KEYWORD: Guideline H; Guideline E

DIGEST: The Judge laid out in detail and analyzed Applicant's explanation for his marijuana use. The record contains substantial evidence supporting the Judge's rejection of that analysis. Adverse decision affirmed.

CASENO: 10-06512.a1

DATE: 01/04/2012

DATE: January 4, 2012

In Re:	)	
	)	
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	)	
	)	
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 March 16, 2011, 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 October 12, 2011, after the hearing, Administrative Judge Juan J. Rivera denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issue on appeal: whether the Judge's adverse security clearance decision is arbitrary, capricious, and contrary to law. For the following reasons, the Board affirms the Judge's unfavorable decision.

The Judge made the following findings of fact: Applicant is 61 years old and was born, raised, and educated in Afghanistan. Applicant experimented with marijuana once as a high school student. He became a naturalized U.S. citizen in 1991. Applicant married in 1973 and he and his wife have four grown sons. From March 2004 until around April 2009, Applicant worked for two Government contractors. During this period, he was granted an interim top secret clearance. From April 2009 until September 2009. Applicant worked for another government contractor. He was deployed to Afghanistan in support of U.S. military operations in that country. Around October 2009, Applicant was hired by another Government contractor in Afghanistan. During a health and welfare inspection conducted with the assistance of a working dog, the military police discovered Applicant had hashish (marijuana) in his belongings, consisting of a piece approximately the size of a garbonzo bean). Applicant was terminated from his employment because of his possession of an illegal substance in violation of a general order and he was returned to the United States. The hashish belonged to Applicant; he used it twice; and he knew that his possession and use of marijuana was illegal. Before using hashish, Applicant did not tell any of his supervisors that he intended to use hashish to resolve a gastrointestinal illness. When he was terminated, Applicant provided no explanation for his possession of the hashish to the military police or to his supervisors.

Applicant later provided a statement to a Government investigator and provided testimony at the hearing in which he explained that during April 2010, he became violently ill with a gastrointestinal illness. Applicant stated that he visited the military base hospital twice, but was turned away. Applicant's supervisor advised him to fly out of country to receive medical treatment, but Applicant, who was earning $150,000 a year at the time, thought it was too expensive. Applicant went back to the military hospital, was seen, and received a shot for dehydration which Applicant claimed did not make him feel any better. Applicant was then told by locals that the best medicine for his condition was hashish. After doing some independent research, Applicant purchased the hashish. He used the hashish twice and felt better. The military police found the hashish the next week. Applicant also revealed that there were two fairly large military retail stores available to him on the base where he was stationed. One of Applicant's friends purchased Pepto-Bismol for him. He tried it but did not like its taste, and he claimed it provided no relief. Applicant also claimed the military store had nothing else to cure him. The base Applicant was stationed on was near his hometown, and he had been stationed there for six months before he got sick. Applicant claimed that he could not go to the many local pharmacies or hospitals for security

reasons. Applicant had many local informants working for him, but he did not ask any of them to buy medicine for him because he wanted to maintain professional relationships. Applicant is remorseful about his lapse of judgment with the hashish, but he maintains that he only used marijuana because he was seriously ill, feared for his life, and there was no other medical treatment available.

The Judge reached the following conclusions: Applicant had a number of viable alternatives to obtain a legal medication or to seek medical treatment for his gastrointestinal illness, which is a fairly common occurrence of deployed personnel. He was not under such extraordinary circumstances that it justified his use of an illegal drug. Applicant's illegal use of marijuana occurred under normal circumstances. He is well-educated and has at least six years of experience working for Government contractors and dealing with the security clearance process. Applicant was 60 years old when he used marijuana in April 2010. He was well aware that using illegal drugs was a criminal offense, and he knew of the adverse job-related consequences of illegal drug use. Not enough time has transpired since his use of marijuana to establish an appropriate period of abstinence or for him to demonstrate his intent not to use illegal drugs in the future.

Applicant argues that the evidence and the circumstances in his case were not properly reviewed. In essence, he reiterates his version of events concerning his hashish use that were asserted below. Applicant also states that the Judge did not credit any of the positive aspects of his past record. Applicant has failed to establish error on the part of the Judge.

Portions of Applicant's arguments on appeal rely on factual assertions that were not part of the record below. The Board cannot consider new evidence on appeal. *See* Directive ¶ E3.1.29.

A Judge is presumed to have considered all the evidence in the record unless he or she specifically states otherwise. *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 laid out in considerable detail, and then analyzed, Applicant's explanations for why he used marijuana in 2010. After a review of the record, the Board concludes that there is substantial evidence to support the Judge's rejection of Applicant's explanations for why he used the illegal drug.

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).

In this case, the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct and considered the possible application of relevant conditions and factors. He adequately discussed why the disqualifying conduct established under Guidelines H and E was not mitigated. Contrary to Applicant's assertions, the Judge discussed at some length Applicant's career achievements and his favorable professional reputation.

The Board does not review a case *de novo*. The favorable evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. *See*, *e.g.*, ISCR Case No. 06-11172 at 3 (App. Bd. Sep. 4, 2007). After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for his 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 ultimate 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: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board