

KEYWORD: Guideline H

DIGEST: We cannot consider new evidence on appeal. The Judge’s finding that Applicant’s employer had a no-drug policy was error. However, the error was harmless. Applicant’s having used marijuana in the past, including ten times after having been granted a trustworthiness designation, was sufficient to raise security concerns. A verbal ambiguity in the Judge’s decision did not rise to the level of a legal error. Adverse decision affirmed.

CASE NO: 14-03601.a1

DATE: 07/01/2015

DATE: July 1, 2015

In Re:	)	
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	)	
Applicant for Security Clearance	)	
	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

John Bayard Glendon, Esq., Deputy Chief Department Counsel

**FOR APPLICANT**

Barry M. Hartman, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On August 8, 2014, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline H (Drug Involvement) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On March 31, 2015, after the hearing, 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 issues on appeal: whether the Judge's findings of fact contained errors; 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 works for a Defense contractor. She graduated from college with a bachelor's degree in 2008. In that year she started working for a Government contractor. When inprocessing, she was advised of her employer's policy against drug use. She submitted an application for a public trust position, in which she disclosed her use of marijuana from 2003 until 2008. She was granted a public trust position.

In 2013, she submitted a security clearance application (SCA). She disclosed her prior history of marijuana use. She also advised that she had used marijuana from March 2006 until March 2013. She characterized her use as "recreational and infrequent." Decision at 2. She also stated that she intended to use marijuana in the future, if presented the opportunity.

In her Answer to the SOR, she stated that she had used marijuana no more than 10 times between 2009 and 2013. She denied having used any other drugs. She also stated that she did not intend to use drugs in the future, a resolve strengthened by the suicide of an acquaintance who had been addicted to cocaine. She also submitted a statement of intent not to use drugs, with automatic revocation of her clearance should she do so anyway.

She stated that she had not used drugs in two years, as evidenced by a change of lifestyle to avoid situations in which drugs might be present. Although she continues to associate with friends who used drugs in college, she does in public places where marijuana is not likely to be available. Applicant expressed regret for her conduct, acknowledging that use of marijuana was both illegal and frowned upon by her employer.

Applicant's performance reviews commend her for her job knowledge and leadership abilities. She has received outstanding ratings from her company. She believes that these matters show that she has been rehabilitated.

### **The Judge's Analysis**

The Judge concluded that Applicant's circumstances raised concerns under Guideline H, citing to evidence of her uses between 2006 and 2013 and to her uses after having received a trustworthiness designation. He also cited to her statement that at the time of some of her uses, she was aware of her employer's policy against illegal drug use.

In analyzing Applicant's case for mitigation, the Judge concluded that "none of the Guideline H mitigating conditions fully apply" and "that not enough time has transpired since Applicant's last use of marijuana to fully establish Applicant's rehabilitation[.]" *Id.* at 5. Although he stated that Applicant had taken steps to rehabilitate herself and noting that she had been truthful throughout the

processing of her SCA, he could not conclude that she was rehabilitated and had demonstrated that her security significant conduct was actually behind her. He noted her promise not to use drugs in the future. However, he stated that her awareness of the illegality of marijuana use and its incompatibility with holding a public trust position or a clearance did not stop her from such misconduct. He concluded that Applicant's conduct evidenced a lack of judgment and an unwillingness to comply with the law, raising questions about her reliability, trustworthiness, and ability of protect classified information.

## **Discussion**

In making her appeal arguments, Applicant asserts matters from outside the record. We are not permitted to consider new evidence on appeal. Directive ¶ E3.1.29.

Applicant challenges the Judge's findings that by using marijuana she knowingly violated her employer's drug policy and that such use could have imperiled her job. We examine a Judge's findings of fact 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. *See also* ISCR Case No. 11-10474 at 3 (App. Bd. Sep. 5, 2014).

We agree with Applicant that there is no evidence explicitly stating that Applicant's employer had a no-drug policy violation of which could cause her to lose her job. Therefore, the challenged findings were erroneous to the extent that they implied such evidence. However, when asked about her employer's position on the use of drugs, Applicant testified that such conduct would be "frowned upon." Tr. at 31. This testimony supports an inference that drug use was not totally compatible with Applicant's job requirements and that Applicant was aware of some degree of incompatibility. 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. Therefore, the error is harmless. Otherwise, the Judge's material findings are based on substantial evidence or constitute reasonable inferences from the evidence.

Applicant challenges the Judge's mitigation analysis. She argues that Applicant's conduct was not sufficiently serious to justify denying her a clearance. She states that there is only one possible reason for the Judge's adverse decision, that is Applicant's "awareness that use of marijuana is illegal and using it infrequently after her initial . . . clearance was granted. Standing alone that is not sufficient to deny a security clearance, nor has any reported case under this set of facts ever done so." Appeal Brief at 4-5.<sup>1</sup> We are not persuaded by this argument. Evidence that

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<sup>1</sup>Applicant also argues as follows: "Given the fact that marijuana use is no longer illegal under multiple state laws, and that the federal government itself has stated that it will not be pursuing enforcement of the federal law that prohibits the use of marijuana against occasional recreational users . . . denying a security clearance on this [ground] alone violates the fundamental common sense principle" that is supposed to govern DOHA adjudications. She argues that the Judge should have distinguished marijuana from other drugs. Appeal Brief at 5.

Compare this argument with Memorandum from Director of National Intelligence, *Adherence to Federal Law Prohibiting Marijuana Use*, dated October 25, 2014, at p. 2: Despite changes to state laws and to the laws of the District

Applicant has used marijuana in the past, on ten occasions over several years after having been granted a trustworthiness designation, and her admission in 2013 that she may do it again in the future are sufficient to raise a concern in a reasonable mind about her “ability or willingness to comply with laws, rules, and regulations.” Directive, Enclosure 2 ¶ 24. Although no two cases are alike, and each must be evaluated on its own facts, we note ISCR Case No. 11-03909 (App. Bd. Aug. 30, 2012), in which we upheld a Judge’s adverse finding under Guideline H based upon the applicant’s having used marijuana on a single occasion while holding a security clearance.<sup>2</sup> Considering her Appeal Brief as a whole, we conclude that Applicant’s argument consists basically of a disagreement with the Judge’s weighing of the evidence. However, as Department Counsel notes in his Reply Brief, that is not enough to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law.

Applicant argues that the Judge erred in stating that “none of the Guideline H mitigating conditions fully apply.” She contends that it is not clear whether the Judge meant that none of the Guidelines in and of themselves fully apply or that the Guidelines as a whole do not fully apply. Either way, she argues that the Judge’s comment is not consistent with the record, citing to evidence of her changed lifestyle and her signed statement of intent.

We do not read individual sentences in isolation but in light of the Decision as a whole. *See, e.g.*, ISCR Case No. 08-06506 at 2 (App. Bd. Jul. 30, 2010). We interpret the challenged comment to mean that Applicant’s evidence is not sufficient to meet her burden of persuasion under 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’”). Perhaps a somewhat clearer wording would have been that Applicant’s security concerns have not been fully mitigated. However, we agree with Department Counsel that Applicant’s argument attempts to convert a possible verbal ambiguity into legal error, an argument that is not supported by a fair reading of the Decision as a whole.

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 Egan, supra*. *See also* Directive, Enclosure 2 ¶ 2(b): “Any doubt

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of Columbia, “[a]n individual’s disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations. As always, adjudicative authorities are expected to evaluate claimed or developed use of, or involvement with, marijuana using the current adjudicative criteria. [Authorities] must determine if the use of, or involvement with, marijuana raises questions about the individual’s judgment, reliability, trustworthiness, and willingness to comply with law, rules, and regulations[.]”

Official pronouncements by the President, the Department of Defense, or other appropriate Federal agency on matters of national security are equivalent to legislative facts for purposes of DOHA adjudications in that they bind the Judge and are not subject to refutation. *See* ISCR Case No. 05-11292 at 4, note 1 (App. Bd. Apr. 12, 2007).

<sup>2</sup>Trustworthiness designations are evaluated according to the same criteria and standard as are security clearances. *See Kaplan v. Conyers*, 733 F.3d 1148 (Fed. Cir. 2013), *cert. denied*.

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: Jeffrey D. Billett  
Jeffrey D. Billett  
Administrative Judge  
Member, Appeal Board

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