

KEYWORD: Guideline H; Guideline E

DIGEST: The Board does not review a single sentence in isolation, but considers it reference to the decision as a whole. Applicant's reliance on the Adjudicative Desk reference is misplaced. DOHA judges are required to use the Adjudicative Guidelines of the Directive, not the Adjudicative Desk reference. Adverse Decision affirmed.

CASENO: 07-02253.a1

DATE: 03/28/2008

DATE: March 28, 2008

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In Re:)	
-----)	ISCR Case No. 07-02253
)	
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 July 19, 2007, 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 November 28, 2007, after the hearing, Administrative Judge John Grattan Metz, Jr. denied Applicant’s request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge’s decision was arbitrary, capricious, or contrary to law. Finding no harmful error, we affirm.

The Judge found that Applicant used marijuana from 1980 through 2004, at times as much as 150 times per year. He also found that Applicant purchased marijuana 50-60 times over the years, spending thousands of dollars, and used cocaine with his wife on two occasions between 1986 and 1989. Additionally, the Judge found that Applicant concealed his history of drug use by falsifying a job application with his current employer, by falsifying earlier security clearance applications, and finally by falsifying a July 2004 application for a clearance upgrade. In each instance, Applicant answered “no” to pertinent questions about drug use. The Judge found that Applicant acknowledged that he falsified his clearance applications because he did not want his employer and the government to know about his drug abuse history.

The Judge concluded that the government established a case for disqualification under both Guidelines H and E. After noting Applicant’s extensive drug history, the Judge concluded that a little over three years of abstinence was inadequate to mitigate the government’s security concerns. The Judge also concluded that Applicant’s deliberate falsifications were not mitigated.

On appeal, Applicant asserts: (a) the Judge’s decision misstated the period of Applicant’s heaviest marijuana use; (b) the Judge’s decision contains a misstatement when it asserts that Applicant “defeated” a pre-employment drug screen; (c) the Judge improperly discounted the testimony of Applicant’s professional character witnesses, as evidenced by his statement, “Tellingly, neither of them was aware of the issues in this case.”; (d) in the last sentence of his Conclusions section, the Judge mistakenly resolved Guideline J against Applicant, indicating that the Judge gave cursory attention to the case; (e) the Adjudicative Desk Reference contains the proper approach to making a common sense decision based on the whole-person concept, and under its provisions, the Judge should have concluded that Applicant’s marijuana use was no longer of security concern; (f) the Judge’s attitude indicated a personal prejudice against those who admit marijuana use and he was therefore predisposed to find against Applicant; and (g) the concealing of the marijuana use was, to Applicant at the time, part of his ongoing marijuana use, and it was unreasonable and arbitrary and capricious for the Judge to consider those falsifications unmitigated in light of Applicant’s excellent professional history and his current understanding of his untruthfulness as a separate and very serious issue of its own.

Applicant’s appeal brief does not establish harmful error with regard to the alleged misstatement of facts contained in the Judge’s decision. After a review of the Judge’s decision and the record evidence as a whole, the Board concludes that the Judge’s characterizations complained about by Applicant are a reasonable interpretation of the record evidence. Moreover, the Judge was

entitled to take into account the character witnesses' lack of knowledge concerning the facts of the case when deciding how much weight to afford the testimony of those witnesses. Applicant has not demonstrated that the Judge weighed the testimony of these witnesses in an arbitrary or capricious manner.

The Judge erred when he resolved Guideline J against Applicant in the last sentence of his Conclusions section, as no case had been brought against Applicant under Guideline J. Applicant asserts that this error is indicative of the cursory attention the Judge showed his case. However, the Board will not view single sentences of a decision in isolation, but will instead consider them with reference to the decision as a whole. *See, e.g.*, ISCR Case No. 02-10215 at 6 n. 4 (App. Bd. Jan. 30, 2004). The Judge correctly refers to Guidelines H and E in other parts of his decision, including the formal findings section. The Board concludes that the error pointed out by Applicant is an isolated, typographical one that had no bearing on the decision as a whole. Concerning Applicant's assertion that the error was indicative of a cursory attitude on the part of the Judge, there is a presumption in favor of regularity and good faith on the part of DOHA judges as they engage in the process of deciding cases. *See, e.g.*, ISCR Case No. 99-0019 at 5 (App. Bd. Nov. 22, 1999). After a review of the Judge's decision and the overall record, the Board concludes Applicant has failed to overcome that presumption.

Applicant's reliance on portions of the Adjudicative Desk reference (ADF) is misplaced. DOHA judges are required to decide cases by using the Adjudicative Guidelines, not the ADF. The ADF itself contains language indicating that it may not be cited as authority for denial or suspension of access. *See, e.g.*, ISCR Case No. 03-04090 at 6 (App. Bd. Mar. 3, 2005). Given that language, Applicant cannot reasonably contend that the portions of the ADF cited by him constituted official U.S. government policy that the Judge was required to follow.

The portion of Applicant's brief that cites to the ADF also contains a lengthy narrative as to why he believes his history of drug use is mitigated. A review of the Judge's decision indicates that he weighed the mitigating evidence offered by Applicant against the recency and seriousness of the disqualifying conduct, and considered the possible application of relevant mitigating conditions and whole-person factors. He reasonably explained why the evidence which Applicant presented in mitigation was insufficient to overcome the government's security concerns under Guideline H. The Board does not review a case *de novo*. A party'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. *See* ISCR Case No. 06-08116 at 2 (App. Bd. Jul. 2, 2007). Given the record that was before him, the Judge's ultimate unfavorable clearance decision under Guideline H is sustainable.

By asserting that the Judge was predisposed to rule against him because of personal views concerning marijuana use, Applicant is effectively accusing the Judge of bias. The Board has long held that there is a rebuttable presumption that a Judge is impartial and unbiased, and a party seeking to overcome that presumption has a heavy burden of persuasion. *See, e.g.*, ISCR Case No. 02-08032 at 4 (App. Bd. May 14, 2004). The Board has noted that the issue is not whether Applicant believes

the Judge was biased or prejudiced against Applicant. Rather, the issue is whether the record contains any indication that the Judge acted in a manner that would lead a reasonable person to question the fairness or impartiality of the Judge. *See, e.g.*, ISCR Case No. 99-0710 at 5 (App. Bd. Mar. 19, 2001). In this case, after a review of the Judge's decision and the entirety of the record, the Board concludes that Applicant has failed to meet his burden of demonstrating bias on the part of the Judge.

Lastly, Applicant challenges the Judge's resolution of the falsification allegations under Guideline E. Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. Directive ¶ E3.1.15. The application of disqualifying and mitigating conditions 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, e.g.*, ISCR Case No. 01-14740 at 7 (App. Bd. Jan. 15, 2003). The Applicant has not met his burden of demonstrating that the Judge erred in concluding that the security concerns raised by Applicant's falsifications had not been mitigated. Although Applicant strongly disagrees with the Judge's conclusions, he has not established that those conclusions are arbitrary, capricious, or contrary to law. *See*, Directive ¶ E3.1.32.3.

Order

The decision of the Judge denying Applicant a security clearance is AFFIRMED.

Signed: Jeffrey D. Billett

Jeffrey D. Billett
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

