

KEYWORD: Guideline H; Guideline E

DIGEST: The Judge's possible error regarding his conclusions under Guideline E is harmless given his conclusions under Guideline H. It is not inconsistent for a Judge to find an applicant's presentation credible and still find that the applicant has not met his burden of persuasion. Adverse decision affirmed.

CASENO: 14-01669.a1

DATE: 01/29/2015

DATE: January 29, 2015

In Re:)	
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Applicant for Security Clearance)	
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)	
)	
)	ISCR Case No. 14-01669

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Philip G. Mylod, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On June 4, 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 hearing. On October 14, 2014, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Arthur E. Marshall, Jr., 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 his application of the pertinent mitigating conditions and whether 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 company where he has worked for 19 years. He served in the U.S. military for several years and has maintained a clearance since 1977. He was most recently granted a clearance in 2007.

Applicant experimented with marijuana as a teenager but otherwise had no history of drug use. In May 2013, however, he purchased marijuana at a party. He used it three times, twice at home and a third time while driving a car. Applicant was charged with possession of marijuana and disorderly conduct. Applicant used marijuana because of job-related stress. He stated that the threat of layoffs is very real at his place of employment, a threat that remains ongoing.

Applicant reported the arrest to his supervisor, offering to resign. However, his supervisor stated that Applicant might be overreacting. He pled guilty to blocking traffic and paid a fine. The marijuana charge was dismissed.

In November 2013, Applicant was being treated for diabetes. He was experiencing chest pains and was given an electrocardiogram, which showed that Applicant was experiencing atrial fibrillation. Applicant attributes his drug abuse to his medical condition and to his judgmental error. Since his arrest, he has refrained from the use of illegal drugs, watched his diet, and exercised. Applicant was not referred to drug counseling, although he received telephonic counseling at his job.

Applicant has an excellent work record. He signed a statement of intent not to use drugs in the future, with an automatic revocation of his clearance should he fail to honor that pledge. Applicant states that he is still stressed at his job, and that there are still rumors of layoffs. He believes that it would affect his professional standing if his drug use were to become known.

The Judge’s Analysis

The Judge concluded that Applicant’s conduct raised concerns under Guideline H. In concluding that Applicant had not mitigated these concerns, the Judge cited to evidence of his military service, which gave him reason to know that drug use was inconsistent with holding a

security clearance. Despite having refrained from using marijuana since he was in high school, at age 59 Applicant purchased some and smoked it on three occasions. The Judge noted Applicant's testimony that he used the drug because of job-related stress. He also cited to Applicant's evidence that his health problems contributed to his drug use. The Judge concluded that Applicant had not demonstrated a nexus between his medical problems and his drug use and that Applicant's 17 months of abstinence were not enough to demonstrate an intent not to use drugs in the future.

The Judge did some analysis under Guideline E but then stated that Applicant's conduct was sufficiently addressed under Guideline H. "Therefore, none of the Guideline E disqualifying conditions are needed or apply." Decision at 6.

In the whole-person analysis, the Judge noted Applicant's lengthy career in the military and in the reserves. He cited to evidence that Applicant was granted his first clearance not long after he had ceased using marijuana as a young man. The Judge then stated that "for some, almost imperceptible reason, he decided to illegally use marijuana to address his work-related stress." *Id.* The stress that Applicant was experiencing was not new, insofar as it was connected with his job. Moreover, at the time of his misconduct, he knew that his responsibilities included refraining from using illegal drugs. The Judge stated that, given Applicant's age, experience, and status as a holder of a security clearance, his behavior was reckless. He found that the conditions underlying Applicant's drug use—stress and health problems—remain in existence.

Discussion

Applicant points to an inconsistency in the Judge's treatment of Guideline E. He notes that, although the Judge concluded that the Guideline E concerns were not necessary in order properly to adjudicate Applicant's case, he nevertheless entered adverse formal findings under that Guideline. We agree with Applicant that there is an error and that the Judge's analysis is unclear. The first two paragraphs suggest an adverse conclusion. Later, however, the Judge appears to state that Guideline E does not apply. Having apparently concluded that the Guideline E disqualifying conditions were not appropriate, the Judge should have entered favorable findings. The adverse findings that he did enter were not supported by all of the analysis upon which they were purportedly based. It is possible that this error was typographical. In light of the adverse findings under Guideline H, this error did not affect the overall outcome of the case and, therefore, was harmless.

Applicant cites to his evidence about the effect that his medical issues exerted on his decision to use marijuana. He believes that the Judge did not consider this evidence or that he did not extend it the proper weight. The Judge made findings about the evidence that Applicant has cited, and he discussed these findings in his Analysis. The Judge's treatment of this evidence was consistent with the record that was before him. Applicant has not rebutted the presumption that the Judge considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 10-04413 at 2 (App. Bd. Feb. 16, 2012). Applicant's appeal argument consists basically of a disagreement with the Judge's weighing of the evidence, which is not sufficient to demonstrate that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 12-01977 at 2-3 (App. Bd. Dec. 30, 2013).

In making his argument about mitigation, Applicant notes that the Judge made no adverse credibility determination. Therefore, he contends that the Judge's conclusion about the likelihood of recurrence of drug use was merely speculative. As we have stated before, the Directive does not require a Judge to make an explicit credibility determination. It is not inconsistent for a Judge to find that an applicant's presentation is believable as far as it goes, yet insufficient to meet the applicant's burden of persuasion, viewed in light of the entire record. *See, e.g.*, ISCR Case No. 11-04287 at 3 (App. Bd. Sep. 11, 2012). It is the applicant's responsibility to present evidence in mitigation and extenuation. Directive ¶ E3.1.15. In the case before us, even though the Judge did not make an explicit finding that Applicant was not credible, it was not error for him to conclude that such evidence as Applicant presented was not sufficient to meet the standard set forth in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988): "The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" Evidence that Applicant returned to marijuana use despite abstinence of several decades duration; that he knew that drug use was not compatible with holding a clearance; that he in fact held a clearance at the time of his misconduct; and that the Judge did not find a nexus between Applicant's misconduct and his medical problems support the adverse formal findings under Guideline F.

After considering the record as a whole, we conclude that the Judge examined the relevant data and articulated a satisfactory explanation for the decision, both as to the mitigating conditions and the whole-person factors. The decision is sustainable on this record. *See* 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