KEYWORD: Guideline H; Guideline E

DIGEST: Given Applicant's long-standing use of marijuana, the Judge's adverse decision is sustainable. Applicant's favorable evidence did not compel a favorable decision Adverse decision affirmed.

CASENO: 06-18665.a1

DATE: 08/31/2007

DATE: August 31, 2007

In Re:	)	
---	)	ISCR Case No. 06-18665
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 29, 2006, DOHA 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 January 18, 2007, after the hearing, Administrative Judge Joan Caton Anthony denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.[1]

Applicant raised the following issues on appeal: (a) whether the Administrative Judge's analysis of relevant mitigating conditions and "whole person" factors was arbitrary, capricious, or contrary to law; and (b) whether the Administrative Judge gave insufficient weight to,or failed to consider, favorable evidence that substantially mitigates the security concerns.

Whether the Record Supports the Judge's Factual Findings

A. Facts

The Administrative Judge made the following relevant findings of fact:

Applicant is 26 years old, and for the past two years has been employed as a financial analyst by a government contractor. She was awarded a bachelor of arts degree in May 2002, and her academic transcripts indicated that she earned mostly Bs and As. Applicant began using marijuana, which she knew to be illegal, when she was 14. She used marijuana approximately 50 times during high school and college. Her heaviest use of marijuana occurred in high school, when she sometimes used it twice a week. At other times, months would pass from one use to the next. In college, Applicant's use of marijuana would follow a similar pattern. Sometimes she used the drug for two weekends in a row, and at other times several months would pass between uses. Applicant purchased marijuana twice in high school and once in college. She used marijuana for approximately three years after graduating from college. She has witnessed others in her social circle using marijuana within the last 6 to 12 months, and she has a close companion who uses marijuana.

In her security clearance application (SF-86) executed on November 3, 2004, Applicant admitted using marijuana 50 times between October 1997 and July 2004, pointing out that most of her usage took place when she was in high school and college. In September 2005, Applicant was interviewed by an authorized investigator of the Department of Defense and she admitted using marijuana on three occasions after completing her SF-86, with a last use in February 2005. When asked by the investigator whether she would use marijuana again, she said that she could not predict the future but could not foresee herself using it again. At the hearing, the Applicant stated that she was nervous when questioned by the investigator and did not come across as emphatically as she had hoped to, but that she had no intention in September 2005 or at the hearing of ever using marijuana again.

On October 17, 2006, Applicant met with a clinical psychologist for substance abuse evaluation. He evaluated her and issued a report (Applicant's Exhibit D). The report included Applicant's statement to the psychologist that "she has not smoked any marijuana in several years

[1]The Judge's formal findings in favor of Applicant under SOR paragraphs 1.c and 1.e are not in issue in this appeal.

and the last time she smoked 'it seemed stupid and I wanted to grow up.'" Based on his assessment of Applicant's marijuana use and a negative drug test, the psychologist concluded that Applicant "does not have an ongoing substance abuse problem." He made no recommendations for substance abuse education or treatment. At her hearing, Applicant stated that the psychologist was inaccurate when he reported that she told him that she had not smoked marijuana in several years. Nothing in the record indicated Applicant had brought the alleged inaccuracy to the attention of the psychologist or had asked him to correct his report or, if necessary, revise his evaluation.

Applicant does not believe that her marijuana use affected her academic performance, her judgment, or job performance. She participates in a community service program to mentor underprivileged high school students; her supervisor praised her professionalism and judgment; and her job appraisals indicated that she exceeded standards in many areas.

B. Discussion

Applicant does not dispute the Judge's findings as such. But, as indicated hereafter, Applicant does dispute the Judge's interpretation of some of the findings, the weight the Judge placed on some of them, or the conclusions that the Judge drew from them. Applicant believes that the Judge erred in not discussing some favorable evidence, and offers some rebuttal evidence for the Board's consideration.

The Board's review of a Judge's findings is limited to determining if they are supported by substantial evidence—such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all contrary evidence in the record. Directive ¶ E3.1.31.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). In evaluating the Judge's findings, we are required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1. The Board does not review a case *de novo*.

Applicant disputes the weight and negative inferences that the Judge placed on the portion of the psychologist's report which stated that Applicant had told the psychologist in October 2006 that she "had not smoked any marijuana in several years." Applicant denies that she reported to the psychologist that she had not smoked marijuana for several years. She argues on appeal that she voluntarily brought this inconsistency to the Judge's attention. Applicant indicates that she thought that she had a moral responsibility to do so. She argues that she was prepared to explain why she had not gotten the psychologist to address the discrepancy, but that neither the Department Counsel nor Judge pursued this issue.

The Judge could have concluded that pointing out such a discrepancy within one's own exhibit before cross-examination is favorable to Applicant, and as Applicant indicated, she had a moral duty to do so. Applicant also had a legal duty to do so because she knew that a portion of her own exhibit was incorrect. However, Applicant's initiative did not require the Judge, as a matter of law, to draw an inference on this issue in Applicant's favor. Moreover, neither the Department Counsel nor the Judge were required to ask follow-up questions about the discrepancy and why Applicant had not pursued efforts to get the psychologist to correct the error and reconsider his

conclusions if necessary. The burden of explanation was on the Applicant, not the Department Counsel. Directive ¶ E3.1.15. Applicant had introduced this issue in her direct examination, and that would have been a proper place to offer further explanation. The Judge, as an impartial trier of fact, has the discretion but is not required to conduct an examination of any witness. The statement in Applicant's appeal brief that she did not approach the psychologist about clarifying the discrepancy in his report, and modify any recommendation if necessary, because she had inadequate time to prepare after her attorney's withdrawal, is not persuasive. At the beginning of the hearing, Applicant, who was then represented by a personal representative, was invited to address the consequences of her attorney's late withdrawal, but she chose not to request a continuance on that basis. Applicant admitted that she had adequate notice and time to prepare. Tr. at 9-10. Under those circumstances, the Judge could reasonably conclude that Applicant's failure to call the psychologist as a witness, or otherwise request him to clarify this discrepancy and modify his conclusions if necessary, "cast doubt on the reliability of the report and raised concerns about [Applicant's] credibility." Decision at 6.

Applicant argues that the Judge erred by not discussing favorable record evidence. Examples of this include a letter from the corporate vice president of her employer who has no hesitation in recommending Applicant for a position of trust notwithstanding her prior indiscretions (Applicant's Exhibit C). Moreover, while the Judge mentioned Applicant's community service role as a mentor for underprivileged high school students, Applicant argues that the Judge erred by not addressing her intention to continue with the program and the time and dedication that she invested in it (Applicant's Exhibit F).

There is a rebuttable presumption that the Judge has considered all record evidence unless the Judge specifically states otherwise. Furthermore, the Judge was not required to discuss each and every piece of evidence in her decision. *See* ISCR Case No. 03-07412 at 2 (App. Bd. Apr. 9, 2007). The corporate vice president's letter and evaluation as supervisor, along with prior evaluations by other supervisors, are all part of Applicant's Exhibit C, and the Judge cited this exhibit in her decision. Decision at 4. The Judge's decision specifically cited Applicant's testimony (Tr. at 44-47) in which Applicant described her time and dedication to the mentor program and her commitment to the program for another year. Decision at 4. Applicant's argument that the Judge failed to consider this favorable evidence is not persuasive.

Whether the Record Supports the Judge's Ultimate Conclusions

A Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision "including a 'rational connection between the facts found and the choices made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)(quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). "The general standard is that a clearance may be granted only when 'clearly consistent with the interests of national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The Appeal Board may reverse a Judge's decision to grant, deny or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶¶ E3.1.32.3 and E3.1.33.3.

There is a presumption against granting a clearance. *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9 Cir. 1990), *cert. denied,* 499 U.S. 905 (1991). Once the government presents evidence

raising security concerns, the burden shifts to the applicant to establish any appropriate mitigating conditions. Directive ¶ E3.1.15. "The application of disqualifying and mitigating conditions and whole person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole." *See* ISCR Case No. 05-03635 at 3 (App. Bd. Dec. 20, 2006).

Applicant contends that Drug Involvement Mitigating Conditions 1[2] and 3[3] applied to her circumstances, and that as a matter of law, based on record evidence, the Administrative Judge was compelled to make formal findings in her favor. While the Judge agreed that Applicant's drug involvement was not recent, she found that Applicant's marijuana use, although sometimes sporadic and intermittent, was continual and spanned approximately eight years of her adolescence and young adulthood. Decision at 5-6. Thus, the Judge concluded that Drug Involvement Mitigating Condition 2[4] did not apply because Applicant's "drug involvement was neither isolated nor aberrational and represented a consistent and long-standing lifestyle choice." Decision at 6. The Judge then considered Drug Involvement Mitigating Condition 3 and found that Applicant had no plan or rationale for abstaining from marijuana, and that she continues to associate with people who use it. In that regard, the Judge's analysis highlighted the absence of a track record demonstrating abstinence. Decision at 6. Applicant contends that the Judge's decision not to apply Mitigation Condition 3 was arbitrary, capricious, or contrary to law because: in her testimony she provided the Judge her rationale for abstaining from future use; her hearing testimony about use of marijuana in her social circle shows that she has "not witnessed anybody use marijuana in quite a long time;" she has not used marijuana since February 2005; and the psychologist concluded that she did not have an ongoing substance abuse problem.

The Judge's conclusions that Drug Involvement Mitigating Condition 3 did not apply and that security concerns under Guideline H could not be mitigated, are sustainable. Considering Applicant's long-standing use of marijuana, the Judge had reasonable concerns about whether Applicant's social circle would support her abstinence. The Judge plausibly interpreted Applicant's hearing testimony to be that she continues to associate with people who use marijuana. For example, regarding marijuana use by her "good friends" at the time of the hearing, Applicant testified that "I may know a few people that still will casually use it, yes." Tr. at 51. And while Applicant claims that she had not witnessed anybody use marijuana "in quite a long time," she also testified that people who she socializes with used marijuana in front of her within the past two years. Tr. at 58-59. The Judge's conclusion that Applicant had not provided sufficient evidence to resolve the discrepancy in the psychologists's report is sustainable, and the Judge reasonably questioned whether the discrepancy impeached a psychologist's evaluation that was facially predicated, in part, on Applicant having not smoked marijuana for several years. The presence of some mitigating evidence does not compel the Judge to make a favorable security clearance decision. An applicant's disagreement with the Judge's weighing of the evidence, or ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate that the Judge weighed the evidence

[2]"The drug involvement was not recent" (Directive ¶ E2.A8.1.3.1).

[3]"A demonstrated intent not to abuse any drugs in the future" (Directive ¶ E2.A8.1.3.3).

[4]"The drug involvement was an isolated or aberrational event" (Directive ¶ E2.A8.1.3.2).

or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 03-07412 at 2 (App. Bd. Apr. 9, 2007).

Applicant claims that the security concerns under Guideline E must be mitigated under Personal Conduct Mitigating Conduct 5.[5] However, for the reasons explained in the previous paragraph, the Judge's conclusion that Mitigating Condition did not apply is sustainable. There is plausible evidence that Applicant's still associates with persons who use marijuana socially. Such activity also supported the Judge's conclusion that Personal Conduct Mitigating Condition 7[6] did not apply.

Finally, the Judge's whole person analysis is sustainable. Viewed in its most positive light, all of Applicant's favorable evidence, including her exemplary job performance and valuable community service, did not compel the Judge to conclude that such evidence outweighed the security concerns. Evidence of an applicant's value to her employer or community is not the issue here; the issue is Applicant's security eligibility. *See*, *e.g.*, ISCR Case No. 04-11893 at 2 (App. Bd. Apr. 25, 2006). The Federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *See Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). Security clearance decisions are not an exact science, but rather are predictive judgments about a person's security suitability in light of that person's past conduct and present circumstances. *See Department of the Navy v. Egan*, 484 U.S. 518, 528-529 (1988). An applicant with good or exemplary job performance may engage in conduct that has negative security implications. *See, e.g.,* ISCR Case No. 99-0123 at 3 (App. Bd. Jan. 11, 2000). A whole person analysis, by its very language, is not confined to the workplace. *See, e.g.,* ISCR Case No. 03-11231 at 3 (App. Bd. Jun. 4, 2004). Here the Judge explicitly considered the whole person factors described in Directive ¶ E2.2. While considering favorable record evidence for Applicant, the Judge also considered such unfavorable evidence as Applicant's continued association with persons who still use marijuana, Applicant's knowledge even as a adolescent that marijuana use was illegal, and Applicant's use of marijuana after she completed her SF-86. The Judge had to consider the record evidence as a whole and consider whether the favorable evidence outweighed the unfavorable evidence, or *vice versa*. *See, e.g.,* ISCR Case No. 03-13768 at 5 (App. Bd. Jun. 16, 2005). In this case, the Judge reasonably concluded that the weight of the unfavorable evidence was such that it was not clearly consistent with the national security to grant Applicant a security clearance. Directive ¶ E2.2.2.

[5]"The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress" (Directive ¶ E2.A5.1.3.5).

[6]"Association with persons involved in criminal activities has ceased" (Directive ¶ E2.A5.1.3.7).

Order

The Judge's decision denying Applicant a clearance is AFFIRMED.

Signed: Michael D. Hipple
Michael D. Hipple
Administrative Judge
Member, Appeal Board

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

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board