

KEYWORD: Guideline J; Guideline H; Guideline G; Guideline E

DIGEST: Applicant failed to rebut the presumption that the Judge considered all of the evidence. The Judge’s finding that Applicant willfully falsified his clearance application was supported by substantial evidence. Adverse decision affirmed.

CASE NO: 14-02790.a1

DATE: 06/21/2014

DATE: June 21, 2016

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In Re:)	
)	
-----)	ISCR Case No. 14-02790
)	
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 January 13, 2015, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct), Guideline H (Drug Involvement), Guideline G (Alcohol Consumption), and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On March 9, 2016, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Richard A. Cefola 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 35-year-old former U.S. Marine Corps (USMC) officer who served two tours of duty in Iraq and suffers from post-traumatic stress disorder. While serving in the USMC in May 2011, he was arrested and subsequently charged by civilian authorities with Driving Under the Influence of Alcohol/Drugs (DUI). In June 2011, he was diagnosed as suffering from alcohol abuse. In August 2011, he pled guilty to the DUI charge and was sentenced to ten days in jail or “work alternative program” and was placed on probation for five years. He is still on probation. He has not consumed alcohol since October 2011.

Applicant was granted a security clearance in about May 2004 and used an illegal substance, Ecstasy, while possessing a security clearance in 2011. After an Article 32, Uniform Code of Military Justice (UCMJ) investigation, the investigating officer recommended referral of a charge of wrongful use of Ecstasy under Article 112a, UCMJ, to a general court-martial. In January 2012, Applicant requested to resign from the USMC in lieu of a court-martial, which was later granted.

In his Answer to the SOR, Applicant admitted “that . . . [his] use of MDMA [ecstasy] and driving while intoxicated was a criminal act.” He further admitted “that . . . [his] use of MDMA and driving while intoxicated tarnished the trust and reliability others had in me, including the Marine Corps.” In a security clearance application (SCA) dated February 27, 2013, he responded “No” to the question that asked if he illegally used any drugs or controlled substances in the last seven years. In his Answer to the SOR, he stated that he “misunderstood the question.” At the hearing, however, he denied ever knowingly using Ecstasy.

The Judge's Analysis

The Judge found in favor of Applicant on the allegations under Guidelines J, H, and G citing that the behavior in question happened so long ago that it was unlikely to recur. He found against Applicant on the alleged SCA falsification for failing to disclose his illegal use of a drug in the last seven years. The Judge concluded that Applicant willfully falsified his SCA, noting that he used Ecstasy prior to executing that document and knew the Marine Corps charged him with use of Ecstasy in 2011, which lead to his discharge in lieu of court-martial. In the whole-person analysis, the Judge also stated that Applicant “was clearly less than candid with the Government as to his past drug abuse.”¹

Discussion

Applicant contends that the Judge did not consider all of the evidence in the record. For example, he argue the Judge did not consider statements of his friends and coworkers. In his whole-person analysis, however, the Judge stated that Applicant had the unqualified support of those who

¹ “Drug abuse” is defined in the Directive as the illegal use of a drug or use of legal drug in a manner that deviates from approved medical direction. *See* Directive, Enclosure 2, ¶ 24(b).

knew him in the Marine Corps. Applicant has not rebutted the presumption that the Judge considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 12-05959 at 2 (App. Bd. Apr. 6, 2016).

Applicant also contends that he has never knowingly consumed any illegal drugs and, therefore, his response to the SCA question about illegal use of drugs was correct. In May 2011, he was involved in a vehicle accident and hospitalized. A blood sample taken from him revealed his blood-alcohol level was above the legal limit for driving and also tested positive for Ecstasy. Civilian authorities prosecuted him for DUI, and the Marine Corps charged him with wrongful use of Ecstasy. In his request to resign from the USMC in lieu of court-martial, Applicant acknowledged that the charge against him consisted of two elements: (1) he used Ecstasy, a controlled substance, and (2) his use was wrongful.² He further stated, “I admit that I am guilty of this offense” and explained he could pursue the defense of unknowing or innocent ingestion of the charged substance, but did not wish to pursue such a defense. As noted in the Judge’s findings, Applicant also admitted in his Answer to the SOR that his use of Ecstasy was a criminal act. The Judge’s finding that Applicant willfully falsified his SCA by failing to disclose his illegal use of a drug is based on substantial evidence, or constitutes reasonable characterizations or inferences that could be drawn from the record. Applicant has not identified any harmful error likely to change the outcome of the case.³ Considering the record evidence as a whole, the Judge’s material findings of security concern are sustainable. *See, e.g.*, ISCR Case No. 12-03420 at 3 (App. Bd. Jul. 25, 2014).

Applicant further argues that the Judge should have found the security concerns mitigated. This argument amounts to a disagreement with the Judge’s weighing of the evidence, which is not sufficient to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 14-04719 at 3 (App. Bd. Apr. 6, 2016). Furthermore, the Judge’s consideration of the totality of the evidence in reaching his decision complies with the whole-person analysis requirements. *See* Directive, Enclosure 2 ¶ 2 and ISCR Case No. 14-02806 at 4 (App. Bd. Sep. 9, 2015).

² “‘Use’ means to inject, ingest, inhale, or otherwise introduce into the human body, any controlled substance. Knowledge of the presence of the controlled substance is a required component of use. Knowledge of the presence of the controlled substance may be inferred from the presence of the controlled substance in the accused’s body or from other circumstantial evidence. This permissive inference may be legally sufficient to satisfy the government’s burden of proof as to knowledge.” “Possession, use, distribution, introduction, or manufacture of a controlled substance is wrongful if it is without legal justification or authorization.” (Emphasis added.) *See*, Paragraphs 37c(5) and (10) of Part IV, Manual for Courts-Martial (2005).

³ In his findings on the falsification allegation, the Judge stated, “However, at his hearing, [Applicant] places great weight on ‘never knowingly . . . doing drugs.’ (TR at page 44 lines 15~19.) The posited [SCA] question is simply stated. It does not differentiate between ‘knowing’ and ‘unknowing.’” The Judge’s statement about the question is inaccurate. The question asked Applicant if he “illegally used any drugs or controlled substances.” Decision at 3. Because an “unknowing” use of controlled substance does not constitute an “illegal” use, the question implicitly asked Applicant if he “knowingly” used a controlled substance. *See also*, n. 2, *supra*, and accompanying text. The Judge’s error, however, is harmless given the record evidence that Applicant’s use of Ecstasy was a knowing use. *See, e.g.*, ISCR Case No. 14-03601 at 3 (App. Bd. Jul. 1, 2015) (“Given the evidence as a whole, we conclude that the Judge would likely have reached the same overall decision even if the error described above had not been made.”).

The Judge examined the relevant evidence 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: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board