

KEYWORD: Guideline H; Guideline E

DIGEST: Applicant challenges the Judge’s treatment of Applicant’s having used marijuana while he held a clearance in his analysis both of Disqualifying Conditions and Mitigating ones. Applicant argues that the Judge improperly conflated the concepts of disqualification and of mitigation. We find no support for this argument. Neither the Directive, general principles of legal analysis, nor common sense prohibit consideration of the same piece of evidence both for what it may reveal about the nature of the security concerns and about whether the applicant has met his burden of persuasion in mitigating them. Holding a clearance may enhance the seriousness of drug abuse and is relevant in determining whether a sufficient period of time has elapsed to conclude that security-significant conduct is behind applicant. Adverse decision affirmed.

CASENO: 14-03522.a1

DATE: 02/24/2016

DATE: February 24, 2016

In Re:)	
)	
-----)	ISCR Case No. 14-03522
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Tod D. Stephens, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On November 7, 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 November 15, 2015, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert E. Coacher 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’s findings of fact contained errors; whether the Judge erred in concluding that Applicant’s conduct raised security concerns; and 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 62 years old. He is married, and his youngest child lives with him along with her own two children. He has worked for a Defense contractor for over 30 years and has held a security clearance during that time, including 10 years with a top secret clearance.

Applicant admitted the allegations in the SOR. The first asserts that he used marijuana from August to November 2011 after having been granted a security clearance. The second asserts that he was arrested in November 2011 for possession of a dangerous drug without a prescription and for driving under the influence of drugs (DUI). He pled guilty to the latter offense.

Applicant suffered a back injury in 2009, as a consequence of which he was prescribed hydrocodone and morphine sulfur. He was also prescribed muscle relaxers, which affected his judgment. He used marijuana from August to November 2011, having recalled from prior usage in the 1970s that it would help him sleep. During the 1970s, Applicant had been arrested several times for using the drug. He held a security clearance at the time he started using marijuana in 2011. He used it two or three times a week prior to going to bed. Applicant obtained the marijuana from a person he knew from the 1970s, paying about \$40 an ounce. He knew that using marijuana was contrary to his employer’s policy regarding drug use and that it could cause him problems with his clearance. He did not disclose his drug use to anyone at work.

In November 2011, Applicant was driving to work when he had a flat tire. A police officer pulled over to assist him. Applicant had a prescription drug in the car and, when asked to produce the prescription, could not do so. The officer administered a field sobriety test to Applicant, which he failed. The officer arrested Applicant. A subsequent blood test yielded a positive result for marijuana. Applicant was charged with DUI because of this blood test. He was not prosecuted for the prescription drug. Applicant pled guilty and has completed all of his sentence. He states that he has not used marijuana since his arrest and does not intend to do so in the future.

Applicant still suffers from his back problem and remains in constant pain. He does not intend to undergo surgery and remains on prescription pain medication. Applicant has received awards for the quality of his work as well as excellent ratings on his performance evaluations.

The Judge's Analysis

The Judge concluded that Applicant's misconduct raised two concerns under Guideline H: Disqualifying Conditions 24(a) ("any drug abuse")¹ and 24(g): ("any illegal drug use after being granted a security clearance").² Regarding Guideline E, he concluded that Applicant's use of marijuana satisfied the criteria of Disqualifying Condition 16(e) ("personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress").³ In further concluding that Applicant had not mitigated the concerns raised by his conduct, the Judge stated that Applicant has resumed marijuana use after a 36-year abstinence and that he still experiences the back pain that gave rise to his 2011 marijuana use. He noted that Applicant has not used marijuana for four years. However, he also stated that Applicant's having held a clearance at the time of his drug use and his knowledge that such use was illegal raises a serious concern about his judgment. He stated that these actions cast doubt upon Applicant's current reliability and good judgment. The Judge also stated that Applicant's willingness to use marijuana while his grandchildren were living with him undercut his effort to demonstrate mitigation. In analyzing Applicant's case under Guideline E, the Judge cited to some of the same evidence he had addressed under Guideline H. He also stated that Applicant had not presented sufficient evidence of positive steps to reduce or eliminate his vulnerability to coercion.

Discussion

Applicant challenges some of the Judge's findings of fact. We examine a Judge's findings to see if they are supported by "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. Applicant asserts several factual errors. One is the finding that he had been arrested several times in the 1970s for using marijuana. He states that, to the contrary, he was arrested for having possessed the drug, not for having used it. This argument is persuasive. The only evidence concerning these prior arrests is found in Applicant's security clearance application (SCA) and his clearance interview, both of which disclose possession and make no reference to use. However, it is not likely that this error exerted any influence on the Judge's overall decision. Therefore, it is harmless. *See, e.g.*, ISCR Case No. 14-03601 at 3 (App. Bd. Jul. 1, 2015).

Applicant also contends that the Judge erred in stating that he had admitted all of the allegations in the SOR. He argues that he had "refuted," that is, denied, the allegation regarding his

¹Directive, Enclosure 2 ¶ 24(a).

²Directive, Enclosure 2 ¶ 24(g).

³Directive, Enclosure 2 ¶ 16(e).

arrest for possession of a dangerous drug without a prescription and DUI and that there is no evidence that he had pled guilty to DUI.⁴ The SOR allegation reads as follows:

In approximately November 2011, you were arrested and charged with Possession of Dangerous Drug without Prescription, Driving Under the Influence of Alcohol and/or Drugs, and Unsafe Vehicle. In approximately July 2013, you pled Guilty to DUI[.]

The allegation went on to describe the sentence imposed upon Applicant for the offense of which he was convicted. In his Answer to the SOR, Applicant stated, “I admit the arrest took place.” He provided an explanation to the effect that he had a prescription for the drugs in question but was not in possession of the prescription at the time of his arrest. He stated that this was probably why he was charged only with DUI. Applicant specifically admitted that during the time leading up to his arrest he had been using marijuana to help him sleep. This explanation does not explicitly refute or deny the basis for his arrest or other facts set forth in the SOR. Moreover, it is generally consistent with the Judge’s findings, which, in any event, are independently supported by Applicant’s admissions in the SCA, his clearance interview, his hearing testimony, and the security clearance incident history.⁵ Even if there were some error in the challenged finding, in that Applicant’s Answer to the SOR did not explicitly admit every aspect of the allegation, it would not likely have exerted an effect on the outcome of the case. The other challenged findings are based upon substantial evidence or constitute reasonable inferences from the evidence. Applicant has cited to no harmful error in the Judge’s findings. The Judge’s material findings are sustainable. *See, e.g.*, ISCR Case No. 12-03420 at 3 (App. Bd. Jul. 25, 2014).

Applicant challenges the Judge’s application of the pertinent Disqualifying Conditions. Under Guideline E, he contends that there is no evidence that would show him to be vulnerable to coercion. However, the evidence, including Applicant’s testimony, shows that, after a hiatus of over three decades, Applicant resumed using marijuana. He did so while holding a clearance and at a time when he was also taking oxycodone and morphine. He testified that when he began using marijuana, he did not advise his employer. Tr. at 39. This evidence is sufficient to raise in a reasonable mind a concern that Applicant engaged in conduct which, had it become known, might have imperiled his clearance, thereby rendering him vulnerable to coercion. We find no reason to disturb the Judge’s application of Disqualifying Condition 16(e).

Applicant also challenges the Judge’s treatment of the Guideline H Disqualifying Conditions. Among other things, he notes that the Judge discussed Applicant’s having held a clearance while using marijuana in his analysis both of the Disqualifying Conditions as well as the Mitigating ones.

⁴In addressing this assignment of error, Applicant cites—in block format, implying that it is a quotation—language that does not appear in the SOR Answer or anywhere else in the record. In particular, the Answer does not use the word “refute,” “deny,” or any other word of equivalent meaning in addressing the allegation under consideration.

⁵The incident history was admitted without objection as Government Exhibit 2. This document states, in pertinent part, “On 24 July 2013, [Applicant pled] guilty to the charge(s) of DUI[.]”

Applicant argues that, by doing so, the Judge improperly conflated the concepts of disqualification and of mitigation, thereby impairing his ability to evaluate Applicant's favorable evidence. We find no support for this argument. The Judge correctly cited and quoted the pertinent passages of the Directive in concluding that illegal drug use while holding a clearance raised a concern under Guideline H, in that Applicant might be lacking in reliability and trustworthiness. He also correctly cited and quoted the pertinent Guideline H Mitigating Conditions. Nowhere in his analysis does the Judge appear to have mistaken the concepts of disqualification and mitigation for the other, misstated the Directive, or entered contradictory findings. Neither the Directive, general principles of legal analysis, nor common sense prohibit consideration of the same piece of evidence both for what it may reveal about the nature of an applicant's security concerns and about whether the applicant has met his burden of persuasion in mitigating them. Indeed, holding a clearance may well enhance the seriousness of drug abuse and is therefore relevant in determining whether a sufficient period of time has elapsed to enable a conclusion that an applicant's security-significant conduct is behind him. *See, e.g.*, ISCR Case No. 14-01847 at 3 (App. Bd. Apr. 9, 2015) (Evidence that the applicant used marijuana multiple times while holding a clearance supported the Judge's conclusion that not enough time had passed to show that the applicant's misconduct was unlikely to recur). The Directive presumes a nexus between admitted or proven conduct under any of the Guidelines and an applicant's eligibility for a clearance. *See, e.g.*, ISCR Case No. 14-04648 at 3 (App. Bd. Sep. 9, 2015). Applicant's arguments are not enough to rebut the presumption of nexus.

We have considered Applicant's challenge to the Judge's mitigation analysis as well as his application of the whole-person factors. We find persuasive Department Counsel's contention that Applicant's arguments are, in essence, a disagreement with the Judge's weighing of the evidence, which is not enough 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. 14-06440 at 4 (App. Bd. Jan. 8, 2016). 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: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board