KEYWORD: Guideline H

DIGEST: The Judge's favorable decision does not address Applicant's June 2007 statement that he intends to continue using marijuana. The Judge also overlooked evidence of Applicant's continued use after drug testing. Favorable decision reversed.

CASENO: 07-10804.a1

DATE: 06/19/2008

DATE: June 19, 2008

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| Applicant for Security Clearance | ) | |

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**
Julie R. Edmunds, Esq. Department Counsel

**FOR APPLICANT**
***Pro Se***

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On October 9, 2007, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guideline H (Drug Involvement) of Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive). Applicant requested a hearing. On February 4, 2008, after the hearing, Administrative Judge Darlene Lokey-Anderson granted Applicant's request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raises the following issue on appeal: whether the Judge's application of Drug Involvement Mitigating Condition 26(a) and her whole-person analysis are arbitrary, capricious, and unsupported by the record evidence. Finding error, we reverse the Judge's decision.

**Whether the Record Supports the Judge's Factual Findings**

A. Facts

The Judge made the following relevant factual findings: Applicant is a 38-year old chemical engineer. He married in 1999 and has a 5-year old daughter and another child on the way. Applicant used marijuana several times a year at social gatherings during his college years, from 1988 to 1994. Between 1994 and 1999, he is not sure if he used marijuana, but if he did so, it was once or twice a year. From 1999 until his last use in 2005 or 2006, he used it once every other year—at least seven times. Applicant admitted his marijuana use when he completed a security clearance application in January 2007. When interviewed by an investigator in June 2007, Applicant indicated that he intended to continue using marijuana in the future. However, in his answer to the SOR dated October 30, 2007, Applicant denied that he intends to use marijuana in the future.

B. Discussion

The Appeal Board's review of the Judge's findings of facts 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.

Department Counsel has not challenged the above factual findings. Therefore, they are not at issue in this appeal. In arguing the issues on appeal, Department Counsel contends that the Judge's decision does not take into account significant contrary record evidence. The Board will address this contention below.

**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 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)). "The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The Appeal Board may reverse the 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.

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied,* 499 U.S. 905 (1991). After the government presents evidence raising security concerns, the burden shifts to the applicant to establish any appropriate mitigating conditions. *See* 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, e.g.,* ISCR Case No. 05-03635 at 3 (App. Bd. Dec. 20, 2006).

In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

The Judge found that the government had met its burden under Guideline H and that the "totality of this evidence indicates poor judgment, unreliability and untrustworthiness on the part of the Applicant." Decision at 5. However, the Judge then applied Mitigating Condition 26(a),[1] stating that Applicant had not used marijuana in over two years and that he "credibly testified that he has no intentions of ever using any illegal drug in the future." *Id.*

As Department Counsel points out, the Judge overlooked significant evidence in making that statement and in mitigating Applicant's conduct. As discussed above, Applicant indicated his intention to continue to use marijuana in his June 2007 interview with an investigator. In August

[1]"[T]he 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 judgement;" Directive ¶ E2.26(a).

2007, DOHA sent Applicant a copy of the statement he made to the investigator. He was asked to authenticate it and was given an opportunity to add additional information. In his response dated September 5, 2007, he clarified one aspect of the statement, but did not address his statement that he would continue to use marijuana in the future. Then in his answer to the SOR in October, Applicant denied that he intended to continue using it. A major part of Applicant's testimony at the hearing revolved around the difference between Applicant's statement in June and his statement to the contrary in October. The Judge does not refer to that conflict in her decision, merely stating that Applicant "credibly testified" about his intentions not to use drugs, as set forth above. The Board has held that while a Judge's credibility determination is entitled to deference, such an assessment does not relieve the Judge of the obligation to decide how much weight can properly be given to an applicant's testimony in light of the record evidence as a whole. *See, e.g.,* ISCR Case No. 03-02486 at 7 (App. Bd. Aug. 31, 2004), citing *Anderson v. City of Bessemer,* 470 U.S. 564, 575 (1985). A Judge's decision is not measured by a standard of perfection, but the credibility of Applicant's testimony of changed intent toward the future use of drugs is a critical aspect of the case. Given the self-serving nature of Applicant's statements of future intent starting in October 2007, as well as record evidence of Applicant's prior use while serving in other positions subject to drug testing, it is not reasonable for the Judge to merely accept the credibility of statements of future intent without a clear explanation of why she found it credible.

The Judge also overlooked record evidence regarding Applicant's drug use following drug tests in the past. Applicant testified that he passed an initial drug test with his current employer and has not used marijuana since. However, he also stated that all the jobs he held in the past required drug tests, and he continued to use marijuana after passing initial drug tests while holding those jobs. Transcript at 28. In another case involving intent to use drugs in the future, the Board stated: "As a matter of common sense, one would expect that a person who has taken a drug test as a condition of employment would understand the importance of future abstention." ISCR Case No. 06-18270 at 3 (App. Bd. Nov. 7, 2007). Here again, the Judge relied on Applicant's current statement that he no longer intends to use marijuana and overlooked significant record evidence to the contrary.

Department Counsel correctly points out the Judge also overlooked significant record evidence in her whole-person analysis. The Judge concluded that Applicant has matured in the two years since he last used marijuana, that he now has family responsibilities, and will do nothing to jeopardize his career. However, the record indicates that Applicant continued to use marijuana after his marriage in 1999 and the birth of his first child, who is now five years old.

Viewed in light of the record as a whole, the Judge's favorable decision is not sustainable.

## Order

The Judge's favorable security clearance decision is REVERSED.

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