

KEYWORD: Guideline H; Guideline E

DIGEST: A judge may weigh the same evidence differently under different guidelines. The Appeal Board has no authority to rule on the sufficiency of a clearance investigation. Adverse decision affirmed..

CASENO: 14-00715.a1

DATE: 12/10/2014

DATE: December 10, 2014

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In Re:)	
)	
-----)	ISCR Case No. 14-00715
)	
)	
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 April 3, 2014, 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 decision on the written record. On September 8, 2014, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Juan J. Rivera 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 adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge’s Findings of Fact

Applicant is a 60-year-old employee of a Government contractor. Married since 1978, he and his wife have three adult children.

Applicant worked for another Government agency from 1977 to 1985. He began working for his current employer in mid-1985. He has held a security clearance for 36 years. His most recent eligibility was granted in 2004.

Applicant illegally used marijuana from mid-2006 until mid-2013, all the while holding a security clearance.¹ He characterized his use as once or twice a year “in very small amounts.” Decision at 2. In his security clearance application (SCA), Applicant stated that he intended to use marijuana in the future. He stated that he considered it to be harmless when used only occasionally and that he would never engage in such activity under circumstances that might harm others or himself. Applicant reaffirmed his admissions of marijuana use in his answer to the SOR, stating, however, that he would not use illegal drugs in the future. He made similar statements in his response to the File of Relevant Material (FORM).

Applicant cited to his service to the community, such as his participation in the Parent Teacher Association, church, veterans groups, boy scouts, etc. He highlighted his excellent work ethic and his reputation within the community.

He avers that his last drug use was not recent and that he no longer associates with persons who use marijuana. He claims that his lifestyle changes indicate that his drug use is unlikely to recur.

The Judge’s Analysis

¹Applicant admitted all the allegations in the SOR, and the Judge incorporated these admissions into his findings of fact. Allegation 1(a) stated that, in addition to his more recent use, Applicant used marijuana “from about 1971 to approximately 1974.”

The SOR alleged Applicant's drug use under Guidelines H and E, and the Judge concluded that Applicant's misconduct raised concerns under both. He further concluded that Applicant had not mitigated the Guideline H concerns, citing to evidence of his many years experience with holding a clearance. The Judge stated that, as a consequence of this experience, Applicant knew or should have known the adverse effect of illegal drug use on his clearance. He stated that Applicant's use of marijuana violated the trust placed in him by the Government and indicates a lack of judgment, reliability, and trustworthiness. The Judge concluded that Applicant's promises to refrain from future drug use are entitled to "little weight," insofar as he has used marijuana over several years duration despite his knowledge of the drug's illegality. Under Guideline E, the Judge concluded that Applicant's admission of his drug use precludes the likelihood that he could be subjected to blackmail. He resolved that Guideline in Applicant's favor.

In the whole-person analysis the Judge noted evidence of Applicant's professional competence, his reputation in the community, and his having held a clearance for 36 years. He went on to say, however, that notwithstanding his favorable qualities, Applicant's use of marijuana violated the trust that the Government had placed in him and raised questions about his judgment, trustworthiness, and ability to comply with the law and to protect classified information.

Discussion

Applicant contends that the Judge's conclusions are inconsistent, in that the Judge found in Applicant's favor under Guideline E regarding the same allegations that he found against Applicant under Guideline H. He argues that if his conduct were mitigated under one it should have been mitigated under the other. However, a Judge may weigh the same evidence differently under different Guidelines. *See, e.g.*, ISCR Case No. 13-00142 at 4 (App. Bd. Oct. 15, 2014). In the case before us, we find no reason to disturb the manner in which the Judge weighed the evidence. His differing conclusions under the two Guidelines alleged in the SOR are sustainable.

Applicant contends that the Government should have delved deeper into his background in order to obtain favorable evidence that would counterbalance his drug use. He believes that the investigation in his case was not thorough enough, thereby presenting a distorted view of his trustworthiness. We have no authority or duty to rule on the sufficiency of a clearance investigation. *See, e.g.*, ISCR Case No. 00-0430 at 3 (App. Bd. Jul. 3, 2001). In a DOHA case, once security concerns are raised, either through an applicant's admissions or through evidence provided by the Government, it is the applicant's responsibility to present evidence in mitigation. An applicant "has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15. The Directive imposes no such burden on the Government.

As the Judge concluded, Applicant's admissions to the SOR and his answers in the SCA that he had used marijuana on multiple occasions while holding a clearance were sufficient to raise security concerns under both Guidelines.² Therefore, the burden fell upon Applicant to present any

²The Directive presumes a nexus between proved or admitted conduct under any of the Guidelines and an applicant's security worthiness. *See, e.g.*, ISCR Case No. 14-00114 at 4 (App. Bd. Sep. 30, 2014).

and all evidence in mitigation. Although *pro se* applicants are not expected to present their cases as would an attorney, they are expected to take reasonable steps to protect their rights. *See, e.g.*, ISCR Case No. 12-02371 at 3 (App. Bd. Jun. 30, 2014). In addition to his SOR answer, Applicant submitted a written response to the FORM. If he believed that further evidence was needed, it was his responsibility to submit it to the Judge.

Applicant's brief cites to evidence of his good character and other positive traits. He notes that the Judge himself commented on this evidence in his whole-person analysis. He believes that this comment is not consistent with other parts of the Judge's analysis in which he states that Applicant's drug use impugns his judgment, trustworthiness, and willingness to comply with the law. However, it is not inconsistent for a Judge to acknowledge an applicant's favorable evidence but, nevertheless, conclude that this evidence is not sufficient to undermine the security concerns raised by his conduct or circumstances. *See, e.g.*, ISCR Case No. 08-06591 at 2 (App. Bd. Oct. 16, 2009). Given the record that was before the Judge, a reasonable person could conclude that the admittedly laudatory aspects of Applicant's record were not sufficient to mitigate the Guideline H concerns in his case.

The Judge examined the relevant data and articulated a satisfactory explanation for the decision. The Judge's findings about Applicant's multiple uses of marijuana while holding a clearance and his inconsistent statements about his intent for future use support the Judge's mitigation analysis. *See, e.g.*, ISCR Case No. 06-18270 at 3, n. 4 (App. Bd. Nov. 7, 2007). 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