

KEYWORD: Guideline H; Guideline E

DIGEST: Judge's decision was premised on his conclusion that Applicant's falsification was isolated. At the hearing, Applicant offered inconsistent explanations for his false answer to question 24 of his security clearance application. The Board concludes that this amounts a second falsification. Furthermore Applicant provided false information in an interrogatory. Therefore, the Judge's premise for applying the mitigating conditions was not valid. Favorable decision reversed.

CASENO: 07-08640.a1

DATE: 12/15/2008

DATE: December 15, 2008

In Re:	)	
	)	
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	)	
Applicant for Security Clearance	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James F. Duffy, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On May 12, 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, which was held on August 13, 2008. On September 19, 2008, after the hearing, Administrative Judge Paul J. Mason granted Applicant’s request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.<sup>1</sup>

Department Counsel raises the following issues on appeal: (a) whether the Judge erred in his application of Personal Conduct Mitigating Conditions 17(c) and 17(d); and (b) whether the Judge’s favorable whole-person analysis is unsustainable because it is unsupported by the totality of the record evidence. For the following reasons, the Board reverses the Judge’s favorable decision.

### **Whether the Record Supports the Judge’s Factual Findings**

#### **A. The Judge made the following pertinent findings of fact:**

On November 24, 2006, Applicant certified that the information he provided in his security clearance application was true and made in good faith. Yet, in response to question 24 a., requiring information about drug use since the age of 16 or in the last 7 years, Applicant answered “no,” even though he used marijuana about once a week between 2001 and late 2004 or early 2005. He initially characterized the omission as a mistake at the hearing, but he knew he was hiding four years of marijuana use with his “no” answer to question 24 a. He answered “no” to question 24 a. because he believed that telling the truth would spoil his chances of receiving a security clearance.

Department Counsel does not specifically challenge any of the Judge’s findings. He does, however, describe record evidence in the statement of facts portion of his brief that are not mentioned in the Judge’s decision. The Board concludes that some of this evidence is relevant to a resolution of the issues raised on appeal. The pertinent evidence is as follows: Prior to the hearing, Applicant responded to two sets of interrogatories. Because his responses to the first set of interrogatories were unclear, Applicant was sent another set, which he signed on October 22, 2007. In response to the second set of interrogatories, Applicant denied ever purchasing any illegal substance. At the hearing, however, Applicant admitted that he purchased “nickel” and “dime” quantities of marijuana from his friends.

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<sup>1</sup>Department Counsel does not challenge the Judge’s favorable findings and conclusions under Guideline H.

## B. Discussion

The Appeal Board's review of the Judge's findings of fact is limited to determining if they are supported by substantial evidence—"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." Directive ¶ E3.1.32.1. "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, 620-21 (1966). In evaluating the Judge's findings, we are required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

As Department Counsel does not specifically challenge the Judge's findings of fact, the issues raised on appeal are more appropriately analyzed in terms of challenges to the Judge's conclusions. This analysis is included in the following section.

### **Whether the Record Supports the Judge's Ultimate Conclusions**

#### A. Conclusions

The Judge reached the following pertinent conclusions: The government established a case for disqualification under Guideline E, but Applicant mitigated the security concerns. Specifically, regarding the Applicant's hearing statement indicating the omission was a mistake, the Judge did not believe that Applicant was trying to conceal his marijuana use a second time, given the detailed account he provided of his marijuana history in his answers to interrogatory questions and the generally credible nature of Applicant's testimony. Also, the Judge concluded that Personal Conduct Mitigating Conditions 17(c)<sup>2</sup> and 17(d)<sup>3</sup> were applicable because Applicant's deliberate falsification occurred only once, even though the falsification occurred less than 16 months before the hearing. Additionally, the Judge concluded that the two mitigating conditions applied because within the last three and closer to four years, Applicant admitted the illegality of his drug use, stopped using marijuana, discontinued his ties with his drug-using friends, and developed a good work reputation because of his trustworthiness and reliability. Regarding the whole-person analysis, the Judge concluded that weighing against the deliberate falsification that occurred less than 16 months ago is favorable evidence indicating that Applicant will not repeat this conduct in the future, specifically his ceasing of marijuana use driven by a concern for his future, his not wanting to be caught by a drug test, the ceasing of his association with drug users, his good employment record since 2005, his

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<sup>2</sup>"[T]he offense is so minor, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment."

<sup>3</sup>"[T]he individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur."

coworker's favorable assessment of his professionalism and dependability, and his remedial action of paying off expensive, high-interest loans.

## B. Discussion

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 choice 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)). “[N]o one has a right to a security clearance. . . 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. 581, 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.

Department Counsel contends that the Judge’s decision is not sustainable because he erroneously applied Mitigating Conditions 17(c) and 17(d) in Applicant’s favor when the evidence did not support it. Department Counsel correctly points out that the Judge’s application of the mitigating conditions was predicated largely on his determination that Applicant’s deliberate falsification occurred only once. Department Counsel’s assertion that the evidence does not support the Judge’s characterization has merit. In addition to the act of falsification alleged in the statement of reasons, Applicant responded “No” to an interrogatory question asking whether or not he had ever purchased illegal drugs, when, in fact, he had purchased marijuana. At the hearing, when he was initially asked about the circumstances of his answer to question 24 of the security clearance application, Applicant indicated that his response to the question was a product of an honest mistake arising from a misreading of the question. After more questioning by the Judge, Applicant stated, “On the first one, I’m going to be honest,”<sup>4</sup> and then proceeded to admit that when he was answering question 24, he thought saying he had smoked marijuana would hinder him from getting a security clearance. Although the Judge concluded that Applicant’s initial explanation about his question 24 answer was not a second attempt to conceal his marijuana use, Department Counsel argues persuasively that, irrespective of motive, Applicant’s “mistake” explanation at the hearing was, on its face, untruthful. Given the record evidence to the contrary, the Judge’s conclusion that Applicant’s falsification occurred only once is not sustainable, and as a result his application of Mitigating Conditions 17(c) And 17(d) are significantly undercut.

Department Counsel also persuasively argues that other components listed in Mitigating Condition 17(c) are not supported by the record evidence. No evidence was presented to indicate that Applicant’s falsification occurred under unique circumstances that were unlikely to recur. The record evidence indicates that Applicant provided the false answer for the predictable reason that he feared his true record would diminish his chances of receiving a security clearance. The record

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<sup>4</sup>Transcript, p. 18.

evidence also indicates that the making of false statements by Applicant did, in fact, recur. Mitigating Condition 17(c) also speaks in terms of the passage of time since the incident. The Board does not set forth bright line parameters concerning the amount of time passage necessary to mitigate security-significant behavior. *See, e.g.*, ISCR Case No. 99-0018 at 4 (App. Bd. Apr. 11, 2000). Nevertheless, regarding the facts and circumstances of this case, which include an initial falsification that occurred 16 months prior to the close of the record, and evidence of lack of candor that occurred subsequent to the initial falsification including the date of the hearing, there is insufficient evidence to support the notion that so much time has passed that the behavior does not cast doubt on Applicant's reliability, trustworthiness, or good judgment.

Regarding Mitigating Condition 17(d), the Judge found that it applied because Applicant's falsification occurred only once, he admitted his illegal drug usage, stopped using illegal drugs, discontinued ties with his drug-using friends, and developed a good work reputation for trustworthiness and reliability. Department Counsel persuasively argues that the evidence that Applicant stopped using marijuana in late 2004 and disassociated himself from drug-using friends in approximately 2003, while it assists in mitigating concerns about drug involvement under Guideline H, does little to inform an analysis of the security concerns brought on by Applicant's falsifications. The Judge's decision contains no explanation as to how the cessation of drug use and the disassociation from drug users alleviated any factors that caused the untrustworthy behavior, especially since the falsifications occurred well after the time frame when Applicant, by his own reckoning, ended the drug usage and the associations. There is also no evidence in the record indicating that Applicant obtained any counseling in relation to his falsifications. The Judge's application of Mitigating Condition 17(d) is not sustainable.

Department Counsel also asserts that the Judge's whole-person analysis is unsustainable because it runs contrary to, and is unsupported by, the totality of the record evidence. A review of the Judge's whole-person analysis reveals that the Judge weighed the deliberate falsification that occurred less than 16 months before the close of the record against favorable evidence that the Judge concluded persuasively established that Applicant will not repeat the conduct in the future. Some of the evidence cited by the Judge in support of this conclusion is the same evidence he cited in support of the application of Mitigating Condition 17(d)(ceasing marijuana use, ending troubling associations, etc.). Again, while these factors speak directly to mitigation of drug usage under Guideline H, they bear little relationship to the ultimate determination of Applicant's security worthiness in light of evidence of falsification under Guideline E. Additionally, the Judge mentions Applicant's good employment record, character evidence from co-workers, and the paying off of expensive, high-interest loans as evidence of Applicant's trustworthiness and reliability. However, the favorable evidence cited by the Judge is insufficient to overcome the government's concerns about falsification in this case, especially in light of the fact that the record establishes that Applicant engaged in multiple acts of falsification, rather than one isolated instance.

## **Conclusion**

Considering the record evidence as a whole, Department Counsel has identified errors by the Judge which, taken in their entirety, warrant reversal of the Judge's favorable security clearance decision.

**Order**

The decision of the Administrative Judge granting Applicant a security clearance is REVERSED.

Signed: Jeffrey D. Billett  
Jeffrey D. Billett  
Administrative Judge  
Member, 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