistent with the following, we affirm.

### **The Judge's Findings of Fact**

Applicant began using drugs recreationally in high school. He used nitrous oxide three times and LSD twice. In college he occasionally used marijuana. He used hallucinogenic mushrooms twice. While in graduate school he began working for a Federal contractor. In completing his first security clearance application (SCA), Applicant disclosed his drug use. He continued to use drugs for at least two years after submitting his SCA. He knew that this use violated his employer's drug policy. He smoked marijuana with varying degrees of frequency between 2001 and 2003. He also used mushrooms once in 2003. He received a top secret clearance in 2004. He abstained from drug use from 2004 until 2009.

In 2009, Applicant's mother was diagnosed with cancer. She died the following year. Upon learning of his mother's illness, Applicant postponed moving to another state, in order remain with his mother. In 2009 and 2010, Applicant used marijuana five times. He stated that he did so in order to relieve stress and to "maximize some fun in [his] life." Decision at 2. Each time he used marijuana he contemplated the wrongfulness of his action but went ahead with the use anyway. In doing so, Applicant was attempting to self medicate. He realized that his conduct was not acceptable, so he entered grief counseling. He did not disclose his drug use to the counselor. When Applicant told his girlfriend about his conduct, she did not approve of it.

In 2010, he completed another SCA. He disclosed his drug use, but, as he had with his use in previous years, he did not disclose it to his employer. At the time, his career was in transition and he believed that reporting his drug use would be harmful to his career.

In 2012, Applicant moved across country to be with his girlfriend. He no longer associates with people who use drugs. At his girlfriend's recommendation, Applicant entered counseling for stress management. He believes that his counseling has enabled him to deal with his emotions in a constructive manner. Applicant's therapist provided a letter in which she lauded his progress.

Applicant obtained a drug evaluation from an addictions counselor, who stated that he did not meet the criteria for substance abuse or dependence. Although the counselor stated that Applicant did not need any more drug therapy, she recommended further counseling in stress management.

In 2012, Applicant began working for his current employer. Prior to the hearing, he disclosed his drug use to his current supervisor, but he did not disclose his use while holding a clearance.

### **The Judge's Analysis**

Applicant's SOR alleged the same misconduct under both Guidelines. The Judge cleared Applicant under Guideline H, stating that his disclosures of his drug use to various persons means that he is not likely to be subject to coercion or blackmail. She also cited to the passage of time since Applicant's last use of drugs as well as to his receipt of counseling and to his strong support system. The Judge also concluded that Applicant's use of drugs, under the facts of this case, raised concerns under Guideline E, in specific Disqualifying Condition (DC) 16(c).<sup>1</sup> She stated that Applicant's use of drugs while holding a clearance supports a whole-person assessment of questionable judgment, untrustworthiness, and unwillingness to comply with rules and regulations. She also stated that Applicant's failure to disclose his drug use to his former employer was another factor contributing to her whole-person assessment.

The Judge acknowledged that Applicant's more recent drug use was influenced by anxiety over his mother's illness, as well as by the malaise he felt in the transition from student to working professional. However, she stated that he was an educated professional who had better resources at his disposal to address his problems than the use of illegal drugs. She stated that his conduct cannot be viewed as minor, insofar as he repeatedly engaged in actions that were illegal as well as in violation both of his employer's drug policy and his responsibilities as someone who holds a clearance. She stated that his lack of full disclosure to his employer evidenced a choice to protect himself and his reputation over his duty to report security-significant information. She stated that Applicant's drug use and its attendant circumstances raised doubts about his ability willingly to self-report significant information pertinent to his clearance. She concluded that none of the mitigating conditions applied.

## **Discussion**

Applicant challenges the Judge's application of DC 16(c), contending that his case does not show questionable judgment and other such characteristics inconsistent with holding a clearance. He also argues that he does not meet the requirement that "there must be several instances of adverse conduct and they must span several adjudicative areas." We construe this argument to mean that the record evidence was not sufficient to raise security concerns under Guideline E.

We note first of all that the Government is required to produce evidence only regarding allegations that have been controverted. In those cases, the Government's burden is to produce substantial evidence, which 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. *See* ISCR Case No. 09-06218 at 4-5 (App. Bd. Sep. 6, 2011). In the case before us, however, Applicant admitted all of the allegations in the SOR. Because the allegations were not controverted, the Government bore no burden of production. Nevertheless, the Government presented evidence of Applicant's security-significant conduct, including his answers to the SCA and his answers to DOHA interrogatories. These documents are sufficient to constitute substantial

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<sup>1</sup>Directive, Enclosure 2 ¶ 16(c): "credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information."

evidence of the facts underlying the allegations in the SOR, even without reference to Applicant's SOR admissions.

The Directive presumes a nexus between admitted or proven conduct under any SOR allegation and an applicant's security eligibility. *See, e.g.*, ISCR Case No. 10-00925 at 3 (App. Bd. Jun. 26, 2012). We do not find Applicant's contentions on appeal sufficient to rebut this presumption. He relies in large measure upon a rather technical argument that the various criteria described in DC 16(c) have not been met. However, an SOR is an administrative pleading and is not to be held to the same standards one might apply to a criminal indictment. *See, e.g.*, ISCR Case No. 04-08806 at 3 (App. Bd. May 8, 2007). Furthermore, the DCs listed under any of the Guidelines are not exclusive. *See, e.g.*, ISCR Case No. 11-06622 at 4 (App. Bd. Jul. 2, 2012). To the contrary, they are illustrative in nature, and, even when none of the DCs under a particular Guideline can be applied with literal preciseness, it is not improper for a Judge to conclude that an applicant's conduct sets forth concerns under that Guideline.

The same conduct can be alleged under different Guidelines and weighed differently as well. *See, e.g.*, ISCR Case No. 09-07472 at 3 (App. Bd. Feb. 24, 2011). In this case, the Judge's favorable conclusion under Guideline H rested on evidence that the drug use was attenuated by time and that Applicant had matured and was unlikely to return to such use. Under Guideline E, however, the Judge focused upon evidence that Applicant's drug use suggested a cavalier attitude toward the policies of his employer, raising a concern that he might be equally heedless of the Government's rules for the protection of classified information. She also cited to evidence that impugned Applicant's willingness to report security significant conduct, which a reasonable person could conclude raised questions about his candor and reliability, qualities explicitly addressed by Guideline E. These questions go beyond concerns about drug use as such but reasonably encompass the possibility that Applicant might fail to disclose other circumstances of security significance or otherwise place his own personal interests over Government's need to protect classified information.<sup>2</sup> We find no error in the Judge's conclusion that Applicant's conduct raised concerns under Guideline E and that DC 16(c) captured the essence of those concerns. Furthermore, we do not share Applicant's interpretation of the Guideline that there must be several instances of misconduct. The Guideline only requires that the misconduct fall under several adjudicative areas.

Applicant contends that the Judge did not consider any of the Guideline E MCs. It is true that the Judge did not list or explicitly discuss any of them. However, her Analysis examined in some detail evidence that supported her overall conclusion that none of the MCs were entitled to favorable application. The Judge did not err in the manner in which she analyzed Applicant's circumstances. To hold otherwise would elevate form over substance. *See, e.g.*, ISCR Case No. 00-0104 at 8-10 (App. Bd. Mar. 21, 2001). Moreover, her reliance upon evidence that Applicant failed to inform his employer of his security-significant conduct and her conclusion that his infractions

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<sup>2</sup> “[Judge]: Now, when you were using drugs between 2001 and 2003, why didn't you self-report? . . . [Applicant]: . . . Because I realized that what I was doing would probably be detrimental to my career.” Tr. at 48-49.

were not minor relate to matters that are addressed in two of the MCs.<sup>3</sup> After considering her Decision as a whole, we find no reason to disturb the Judge’s mitigation analysis.

Applicant’s citations to various pieces of favorable evidence are not sufficient to rebut the presumption that the Judge considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 11-13984 at 3 (App. Bd. Feb. 20, 2014). An ability to argue for a different interpretation of the evidence is not sufficient to demonstrate that a Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 12-00703 at 3 (App. Bd. Feb. 27, 2014). 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 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

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<sup>3</sup>Directive, Enclosure 2 ¶ 17(a): “the individual made prompt, good-faith efforts to correct the . . . concealment before being confronted with the facts[.]” Directive, Enclosure 2 ¶ 17(c): “the offense is . . . minor . . . and does not cast doubt on the individual’s reliability, untrustworthiness, or good judgment[.]”