

KEYWORD: Guideline H

DIGEST: Applicant used marijuana five times. The Judge's erroneous conclusion that the government failed to establish a case for disqualification is harmless in this case. Favorable decision affirmed.

CASENO: 06-18096.a1

DATE: 04/04/2008

DATE: April 4, 2008

_____)	
In Re:)	
)	
-----)	ISCR Case No. 06-18096
)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Ray T. Blank, Jr., Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 31, 2007, DOHA issued a statement of reasons 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 November 29, 2007, after the hearing, Administrative Judge John Grattan Metz, Jr., granted Applicant’s request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raises the following issue on appeal: whether the Judge’s application of Guideline H disqualifying and mitigating conditions was arbitrary, capricious, or contrary to law.

Applicant is 23 years old. He used marijuana five times between July 2005 and December 2006—four times during college and once after he began working. After his last usage, Applicant realized that his decision to use drugs was a bad one, and he resolved never to use illegal drugs again. Applicant was honest about his drug usage on his security clearance application and in his interview with an investigator. Applicant is pursuing a master’s degree and is highly thought of by his employer.

The Judge concluded that “[t]he government failed to establish a case for disqualification under Guideline H.” Department Counsel argues that conclusion is in error. Department Counsel’s argument has merit. Applicant admitted his drug abuse, and the Directive states that “any drug abuse” is sufficient to raise a security concern. *See* Directive ¶ E2.25(a). Thus, the government’s security concern against him was established. *See, e.g.*, ISCR Case No. 06-22515 at 2 (App. Bd. Dec. 7, 2007). The burden then shifted to Applicant to provide evidence of mitigation.

Department Counsel also contends that the Judge’s application of mitigating conditions is in error. Department Counsel’s contention in this regard lacks merit. The Judge reasonably explained why he applied Guideline H mitigating conditions ¶¶ 26(a) and 26(b).¹ The Judge based his conclusions on record evidence such as the infrequency and the circumstances of the drug use. The Judge also considered changes in Applicant’s life, including his career and his pursuit of a master’s degree.

While the Judge’s conclusion that the government did not establish a case against Applicant was error, that error is harmless, because the Judge went on to apply mitigating factors in order to

¹“(a) the behavior happened so long ago, was so 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 judgement;

(b) a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation;” Directive ¶¶ E2.26(a) and 26(b).

mitigate the security concerns raised by Applicant's drug use. The Board need not agree with the Judge's decision to find it sustainable.²

Order

The Judge's favorable security clearance decision is AFFIRMED.

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, 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

²The Board also need not agree with the Judge's characterizations, *e.g.*, "denying a clearance for a 23-year-old who used marijuana five times defies common sense."