

KEYWORD: Guideline H; Guideline J

DIGEST: Applicant failed to rebut the presumption that the Judge considered all of the evidence. Hearing Office Decisions are not binding on other Hearing Office Judges or on the Appeal Board. Adverse decision affirmed.

CASE NO: 14-05095.a1

DATE: 02/18/2016

DATE: February 18, 2016

In Re:)	
)	
-----)	ISCR Case No. 14-05095
)	
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 March 26, 2015, 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 J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On December 8, 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 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 works for a Federal contractor. Following a short time in college, he enlisted in the U.S. military, serving from 2008 until 2013, at which time he was administratively discharged for misconduct, specifically use of cocaine. During his military service Applicant held a top secret clearance.

In July 2013, Applicant and a companion purchased and used cocaine. Several days later he participated in a drug test that yielded a positive result for the drug. Applicant received punishment under Article 15 of the Uniform Code of Military Justice and was discharged with a General Discharge Under Honorable Conditions. After leaving the military, Applicant was unemployed until February 2014, at which time he was hired by his current employer.

Following his Article 15, Applicant participated in a substance abuse program sponsored by the military. His counselors determined that he was not a frequent user of drugs and that he was not dependent upon them. Applicant stated that, after his discharge, he disassociated himself from his drug-using companions. Applicant has signed a written statement of intent not to use drugs in the future, with an automatic revocation of his clearance in the event of drug use.

In addition to his drug misconduct, Applicant committed some misdemeanor and/or traffic offenses. For example, he was convicted several times of reckless driving, on one occasion driving over 100 miles per hour in a 55-mile-per-hour zone. Applicant's most recent incident of reckless driving occurred in October 2014. Applicant was also convicted of public intoxication and, on another occasion, destruction of private property.

Applicant enjoys a good reputation for the quality of his work performance. He is said to have a strong work ethic and to be highly dependable. Applicant's supervisors recommend him for a clearance.

The Judge's Analysis

The Judge concluded that Applicant's drug use was relatively recent. Though noting favorable evidence, such as Applicant's statement that he had used cocaine only once and that he promised to refrain from future misconduct, the Judge concluded that he had failed to mitigate the concerns in his case. The Judge stated that Applicant had been 24 years old at the time of his cocaine use, that he had served in the military for three years by that time, holding the rank of petty officer second class, and that he held a top secret clearance. He stated that Applicant should have been aware that drug use was against military regulations and that it would have an adverse impact on his security clearance. In light of this evidence, the Judge concluded that Applicant's misconduct was not mitigated through the passage of time. The Judge cited to Applicant's testimony that he entered the military to separate himself from bad company and to change his lifestyle. He also noted Applicant's good work performance and claims to have separated himself from his friends who use drugs. Regarding Guideline H, he noted the repeated nature of Applicant's reckless driving and

misdeemeanor offenses, occurring between 2008 and 2014. He also cited to Applicant's cocaine use. He concluded that Applicant had not demonstrated a track record of reliability, good judgment, or compliance with laws, rules, and regulations.

Discussion

Applicant cites to his favorable evidence, including a written statement he prepared of his intent to refrain from future drug use. The Judge made a finding about this statement. Decision at 3. Applicant also cites to evidence that, he contends, supports a conclusion that his drug use is not recent. As noted above, the Judge discussed this evidence in the Analysis portion of the Decision. He also cited to evidence that reasonably supported a conclusion that Applicant's drug use was not mitigated through the passage of time. Applicant's arguments are not enough to rebut the presumption that the Judge considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 14-06093 at 3 (App. Bd. Dec. 4, 2015). Under the facts of this case, the Judge's conclusion that Applicant did not satisfy the Drug Involvement Mitigation Conditions, including 26(a), is sustainable.¹ His arguments are, to a large extent, a disagreement with the Judge's weighing of the evidence. However, this 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).

Applicant refers to some Hearing Office cases that, he argues, support his case for a clearance. We give thee cases due consideration as persuasive authority. Hearing Office cases are not binding on other Hearing Office Judges or on the Appeal Board. *See, e.g.*, ISCR Case No. 14-03747 at 3 (App. Bd. Nov. 13, 2015).

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."

¹*See* Directive, Enclosure 2 ¶ 26(a): "the behavior happened so long ago, was no infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment[.]" We have never established a "bright line" rule as to the recency of drug use. The extent to which security concerns may have become attenuated through the passage of time is a question that must be resolved based on the evidence as a whole. *See, e.g.*, ISCR Case No. 14-01847 at 3 (App. Bd. Apr. 9, 2015), in which the applicant's having used marijuana while holding a security clearance was a factor that supported the Judge's conclusion that insufficient time had passed to show meaningful rehabilitation.

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