

KEYWORD: Guideline H; Guideline E

DIGEST: The Judge's characterization of Applicant's "admissions" of marijuana use after preparing a security clearance application, even if erroneous is harmless. Adverse decision affirmed.

CASENO: 08-08257.a1

DATE: 01/15/2010

DATE: January 15, 2010

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In Re:)	
)	
-----)	ISCR Case No. 08-08257
)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Jennifer I. Goldstein, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On February 20, 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 September 10, 2009, after the hearing, Administrative Judge Roger C. Wesley 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 certain of the Judge’s findings of fact were supported by substantial record evidence; whether the Judge failed to consider record evidence submitted by Applicant; whether the Judge mis-weighed the evidence; and whether the Judge’s adverse security clearance decision is arbitrary, capricious, or contrary to law. Finding no error, we affirm.

The Judge made the following pertinent findings of fact: Applicant is a software developer for a Defense contractor. Single and without children, he holds a B.S. in computer science.

Applicant was introduced to marijuana in high school. Between 1999 and 2001 he smoked marijuana three to five times a month, mainly in social settings. After college he worked as a consultant for an accounting firm. In 2005 he left the firm under cordial terms. For several months in 2005, he hiked the Appalachian Trail along with some friends. During the evenings the hikers smoked marijuana. Applicant himself used marijuana with them between 10 and 15 times. After completing the hike, he maintained some contact with his companions, though he has had no personal contact with them since changing states of residence in January 2008.

Applicant admitted his marijuana use on his security clearance application (SCA). When asked about this use in an interview, he stated that he was still using marijuana. When advised of the possible consequence this posed to his clearance, he stated that he would stop immediately.

Applicant has shared a household with others during the year preceding the close of the record. One of the roommates keeps marijuana in the household, for medical purposes. The roommate had an authorization from the state to possess the marijuana. Applicant stated, in a post hearing submission, that he would be vacating the apartment in August following the hearing.

Applicant enjoys an excellent reputation for reliability and trustworthiness. Applicant has not used marijuana, at least since October 2008.¹

¹Applicant’s girlfriend “attests to her certainty that he has not used marijuana since they began dating in October 2008, or even entertained the idea of smoking the substance. Her statements corroborate Applicant’s assurances, and are not contradicted by any evidence in the record. Her statements are credible and are accepted.” *Id.* at 5-6.

Applicant challenges the Judge's statements concerning the date at which Applicant ceased using marijuana, specifically the reference in the Analysis portion of the decision to Applicant's "admissions" of marijuana use after having completed his SCA.² The Board has examined the Judge's statement in light of the record evidence. Government Exhibit (GE) 2 consists of Applicant's answers to interrogatories. It includes a summary of the interview to which the Judge refers. The document also includes two questions, one inquiring as to the accuracy of the interview summary and another inquiring if Applicant agreed with the summary. He answered "yes" to both questions. In this interview, Applicant is presented as stating that, as of the date of the interview, he was still using marijuana.³ The interview occurred after the date Applicant signed his SCA. Accordingly, the Judge's description of this interview is accurate. The Judge also stated that Applicant made a further admission of July 2008 marijuana use during his testimony at the hearing. A review of the transcript reveals that this attribution is not correct. However, it does not demonstrate that the Judge's use of the plural "admissions" was error. At worst, the Judge's erroneous characterization of Applicant's hearing testimony is harmless. *See* ISCR 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) for definition of harmless error. 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").

Applicant contends that the Judge did not weigh the record evidence properly and/or that he ignored record evidence pertaining to Applicant's roommate's possession of marijuana. For example, Applicant states that the Judge did not give proper consideration to a post-hearing document in which he promised to move out of his apartment in August 2009. A Judge is presumed to have considered all the evidence in the record. *See, e.g.*, ISCR Case No. 07-00196 at 3 (App. Bd. Feb. 20, 2009); ISCR Case No. 07-00553 at 2 (App. Bd. May 23, 2008). In this case, the Judge acknowledged Applicant's plans to change his living arrangement in the near future. He stated that these plans have some mitigating significance. However, he also noted that, at the close of the record, Applicant was still living with a person who possessed marijuana and that this posed a risk of temptation for continued use. The Judge's treatment of Applicant's living arrangement is a reasonable interpretation of the record evidence. Applicant has not demonstrated that the Judge ignored record evidence or that he weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. *See* ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

After reviewing the record, the Board concludes 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*

²"Applicant used marijuana intermittently in social situations (between 20 or 30 times altogether) with friends before permanently discontinuing his use in July 2008. His admissions to using marijuana after applying for a security clearance do raise initial security concerns[.]" *Id.* at 7.

³GE 2 states that the interview with Applicant was conducted on July 19, 2008. GE 1, the SCA, demonstrates that Applicant signed the SCA on May 15, 2008.

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 decision that “it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance” is sustainable on this record. Decision at 10. “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).

Order

The Judge’s adverse security clearance decision is AFFIRMED.

Signed: Michael Y. Ra’anan
Michael Y. Ra’anan
Administrative Judge
Chairperson, 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