

KEYWORD: Guideline F

DIGEST: Even if the Judge erred in making the challenged findings, such errors were harmless because they did not likely affect the outcome of the case given the evidence as a whole. The Judge's material findings of security concern are based upon substantial evidence or constitute reasonable inferences or conclusions that could be drawn from the evidence. Adverse decision affirmed.

CASENO: 15-01494.a1

DATE: 07/08/2016

DATE: July 8, 2016

In Re:)	
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Applicant for Security Clearance)	ISCR Case No. 15-01494

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 September 3, 2015, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On April 20, 2016, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Noreen A. Lynch 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 and Analysis

The Judge found in a favor of Applicant on the alleged debts and against him on allegations that he was arrested for, and charged with, possession of marijuana in November 2011 after having been granted a security clearance.

Applicant is a 57-year-old employee of a defense contractor. He has worked for his current employer since 2005. He served in the U.S. military from 1979 to 1987 and received an honorable discharge. He is married and has children. He has held a security clearance since 1979.

At the hearing, Applicant testified that in 2011 he found a makeup bag in a playground where his children were playing basketball. There was marijuana in the bag. He put the marijuana in his pocket with the intent of throwing it away. He forgot about that marijuana after he placed it in the console of his truck. Two weeks later, the police approached his vehicle while he was in a parking lot of a restaurant. The police found the marijuana after he consented to a search of the vehicle. He completed 24 hours of court-ordered community service as a result of the possession of marijuana charge. He stated that he does not use marijuana or other drugs. He reported the incident to his facility security officer, but did not do so right away.

The police report reflected that a wooden smoking device containing marijuana was found in Applicant’s truck. It also indicated that the driver jumped out of the vehicle when he saw the officer approaching. The report noted that it appeared someone had just packed the smoking device with marijuana. Next to the smoking device was a black and tan pouch containing a clear baggie of a green leafy substance that appeared to be marijuana. Upon questioning, Applicant told the police officer that it was for his personal use.

In post-hearing submissions, Applicant provided a negative drug test and a declaration that the police report confirmed his testimony. After reviewing the transcript and police report, the Judge

found to the contrary. She concluded that his version of the events was not credible and differed from the police report. She also noted that he testified there was no pipe or drug paraphernalia present and changed his story from him having found the marijuana to this being an isolated incident.

Applicant has received a number work-related awards over the years. His manager, who has worked with him for 30 years, testified he is a trustworthy individual and excellent worker. Two other coworkers also testified in support of Applicant.

Discussion

Applicant contends that the Judge erred in making findings of fact. First, he points out that the Judge found that Applicant has “adult children” when he has one child who is 15 years old and another who is 18 years old. Next, he stated that Judge found the driver (Applicant) jumped out of the vehicle as the police approached; however, the police report stated that the driver “jumped out of his seat.” Finally, Applicant asserts he was not arrested for possession of marijuana, but only cited for that offense. Of note, the cover letter forwarding the police report stated it pertains “to the arrest of” Applicant in 2011, but the police report states he was issued a summons to appear in court. Even if the Judge erred in making those findings, such errors were harmless because they did not likely affect the outcome of the case given the evidence as a whole. The Judge’s material findings of security concern are based upon substantial evidence or constitute reasonable inferences or conclusions that could be drawn from the evidence. *See, e.g.*, ISCR Case No. 12-03420 at 3 (App. Bd. Jul. 25, 2014).

Applicant also argues that the Judge did not consider all of the evidence in the record. He emphasizes that his conduct in question happened over five years ago and cites to the testimony of witnesses about his trustworthiness. The Judge, however, made findings about those matters. He further argues that based on the record 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 2 (App. Bd. Apr. 6, 2016). Furthermore, the Judge’s consideration of the totality of the evidence in reaching her decision complies with the whole-person analysis requirements. *See* Directive, ¶ 6.3, Enclosure 2 ¶ 2, and ISCR Case No. 14-02806 at 4 (App. Bd. Sep. 9, 2015).

Applicant has failed to identify any harmful error. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The decision is sustainable on the 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: James E Moody

James E. Moody
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy

James F. Duffy
Administrative Judge
Member, Appeal Board