

KEYWORD: Guideline H; Guideline E

DIGEST: Record evidence of Applicant’s use of marijuana despite knowing his employer’s prohibition against such conduct supported the Judge’s conclusion that Applicant had not mitigated the security concerns in his case. Applicant did not rebut the presumption that the Judge considered all of the record evidence. Adverse decision affirmed.

CASE NO: 10-10068.a1

DATE: 12/20/2011

DATE: December 20, 2011

In Re:)	
)	
-----)	ISCR Case No. 10-10068
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Raashid S. Williams, Esq., Department Counsel

FOR APPLICANT

Alan V. Edmunds, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 8, 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 September 27, 2011, after the hearing, Administrative Judge Francisco Mendez denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge’s application of the pertinent mitigating conditions was arbitrary, capricious, or contrary to law. Consistent with the

following, we affirm the Judge's decision.

The Judge made the following pertinent findings of fact: Applicant has worked for his current employer, a Government contractor, since he graduated from college in 2000. He is unmarried, with no children.

Applicant used marijuana in 2001 and again in 2009, both times while possessing a security clearance. At the times he used marijuana, he was aware that conduct was inconsistent with his employer's policy against the use of illegal drugs.

Applicant submitted his current security clearance application (SCA) in 2010. A question inquired if he had ever illegally used a controlled substance while holding a security clearance. He admitted his use in 2009 but did not include the 2001 use. He claimed that his omission of the earlier conduct was not intentional. He stated that he simply forgot about it. He also stated that he misread the question as being limited to the previous seven years.

Applicant does not believe his limited marijuana use raises a security concern. He believes that only persistent or continual use is a security risk. He submitted a statement promising not to use illegal drugs in the future. He claims that he no longer associates with those who use illegal drugs. He submitted to a urinalysis just after receiving the SOR, and the test yielded a negative result. He is a good worker, as evidenced by performance reports and awards.

At the conclusion of the hearing, the Government withdrew the Guideline E allegation concerning Applicant's omission to the SCA. The remaining allegations concerned Applicant's uses of marijuana while holding a clearance in 2001 and in 2009. This conduct was alleged both under Guideline H and Guideline E. The Judge noted that on both occasions, Applicant knew that his drug use was contrary to his employer's drug policy. The Judge concluded that Applicant had not demonstrated an understanding that any use of illegal drugs is incompatible with holding a security clearance. The Judge also stated that Applicant's explanations for having omitted the earlier use from his SCA were not credible. Accordingly, he denied Applicant a clearance.

Applicant contends that the Judge failed to consider significant record evidence, such as the voluntary nature of his disclosures, the length of time since his last use of marijuana, his evidence that he no longer associates with those who use drugs, etc. A Judge is presumed to have considered all of the record evidence, and Applicant has not rebutted that presumption. *See, e.g.*, ISCR Case No. 09-06436 at 2 (App. Bd. Feb. 15, 2011). In this case, the Judge's findings encompassed the evidence that Applicant has cited in support of his appeal. However, the Judge plausibly explained his conclusion that Applicant had failed to mitigate the security concerns in his case, citing to Applicant's having used marijuana despite his employer's prohibition of such conduct, and despite the fact that Applicant held a security clearance. *See, e.g.*, ISCR Case No. 11-00391 at 3-4 (App. Bd. Dec. 1, 2011)(In denying the applicant a clearance, the Judge relied on evidence that the applicant had used marijuana while holding a clearance and despite having been placed on notice that such conduct was not compatible with his continued employment.) Moreover, the Judge's credibility determination supported his adverse decision. *See* ISCR Case No. 08-06859 at 4 (App. Bd. Oct. 29, 2010)(Conduct not alleged in the SOR may be considered for other reasons, such as a credibility determination.)

Applicant has cited to a prior Appeal Board decision, which he believes supports his case for a security clearance. We have given this decision due consideration but conclude that it is not sufficient to demonstrate that the Judge erred. 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. “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: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, 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