

KEYWORD: Guideline H; Guideline E

DIGEST: The Judge found that Applicant had previously stated before a DOHA Judge that it was in the best interests of the Department and himself that he not use marijuana . However, Applicant subsequently used marijuana. The Judge’s findings of security concern are supported by substantial record evidence. Although the Judge’s findings contain error, the Board concludes it is harmless. The Judge erred in concluding that Applicant’s prior testimony was a deliberate falsification. The Judge’s decision had language which is inconsistent with her ultimate determination. However, the Judge’s sustainable findings of fact support her conclusion under Guideline E, in that they illustrate questionable judgment and, therefore, impugn Applicant’s reliability and trustworthiness. Adverse decision affirmed.

CASENO: 07-02595.a1

DATE: 01/15/2009

DATE: January 15, 2009

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In Re:)	
)	
-----)	ISCR Case No. 07-02595
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Charles S. Tigerman, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 22, 2008, 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 October 30, 2008, after the hearing, Administrative Judge Darlene D. Lokey Anderson denied Applicant’s request for a security clearance. Applicant filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether certain of the Judge’s findings of fact are supported by substantial record evidence and whether the Judge’s adverse security clearance decision is arbitrary, capricious, or contrary to law.¹ Finding no harmful error, we affirm.

The Judge made the following pertinent findings of fact: in October 1990, Applicant appeared before a DOHA Administrative Judge in a security clearance hearing, addressing his prior use of marijuana. At the hearing, he was asked if he planned to use marijuana in the future. Applicant replied that he did not intend to do so. He further stated, “I believe it’s in my best interest and the best interests of the Department of Defense that I do not, both because of my participation and role as a leader in my company.” Decision at 2. However, Applicant subsequently used marijuana on two occasions. “He does not know why he used it on these occasions.” *Id.*

The Board concludes that the Judge’s material findings of security concern are supported by substantial record evidence. *See* Directive ¶ E3.1.32.1. (Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record.”) Although Applicant has demonstrated that the Judge’s findings contain error, the Board concludes that such error is harmless. *See* ISCR Case No. 06-23112 at 2 (App. Bd. Dec. 31, 2007).² Applicant further contends that the Judge erred in her analysis of the Guideline E security concerns. Specifically Applicant persuasively argues that the Judge erred in concluding that Applicant’s 1990 testimony concerning future marijuana use was a deliberate falsification. Additionally, Applicant correctly notes that certain language in the Judge’s decision

¹The Judge’s favorable decision under Guideline H is not at issue in this appeal.

²For example, the first page of the Judge’s decision makes reference to Guideline F rather than E and H, which the Board concludes is simply a typographical error. Additionally, Applicant asserts that in the past he has *used* marijuana, rather than having *abused* it as the Judge found. The Board concludes that the distinction is without security significance under the facts of this case. Applicant asserts that he does not know the evidentiary basis for identifying his use of marijuana in 2002 as having occurred in February of that year. However, Applicant admitted, in his answer to the SOR, that he used marijuana on two separate occasions between January 1999 and February 2002.

is inconsistent with her ultimate adverse determination.³ However, the sustainable findings of fact in the Judge’s decision support her adverse conclusion under Guideline E, in that they illustrate “questionable judgment” and, therefore, impugn Applicant’s reliability and trustworthiness.⁴ The Board concludes that there is insufficient reason to remand to the case to the Judge for a new decision. Therefore, the Board concludes that identified errors in the decision are harmless. Accordingly, the Board concludes that the Judge’s decision is sustainable in light of the standard set forth in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). (“The general standard is that a clearance may be granted only when ‘clearly consistent with the interests of the national security.’”)

Order

The Judge’s adverse security clearance decision is AFFIRMED.

Signed: Michael Y. Ra’anan

Michael Y. Ra’anan
Administrative Judge
Chairman, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board

³The Judge’s decision contains the following statement: “Considering all of the evidence, the Applicant has introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the government’s case under Guidelines H and E of the SOR.” Decision at 5. The Board also notes Applicant’s point that the Judge’s formal findings neglect to make explicit reference to subparagraphs 1(b) and (c) of the SOR.

⁴See Directive ¶ E2.15.