

KEYWORD: Guideline H; Guideline E

DIGEST: The Guideline E allegations in this case pertained to Applicant’s drug use, not falsification. Nevertheless, the Judge erroneously limited her analysis of the Guideline E mitigating conditions to those that pertain to falsification. However, in light of the Judge’s sustainable formal findings under Guideline H, this error is harmless. Adverse decision affirmed.

CASE NO: 08-11596.a1

DATE: 09/20/2010

DATE: September 20, 2010

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| In Re:                           | ) |                        |
|                                  | ) |                        |
| -----                            | ) | ISCR Case No. 08-11596 |
|                                  | ) |                        |
| 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 June 19, 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 June 21, 2010, after the hearing, Administrative Judge Darlene D. Lokey Anderson denied Applicant’s request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: (1) whether the Judge erred in making two findings; (2) whether the Judge erred in her treatment of pertinent mitigating conditions; and (3) whether the Judge's decision is arbitrary or capricious. For the reasons that follow, the Board affirms the Judge's adverse security clearance decision.

The Judge made the following pertinent findings of fact: Applicant used marijuana about ten times between July 2001 to at least May 2003. He began using it in college, continued to use it during an internship in Europe, and last used it on Memorial Day 2003. On that day he was at a party with friends and smoked it in a Turkish pipe. Applicant also used psilocybin mushrooms on four separate occasions, twice in February 2002, and twice in December 2006. In 2004, Applicant applied for a security clearance that was granted sometime in 2005 with the understanding that he was no longer using illegal drugs. He knew that the use of illegal drugs was against the law and prohibited by his company. On New Year's Eve 2006, he used psilocybin mushrooms while holding a DoD security clearance. In May 2004, Applicant provided a statement to the Department of Defense indicating that he had no intent of ever using illegal drugs in the future. Applicant repeated this statement of intent at the hearing. He states that he has made a lifestyle change and made a deliberate attempt to reduce the frequency of contact with his friends that use illegal drugs. He also submitted a notarized letter of intent where he states that he will not repeat his past illegal drug use and states his understanding that if he does use drugs, his security clearance would be subject to automatic revocation. Applicant was asked by his company to apply for an SCI clearance. Instead of telling the truth about his use of illegal drugs, he submitted a falsified security clearance application in June or July 2006 and intentionally omitted his most recent use of psilocybin mushrooms. Prior to going into a polygraph exam, Applicant confessed to the examiner that he had not been truthful on the application. In June 2007, Applicant was denied program access due in part to his illegal drug use. Applicant has undergone drug tests that have all come back with negative results. Applicant underwent a psychological examination on January 22, 2010 administered by a practitioner of his choice. The results of the examination indicate that Applicant tests with a low probability of substance abuse and substance dependence.

The Judge reached the following conclusions in the case: The Government had met its initial burden of proving that Applicant had a history of illegal drug use (Guideline H) and dishonesty (Guideline E). The totality of this evidence indicated poor judgment, unreliability and untrustworthiness on the part of the Applicant. Applicant knew at the time of his drug use that it was illegal and against company policy. Although his most recent use of any controlled substance occurred in 2006, over four years ago, he told the Government in 2004 that he had no intent of future drug use and then broke his word. Given his past history, there was no guarantee that he would remain drug free in the future or that his word could be relied upon. None of the Guideline H mitigating conditions were applicable. Furthermore, Applicant deliberately provided false information to the Government in 2006 concerning his illegal drug use in the past. He only confessed his drug use when faced with a polygraph. This conduct displayed dishonesty and an unwillingness to comply with rules and regulations and showed a pattern of unreliability and untrustworthiness. None of the Guideline E mitigating conditions were applicable. Under a whole-person analysis, despite letters of recommendation and a high performance appraisal, Applicant disregarded the law, company policy and DoD regulation, revealing a defect in judgment that could not be ignored. Applicant failed to overcome the Government's case opposing his request for a security clearance.

Applicant asserts that the Judge erred by making a finding that he intentionally used marijuana on Memorial Day 2003. Applicant states that his use on that occasion was unintentional as he was at a party and a Turkish pipe was being used to consume a mixture of tobacco and marijuana. Applicant claims that inasmuch as the Turkish pipe was normally used to smoke tobacco, he was unaware that the pipe contained marijuana until he smoked it. Applicant also asserts that the Judge erred by finding that his last use of psilocybin mushrooms was in 2006 instead of 2005. The Board will not disturb a Judge's findings of fact unless there has been a showing that the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.,* ISCR Case No. 98-0592 at 4 (App. Bd. May 4, 1999); ISCR Case No. 97-0630 at 2 (App. Bd. May 28, 1998). Applicant has failed to establish error on the part of the Judge.

The Judge's decision does not contain a discussion of record evidence where Applicant stated that his use of marijuana in May 2003 was unintentional (Government Exhibits 3 and 4). However, the record contains Applicant's admission in his answer to the SOR that he used marijuana in 2003 and his answer to a question on his security clearance questionnaire wherein he admitted to marijuana use in May 2003. In neither of these instances did Applicant qualify his answer by indicating that his May 2003 use was inadvertent. The Judge was free to evaluate Applicant's explanation concerning the circumstances surrounding his May 2003 marijuana use, but she was not compelled to accept Applicant's explanation. Although not commented upon by the Judge, the fact that the marijuana was being consumed in a Turkish pipe at a party supports, rather than detracts from, the Judge's finding that Applicant's May 2003 marijuana use was knowing and intentional. The Judge's finding is supported by substantial evidence.

Applicant challenges the Judge's finding that his last use of psilocybin mushrooms took place at the end of 2005 and not at the end of 2006 as the Judge found. Applicant points to the Judge's finding that he falsified a security clearance application in June or July 2006 in support of his assertion that the last use must have occurred at the end of 2005 rather than at the end of 2006, otherwise it would have been impossible for him to lie about it in mid-year 2006. A review of the record evidence convinces the Board that the Judge's finding that Applicant last used psilocybin mushrooms in December 2006 is sustainable.

The record evidence indicates that Applicant falsified a security clearance application dated January 4, 2007. This falsification is referenced in Govt. Exhibit 2. Thus, the Judge's finding of a falsification in June or July 2006 that Applicant relies on is in error. Also, there is ample support for the Judge's finding that Applicant's last use of psilocybin mushrooms took place in December 2006. Applicant admitted without qualification an SOR allegation that alleged he used psilocybin mushrooms until at least December 2006. In his response to a question about drug use on a security clearance application completed in June 2007, Applicant indicated his mushroom use as ending in December 2006 (Govt. Exhibit 1). In a written statement dated May 23, 2008, Applicant made three references to mushroom use in December 2006 (Govt. Exhibit 3).<sup>1</sup> Applicant has failed to establish

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<sup>1</sup>The same document also contains a single reference to the last mushroom use being in December 2005. The multiple references to December 2006 mushroom use appear to be initialized corrections to original references to a December 2005 date. There is no evidence in the file to explain the internal inconsistencies in this document. It is possible that the lone reference to December 2005 was not corrected as a matter of oversight. In any event, despite the internal inconsistencies, the document provides ample support for the Judge's finding.

error on the part of the Judge with regard to this finding.

Applicant objects to the manner in which the Judge handled the Guideline H and Guideline E mitigating conditions. He notes that the Judge's decision contains no discussion of the individual mitigating conditions and does not go point by point through each mitigating condition to explain why that particular mitigating condition was not applicable to the case. Applicant states that the Judge's lack of explanation about the applicability of the mitigating conditions coupled with the lack of any other explanation, "makes the ruling feel arbitrary."

Regarding Guideline H, the Board notes that the Judge's treatment of the mitigating conditions is cursory. While DOHA administrative judges have broad latitude concerning the manner in which they write decisions, such cursory treatment of applicable mitigating conditions would constitute harmful error absent some suitable explanation (not necessarily tied to specific provisions of the mitigating conditions) as to why the Government's security concerns had not been overcome. In this case, contrary to Applicant's argument, the Judge did provide a detailed explanation as to why she did not conclude that the Guideline H concerns had been mitigated. She cited the facts that Applicant used illegal drugs while working for his current employer, while holding a security clearance, and with the specific knowledge that the use was illegal and against company policy. The Judge also noted that, although his most recent use of any controlled substance occurred over four years ago, Applicant told the Government in 2004 that he had no intent to use illegal drugs in the future and then broke his word. From these facts the Judge ultimately concluded that, given Applicant's past history, his word cannot be relied upon and the possibility of his returning to drugs is high enough to constitute an unacceptable security risk. The Judge's explanation is adequate and her conclusions are sustainable. Indeed, although her decision does not specifically mention Guideline H Mitigating Condition ¶ 26 (a),<sup>2</sup> her conclusions track essentially the same considerations that appear in that mitigating guideline, principal among them being an explanation as to why the drug use was not mitigated after the passage of a considerable length of time (four years).

Applicant's claim of error under Guideline E presents an unusual problem. Applicant's complaints about the Judge's treatment of the Guideline E mitigating conditions concern those mitigating conditions that relate to falsification since the Judge based her adverse conclusions under Guideline E squarely on falsification and then failed to discuss any applicable mitigating conditions. Here, the Judge's failure to discuss the applicability of any of the mitigating conditions is of a greater magnitude than under Guideline H since she provided very little in the way of an independent discussion as to why the security concerns were not mitigated. There is a more fundamental problem with the Judge's analysis under Guideline E, however, that creates a problem for the Board because it is not specifically alleged as an error by Applicant. Although the SOR contained allegations under Guideline E, those allegations did not include falsification.<sup>3</sup>

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<sup>2</sup>"[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 judgment."

<sup>3</sup>In this case, the Guideline E allegations in the SOR merely incorporate the drug use allegations found under Guideline H, with the addition of an allegation stating that Applicant was denied program access through another agency in part due to his illegal drug use.

The scope of review by the Board is limited to a consideration of the material issues raised by the parties. Directive ¶ E3.1.32. By objecting to the Judge's treatment (or lack thereof) of the Guideline E mitigating conditions without objecting to the fact that falsification was not alleged in the SOR, Applicant arguably placed this procedural anomaly beyond the scope of the Board's review. Nevertheless, it could also be argued that, in the broadest sense, Applicant is taking issue with the Judge's overall analysis under Guideline E.<sup>4</sup> Regardless of the merits of these arguments, it would be untenable for the Board to address Applicant's stated objections to the Judge's treatment of the mitigating conditions while ignoring the larger, related problem of the Judge basing her Guideline E analysis exclusively on falsification when there was no basis for doing so under the parameters set forth in the SOR<sup>5</sup>. An applicant is entitled to receive reasonable notice of the allegations being made against him, and which will ultimately determine the resolution of his case, so that the applicant can have a meaningful opportunity to respond to the allegations. *See, e.g.*, ISCR Case No. 99-0710 at 2 (App. Bd. Mar. 19, 2001); Directive ¶¶ 4.3., 4.3.1., and 4.3.2. Regardless of how well Applicant asserted a defense against the Government's case of falsification brought forth at the hearing, it would be unreasonable to assume that the lack of falsification allegations in the SOR had no effect upon Applicant's presentation of his case. Thus, the Judge's use of the falsification evidence as the gravamen of her adverse decision under Guideline E affected Applicant's due process rights under the Directive and was error.

However, the Board concludes the errors contained in the Judge's analysis under Guideline E do not warrant remand. Upon consideration of the entirety of the record evidence and the Judge's decision, the Board concludes that the Judge's overall adverse security clearance decision is sustainable based on her analysis of Applicant's drug use under Guideline H.

### Order

The Judge's adverse security clearance decision is affirmed.

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

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<sup>4</sup>One could also make allowances for Applicant's *pro se* status on appeal, although this point is complicated by the fact that Applicant was represented by counsel below, and no objection was raised nor motion in limine offered by Applicant's counsel when the evidentiary portion of the hearing and closing arguments became focused on the issue of Applicant's falsification. Of course, regardless of the course of the hearing, neither party can know beforehand how a Judge will write his or her decision in a case.

<sup>5</sup>Of course, the evidence of Applicant's falsification could have been used legitimately for limited purposes. *See* ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004). An overall reading of the Judge's decision in this case, however, makes clear that the Judge's reliance on the falsification evidence far exceeded this limited use.

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

Signed: William S. Fields  
William S. Fields  
Administrative Judge  
Member, Appeal Board