

KEYWORD: Guideline H

DIGEST: The Judge concluded that Applicant's use of marijuana is not mitigated (even though four years have passed), given his failure to comply with previous commitments not to use illegal drugs and his age at the last use. Adverse decision affirmed.

CASENO: 10-06480.a1

DATE: 08/19/2011

DATE: August 19, 2011

In Re:)
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 -----) ISCR Case No. 10-06480
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 Applicant for Security Clearance)
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)

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

John N. Griffith, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On January 17, 2011, DOHA issued a statement of reasons (SOR) advising Applicant

of the basis for that decision—security concerns raised under Guideline H (Drug Involvement) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On May 24, 2011, after the hearing, Administrative Judge Edward W. Loughran 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 his application of the mitigating conditions and whether the Judge erred in his whole-person analysis. Consistent with the following, we affirm the Judge’s decision.

The Judge found that Applicant is an engineer for a Defense contractor. He has worked for his current employer for nearly 30 years. He has a Master’s degree and is divorced with three children.

Applicant smoked marijuana once every two months while in college, from 1972 to 1976. When he first applied for a security clearance, Applicant revealed his college marijuana use and revealed that use during subsequent re-investigations.

In 1988 he submitted a security clearance application (SCA). He admitted to his drug use in college. He went on to say, “I have no intention of using illegal drugs in the future.” Decision at 2.

In 1989, he signed a statement in which he averred, in part, “Involvement with marijuana did not fit into my future plans. I have not used marijuana since June 1976 and I have no intention or desire to use marijuana in the future.” *Id.*

He submitted another SCA in 1995. Again he wrote “I have no intention of using illegal drugs in the future.” During the background interview, he made a similar statement. *Id.*

In 2005, Applicant went to a concert with a friend. The friend offered him a pipe containing marijuana, and Applicant took a puff. Two years later, while skiing with the same friend, a local guide offered them marijuana, and again Applicant took a puff.

Applicant was aware that use of marijuana was inconsistent with holding a security clearance. He was not aware of requirements that he immediately report the drug use to security officials; however, he knew he would have to admit the use during the next periodic reinvestigation. He has stated that he does not intend to use drugs in the future. He still sees his friend on occasion, but he has not used marijuana since the skiing trip. He submitted a signed statement of intent not to use drugs, with automatic revocation of his clearance should he do so. He has been evaluated by a psychologist, who opined that Applicant is not addicted to marijuana or to anything else. He enjoys an excellent reputation among his colleagues for his job performance, responsibility, trustworthiness, integrity, etc.

In his analysis, the Judge acknowledged that four years had elapsed since Applicant's last use of marijuana. He also acknowledged Applicant's statement of intent and his apparent desire to remain drug free. He went on to say, however,

[Applicant] previously stated that he would not use illegal drugs again, and he later smoked marijuana with full knowledge that illegal drug use is inconsistent with holding a security clearance. Applicant will probably not use marijuana again; however, I am unable to conclude that illegal drug use is completely in his past. Decision at 6.

In the whole-person analysis, the Judge addressed Applicant's evidence of good character. He went on to state,

[E]ven if Applicant never uses illegal drugs again, his illegal drug use on two separate occasions while holding a security clearance, knowing it was illegal and counter to DoD policy, raises doubts about his current judgment, reliability, and trustworthiness. Four plus years of abstinence is not enough to mitigate his incidents of extremely poor judgment, disregard for the law, and violation of the trust instilled in him while holding a security clearance. Decision at 7.

Applicant contends that the Judge erred in his conclusions pertaining to mitigation. He has submitted decisions from Hearing Office cases, which he argues support his case for a security clearance. We have given these cases due consideration, although they do not constitute mandatory authority. *See, e.g.*, ISCR Case No. 10-02660 at 2 (App. Bd. Jun. 6, 2011).

Applicant cites to two Appeal Board decisions in which the Board reversed denials of security clearances in cases where marijuana use was at issue. ISCR Case No. 02-08032 (App. Bd. May 14, 2004) and ISCR Case No. 04-09239 (App. Bd. Dec. 20, 2006). In both cases, the Board relied on the failure of the Judge to explain why the period of abstinence was not sufficient to mitigate Applicant's use. However, in Applicant's case, the Judge did explain why the period of abstinence was insufficient. The Judge noted that Applicant had committed to refrain from repeating his marijuana use prior to his two uses while holding a security clearance.

In the case before us now, Applicant was a mature man, in his fifties at the time of the marijuana uses at issue, and he used the drug while holding a security clearance. As Department Counsel argues in his Reply Brief, this case is analogous to an earlier one in which the applicant used marijuana after having submitted a SCA. "The Board has previously held that use of marijuana following a pre-employment drug test and after submitting a SCA significantly undercuts an applicant's claim to have demonstrated an intent not to use drugs in the future." ISCR Case No. 07-00852 at 3 (App. Bd. May 27, 2008). *See also* ISCR Case No. 08-01583 at 3 (App. Bd. Dec. 4, 2009) (The Judge stated that the applicant's "position as an intelligent, mature, and highly-regarded engineer made his choice to return to illegal drug use at the age of 50, and while holding a security clearance, particularly disturbing"). In a case decided under the Directive, it is the applicant who bears the burden of persuasion as to obtaining a favorable clearance decision. Directive ¶ E3.1.15.

Given the evidence before the Judge, including evidence that Applicant used marijuana despite numerous prior promises that he would not do so, we are unable to conclude that the Judge's application of the mitigating conditions or the whole-person factors was arbitrary, capricious, or contrary to law.

The record supports a conclusion 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.¹ "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). *See also* Directive, Enclosure 2 ¶ 2(b): "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security."

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

¹We need not agree with a Judge's decision for it to be sustainable. *See, e.g.*, ISCR Case No. 09-02281 at 3 (App. Bd. Apr. 18, 2011).