

KEYWORD: Guideline H; Guideline E

DIGEST: The presence of some mitigating evidence does not alone compel a favorable decision. The government must be able to repose a high degree of trust and confidence in persons granted access to classified information. Favorable decision affirmed.

CASENO: 06-22515.a1

DATE: 12/07/2007

DATE: December 7, 2007

In Re:)	
)	
-----)	ISCR Case No. 06-22515
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Christopher M. Benjamin, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On December 14, 2006, DOHA issued a statement of reasons 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 to have her case decided on the written record. On July 30, 2007, after reviewing the record, Administrative Judge Erin C. Hogan denied Applicant’s request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issue on appeal: whether the Judge’s decision is arbitrary, capricious, or contrary to law.

Applicant used marijuana as a college student between 1997 and 2001, stopping for the first time upon graduation. In 2002, Applicant applied for and was granted a security clearance. At the same time, Applicant professed an intent not to use marijuana or other illegal drugs in the future and submitted a signed, sworn statement to that effect. Applicant received a security clearance in 2003. While holding the clearance, she continued to use marijuana occasionally, until January 2005. Applicant filled out a new security clearance application in September 2005 in order to upgrade her clearance. At that time, Applicant admitted her continued use of marijuana after her submission of the signed, sworn statement. She again professes her intent not to use illegal drugs in the future.

The Judge found in Applicant’s favor with regard to Guideline E; that finding is not in issue here. A *prima facie* case was established with regard to Guideline H, and the burden of proof then shifted to Applicant to mitigate the security concerns raised. Applicant maintains that she met her burden of proof and that the Judge therefore committed error by denying her clearance. The Judge properly concluded that two Drug Involvement Mitigating Conditions might apply in Applicant’s case¹ and then reasonably explained why neither applied under the circumstances of the case.

Applicant disagrees with the Judge’s conclusions as to mitigation. However, 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. *See, e.g.*, ISCR Case No. 05-05439 at 2 (App. Bd. May 29, 2007). Thus, the presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. An applicant’s disagreement with the Judge’s weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law.²

¹Revised Adjudicative Guidelines, ¶ 26(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 judgment;” and ¶ 26(b): “a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates and contacts; (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;”

²Applicant ascribes error to the Judge for failure to discuss Mitigating Condition ¶ 26(c) (“abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended;). There is no indication in the record that that Mitigating Condition could reasonably apply.

With specific reference to Applicant's promise not to use illegal drugs in the future, the federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snepp v. United States*, 444 U.S. 507, 511 n. 6 (1980). Security requirements include consideration of a person's judgment, reliability, and trustworthiness. *Cafeteria & Restaurant Workers Union v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961). In this case, the Judge explained why she gave limited weight to Applicant's promise, in light of a prior promise to the same effect which Applicant did not honor.

Applicant also contends that the Judge did not give adequate consideration to a whole-person analysis. Applicant's argument does not demonstrate that the Judge erred. In her decision, the Judge discussed the whole-person factors in the Directive ¶ 6.3 and the Revised Adjudicative Guidelines ¶ 2(a). Reading the case as a whole, the Board concludes the Judge evaluated the facts and circumstances in terms of the whole-person concept, weighing both the favorable and unfavorable evidence, and articulated reasons for the unfavorable conclusions she reached under Guideline H (Drug Involvement). *See, e.g.*, ISCR Case No. 03-24988 at 4 (App. Bd. Nov. 15, 2005). Here again, the fact that Applicant weighs the evidence differently and reaches different conclusions from it is not indicative of error by the Judge. *See, e.g.*, ISCR Case No. 02-33312 at 4-5 (App. Bd. Oct. 13, 2005).

The fact that the Judge's adverse decision will have a negative impact on Applicant is not a basis for overruling the decision. Likewise, the fact that, in Applicant's opinion, an adverse security decision will have a harmful impact on the national defense is not relevant to whether the Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 03-08107 at 4-5 (App. Bd. Sep. 13, 2005).

Order

The Judge's adverse 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