

KEYWORD: Guideline H, Guideline E

DIGEST: The Judge credibility determination is sustainable based on the record evidence. Adverse decision affirmed.

CASENO: 14-03223.a1

DATE: 04/17/2015

DATE: April 17, 2015

In Re:)	
)	
-----)	ISCR Case No. 14-03223
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Ryan C. Nerney, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On July 29, 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 February 11, 2015, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Francisco Mendez 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 used cocaine from 2005 to 2009, while he was in college. After graduation, he submitted an application for an appointment as a commissioned officer in the U.S. military. Part of the process was his completion of a security clearance application (SCA), on which he disclosed use of marijuana but not cocaine. He deliberately omitted reference to cocaine on the advice of friends who told him that he would likely be denied a commission were he to disclose it. Although he was denied a commission, Applicant’s SCA was adjudicated and he was granted a clearance. Applicant was not aware of this.

In 2012, Applicant accepted a job with a Defense contractor. Shortly before beginning work, he used cocaine with some friends. He stated that his employer had a drug-free workplace policy, so he knew that once he started the job he would not be able to use it again.

On his current SCA Applicant admitted his past drug use. At the hearing, he expressed his intent not to use illegal drugs ever again.

The Judge’s Analysis

The Judge stated that Applicant’s use of cocaine qualifies as “drug abuse” within the meaning of the Directive, thereby raising security concerns under Guideline H. Concerning mitigation, the Judge noted that three years had elapsed since Applicant’s last use of cocaine and the close of the record. However, he also noted that three years separated Applicant’s uses in 2009 and 2012, from which he concluded that Applicant’s circumstances required a lengthier period of abstention to mitigate the security concerns. He also stated that Applicant’s last use of cocaine was after he had accepted employment from a company that he knew required workers to be drug free. “He was thus on clear notice that the use of illegal drugs was inconsistent with his new position as a [Federal] contractor.” Decision at 5. Applicant’s drug use was cross-alleged under Guideline E as well. The Judge concluded that, for similar reason to those he cited in his Guideline H analysis, these concerns were not mitigated either.

Discussion

Applicant cites to his explanations for his conduct and to other favorable evidence. However, a Judge is presumed to have considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 11-09118 at 3 (App. Bd. Mar. 25, 2015). Applicant’s arguments are not enough to rebut that presumption or to demonstrate that the Judge mis-weighed the evidence. Applicant draws our attention to several Hearing Office cases. Hearing Office decisions are not binding on other Hearing Office Judges or on the Appeal Board. *See, e.g.*, ISCR Case No. 11-14723 at 3 (App. Bd. Oct. 3, 2014). Applicant notes the Judge’s comments about his omission of cocaine use from his earlier SCA. We construe this as an argument that, under the circumstances of this case, this omission does not impugn Applicant’s credibility. However, we are required to give deference to a Judge’s credibility determinations. Directive ¶ E3.1.32.1. In this case, the Judge’s credibility determination was supported by the record that was before him.

The Judge examined the relevant data and articulated a satisfactory explanation for the decision. *See* ISCR Case No. 11-00391 at 3-4 (App. Bd. Dec. 1, 2011) (Applicant’s use of marijuana despite having been placed on notice that such conduct was not compatible with his terms of employment impugned his judgment and reliability). 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: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge

Member, Appeal Board