KEYWORD: Guideline H; Guideline E

DIGEST: Applicant failed to mitigate security concerns arising from his prior drug use and his omissions on the security clearance application. The Judge's decision not to admit a document written in a language other than English was not arbitrary, capricious, or contrary to law. Hearing office decisions, even by the same Judge, are not binding precedent. Adverse decision affirmed.

CASENO: 08-04604.a1

DATE: 02/17/2010

DATE: February 17, 2010

In Re:	)	
	)	
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	)	
	)	
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 April 9, 2009, 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 30, 2009, after the hearing,

Administrative Judge Marc E. Curry denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge erred in an evidentiary ruling; whether certain of the Judge's findings of fact were supported by substantial record evidence; whether the Judge mis-weighed the record evidence; whether the Judge erred in his application of the pertinent mitigating conditions; and whether the Judge's whole-person analysis was erroneous. Finding no error, we affirm.

The Judge made the following pertinent findings of fact: Applicant is a Government contractor, working in the telecommunications field. He previously served on active duty with the Army from 1979 to 1986. As a contractor employee he has deployed to combat zones in support of U.S. military objectives.

He has used marijuana and hashish "intermittently" over a period of 30 years. He began smoking marijuana in high school. He smoked hashish in 1982 and 1985, while in the Army. Also in 1985, he was arrested by police in a foreign country for purchasing hashish. Applicant attempted to flee, but he was apprehended. He received punishment under Article 15, UCMJ,[1] for resisting arrest and wrongful possession of hashish. He was barred from reenlisting in the Army. When subsequently asked, during a security clearance interview, if he intended to use illegal drugs in the future, Applicant replied "not only no, but hell no." Decision at 3.

In 1992 Applicant used hashish more than once. In a 2000 security clearance interview he disclosed the hashish use but stated that he had no intention of using illegal drugs in the future. In March 2004 Applicant found marijuana in the apartment of his recently deceased brother. He smoked some of it. The following September, while traveling in Europe, Applicant purchased hashish in a country in which the sale was legal. He attempted to enter another country, in which the sale and possession of hashish were illegal. He was arrested at the border and charged with possession of hashish. He subsequently paid a fine.

On a 1986 security clearance application (SCA) Applicant failed to disclose his prior hashish use and his 1985 arrest for purchasing the drug. On a 2006 SCA he failed to disclose his drug related arrests and his 2004 episode of drug use. He omitted this information from the SCAs because of concerns over his job.

Applicant enjoys an excellent reputation for his work ethic, his leadership qualities, and his meticulous handling of classified information.

Applicant contends that the Judge erred in failing to admit into evidence the results of a test of his urine performed by a civilian laboratory, which was negative for illegal drugs. The record demonstrates that the Judge denied this document because it was written in a foreign language. Decision at 2. However, he did admit the result of a later negative test by the same laboratory, which

[1] 10 U.S.C. § 815.

had been translated into English. Under the circumstances, there is no error in the Judge's ruling. *See* ISCR Case No. 00-0433 at 2 (App. Bd. Sep. 6, 2001) (The Board will overturn a Judge's evidentiary rulings if they are arbitrary, capricious, or contrary to law).

Applicant challenges several of the Judge's findings of fact. After examining the record, however, we conclude that the Judge's material findings of security concern are based upon substantial record evidence. Even if the findings contain errors, they are harmless.[2] *See* ISCR Case No. 01-23362 (App. Bd. Jun. 5, 2006); ISCR Case No. 03-09915 (App. Bd. Dec. 16, 2004); ISCR Case No. 01-11192 (App. Bd. Aug. 26, 2002). Applicant cites to other Hearing Office cases by the same Judge, in which, he contends, the Judge granted clearances to applicants with similar circumstances. The Board gives due consideration to these cases. However, each case "must be decided upon its own merits." Directive ¶ E2.2.3. Hearing Office decisions, even by the same Judge, do not serve as binding precedent. *See* ISCR Case No. 06-24121 at 2 (App. Bd. Feb. 5, 2008).

We have examined the Judge's analysis of the security concerns raised in this case. We conclude that the Judge's treatment of the pertinent mitigating conditions is reasonable. Furthermore, we conclude that the Judge's whole-person analysis complied with the requirements of Directive ¶ E2.2.1, in that the Judge considered the totality of Applicant's conduct in reaching his decision. *See* ISCR Case No. 05-03948 at 3-4 (App. Bd. May 21, 2007); ISCR Case No. 04-09959 at 6 (App. Bd. May 19, 2006). Therefore, we conclude that the Judge did not conduct a piecemeal analysis, as Applicant contends on appeal.

After reviewing the record, we conclude that the Judge examined the relevant data and articulated 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 Judge's adverse decision is sustainable on this record. "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).

[2]For example, Applicant challenges the Judge's finding that he had responded "not no, but hell no" to a question about his intention for future drug use. Applicant demonstrates that this response was actually to a question by the investigator regarding the 1985 arrest for purchase of hashish. The question was "If you had to do it over again, would you?" Government Exhibit 6, Applicant Statement, September 11, 1987. Therefore, the Judge's characterization of Applicant's response is error. However, this error is *de minimis*, because, in the same exhibit, Applicant unequivocally stated that he would not use illegal drugs in the future, a vow he more than once failed to uphold. Accordingly, the Judge did not err in evaluating Applicant's most recent promise not to use drugs in light of his prior similar broken promises.

Order

The Judge's adverse security clearance decision 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