

KEYWORD: Guideline H; Guideline E

DIGEST: Applicant used marijuana from 1999 to January 2010 and had purchased marijuana. Applicant had also been arrested in May 2002 on possession of marijuana with intent to distribute marijuana charges. Although the Judge found in favor of Applicant with respect to the Guideline E allegations, he reasonably explained why the mitigating evidence was insufficient to overcome the government's security concerns under Guideline H. Adverse decision affirmed.

CASE NO: 10-04042.a1

DATE: 10/04/2011

DATE: October 4, 2011

In Re:)	
)	
-----)	ISCR Case No. 10-04042
)	
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 November 17, 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 August 8, 2011, after the hearing, Administrative Judge Thomas M. Crean 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.

Applicant seeks reversal of the Judge’s adverse decision arguing that the evidence demonstrates that Applicant has mitigated the security concerns raised by his drug involvement. In support of his argument, he presents a detailed summary of the evidence presented at the hearing, and resubmits the record from below along with a copy of the Judge’s decision. He also submits some new evidence, which the Board cannot consider on appeal. *See* Directive ¶ E3.1.29. Applicant’s presentation does 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*. 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. 10-00278 at 2 (App. Bd. Mar. 18, 2011).

In this case, the Judge made sustainable findings—consistent with Applicant’s own admissions—that Applicant had used marijuana from approximately 1999 to at least January 2010, and had purchased marijuana. Applicant had also been arrested in May 2002 on charges of Possession of Marijuana with Intent to Distribute Within Proximity of a School and Possession of Marijuana with Intent to Distribute, and had subsequently pleaded guilty to an amended charge of Drugs Manufacturing/Possession of Other Substance. Decision at 2, 3, 4, 6 and 8; Answer at 1-2; GE 1 (eQIP, dated Jan. 4, 2010) at 36-37; GE 2 (Interrogatories). In his brief, Applicant acknowledges that “. . . [he] can understand for a reason like that why [he had] gotten denied . . . a clearance and a trust issue was raised.” Applicant’s Brief at 1.

A review of the decision indicates that the Judge weighed the mitigating evidence offered by Applicant—including his efforts at rehabilitation, his favorable work performance and letters of recommendation, and recent negative drug tests—against the length and seriousness of the disqualifying conduct, and considered the possible application of relevant conditions and factors. Decision at 3, 4, 6 and 8. Although the Judge found in favor of Applicant with respect to the Guideline E allegations, he reasonably explained why the mitigating evidence was insufficient to overcome the government’s security concerns under Guideline H. *Id.*

The Board does not review a case *de novo*. 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: Jean E. Smallin _____

Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: James E. Moody _____

James E. Moody
Administrative Judge
Member, Appeal Board

Signed: William S. Fields _____

William S. Fields
Administrative Judge
Member, Appeal Board