

KEYWORD: Guideline H; Guideline E

DIGEST: An SOR allegation may be included under more than one Guideline and may be given independent weight under each. A finding of mitigation under Gone Guideline does not compel a similar finding under another. Adverse decision affirmed.

CASE NO: 09-07472.a1

DATE: 02/24/2011

DATE: February 24, 2011

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In Re:	)	
	)	
-----	)	ISCR Case No. 09-07472
	)	
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 14, 2010, 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 15, 2010, after the hearing, Administrative Judge Arthur E. Marshall, Jr. denied Applicant’s request for a security clearance. Applicant appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge’s adverse clearance decision is arbitrary, capricious, or contrary to law.

In this case, the Judge made the following essential findings of fact: Applicant, a 49-year-old employee of a Defense contractor, used marijuana about a dozen or more times in 2005, and cultivated it during the same time period. In October 2005, he was charged with possession of a controlled substance, a misdemeanor. Applicant pled guilty to the charge and received six months probation. At the time of Applicant's drug involvement he held a security clearance. Decision at 2-5.

Applicant's drug cultivation and use, his criminal conduct, and the fact that he had used marijuana while holding a security clearance were alleged under Guideline H of the Directive. His marijuana use while holding a security clearance was also alleged separately under Guideline E. The Judge found in favor of Applicant under Guideline H because Applicant had demonstrated mitigation of the drug involvement security concerns by presenting substantial evidence that he had not used marijuana since 2005 and that it was unlikely he would use drugs in the future. Decision at 6-7. However, he found against Applicant under Guideline E. The Judge's adverse decision in that regard was based on the fact that Applicant's drug use while holding a security clearance constituted a serious breach of trust, Applicant knew that marijuana use and possession were proscribed, and Applicant delayed reporting his drug use and conviction to security officials for several years. Decision at 8-10. Although Applicant challenges the Judge's finding regarding the time it took for Applicant to report the marijuana incident to his security authorities, the Judge's description represents a reasonable characterization of the record evidence.

On appeal, Applicant argues that the Judge's adverse decision under Guideline E should be reversed because: 1) the Judge did not acknowledge the difficult circumstances under which the conduct in Applicant's case occurred, and 2) the Judge erred, as a matter of law, in finding against Applicant under Guideline E, having found in his favor under Guideline H as to the same factual allegation. Those arguments do not demonstrate that the Judge's decision is arbitrary, capricious or contrary to law.

Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. Directive ¶ E3.1.15. 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*. See, e.g., ISCR Case No. 06-10320 at 2 (App. Bd. Nov. 7, 2007). A party'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).

A Judge is presumed to have considered all the evidence in the record unless he specifically states otherwise. See, e.g., ISCR Case No. 09-05485 at 3 (App. Bd. Jan. 20, 2011). Applicant has not overcome this presumption. It is clear from a reading of the Judge's decision as a whole that he gave consideration to the unique facts of Applicant's case, engaging in a detailed, sustainable analysis of Applicant's circumstances, which resulted in favorable findings as to some facts of security concern but not as to others.

The Board has previously noted that an SOR allegation may be included under more than

one Guideline and may be given independent weight under each. Furthermore, a finding of mitigation under one Guideline does not compel a similar finding under another. In considering an applicant's claim that a Judge has treated two Guidelines inconsistently, the Board examines the record and the Directive to determine if there is a rational basis for the Judge's decision. *See, e.g.*, ISCR Case No. 08-07575 at 2 (App. Bd. Oct. 8, 2010). In this case, the seriousness of security concern presented by Applicant's drug involvement while holding a clearance, coupled with the continuing poor judgment in failing to report that involvement to appropriate security officials over an extensive period of time, served as a sufficient, sustainable basis for the Judge's different conclusions under Guidelines H and E.

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 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 unfavorable security clearance decision 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  
Chairperson, 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