KEYWORD: Guideline H; Guideline E

DIGEST: The Judge's conclusion that, given the record, Applicant's abstinence from marijuana use since October 2006 was not sufficient to guarantee against recurrence is supported by the record. Adverse decision affirmed.

CASENO: 07-13010.a1

DATE: 01/27/2009

DATE: January 27, 2009

In Re:	)	
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Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Kathryn D. MacKinnon, Esq., Deputy Chief Department Counsel

FOR APPLICANT
Henry A. Sullivan, Esq. and Kelley L. Finnerty, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security

clearance. On May 30, 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 29, 2008, after the hearing, Administrative Judge Elizabeth M. Matchinski 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 issues on appeal: (a) whether the Judge failed to consider record evidence; (b) whether the Judge's application of the Guideline H mitigating conditions is arbitrary, capricious, or contrary to law; and (c) whether the Judge's whole-person analysis is arbitrary, capricious or contrary to law.[1] For the following reasons, the Board affirms the Judge's unfavorable decision.

A recurring theme in Applicant's brief is his assertion that the Judge either overlooked or ignored facts in the evidentiary record when reaching her conclusions in the case. Applicant proffers this argument in the context of the Judge's application of the Guideline H mitigating factors and in the context of the Judge's application of the whole-person analysis. Some of the specific facts that Applicant maintains the Judge did not consider include Applicant's decision to stop attending yearly reunions of his college friends where marijuana was smoked, some arguably less aggrevating aspects of his marijuana use, such as the facts that he never became dependent upon it and his use never affected his work, his substantial security industry experience, his professional accomplishments, his community involvement, and the testimony of Applicant's Facility Security Officer that Applicant is an extremely reliable individual who takes his security duties seriously.

There is a rebuttable presumption that an administrative judge has considered all the record evidence unless he or she specifically states otherwise. *See*, *e.g.*, ISCR Case No. 96-0608 at 3 (App. Bd. Aug. 28, 1997). Also, there is no requirement that a judge discuss or cite every piece of record evidence in a decision. *See*, *e.g.*, ISCR Case No. 02-00305 at 3 (App. Bd. Feb. 12, 2003). After a review of the record and the Judge's decision, the Board concludes that Applicant has failed to overcome the presumption that the Judge considered the entire record.

The remainder of Applicant's arguments go to the weight the Judge assigned various portions of the record evidence and to the manner in which the Judge interpreted specific pieces of evidence when evaluating both the applicability of mitigating factors and when conducting a whole-person analysis. Applicant discusses evidence such as Applicant's actions during social gatherings with college friends and the pattern of Applicant's recent efforts to abstain from involvement with marijuana. The gravamen of Applicant's arguments is that the Judge's decision not to apply the Guideline H mitigating factors in Applicant's favor is arbitrary and capricious. Applicant has not demonstrated that the Judge has committed error.

The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. 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*.

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[1]The Judge found in favor of Applicant regarding Guideline E. That portion of the case is not at issue on appeal.

See, *e.g.*, ISCR Case No. 06-10320 at 2 (App. Bd. Nov. 7, 2007). 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. *See*, *e.g.*, ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

In this case, the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct and considered the possible application of relevant conditions and factors. While citing specific Guideline H mitigating factors, the Judge reasonably explained why the mitigating evidence was insufficient to overcome the government's security concerns. Specifically, the Judge's concluded that, given all of the circumstances indicated by the record, Applicant's abstinence from marijuana use since October 2006 was not sufficient to guarantee against recurrence. The Board does not review a case *de novo*. The favorable evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. *See*, *e.g.*, ISCR Case No. 06-11172 at 3 (App. Bd. Sep. 4, 2007). After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for her 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). Therefore, the Judge's ultimate unfavorable security clearance decision under Guideline H is sustainable.

Order

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

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairman, Appeal Board

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

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board