

KEYWORD: Guideline H; Guideline E

DIGEST: Applicant used marijuana for twenty years ending in 2012. A party's disagreement with the Judge's weighing of the evidence is not sufficient to demonstrate error. Adverse decision affirmed.

CASENO: 11-01671.a1

DATE: 06/20/2012

DATE: June 20, 2012

In Re:)	
)	
-----)	ISCR Case No. 11-01671
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Alan V. Edmunds, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On May 25, 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 March 22, 2012, after the hearing, Administrative Judge Claude R. Heiny 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 issues on appeal: whether the Judge’s decision was arbitrary, capricious, or contrary to law.¹ For the following reasons, the Board affirms the Judge’s unfavorable security clearance decision.

The Judge made the following findings of fact: Applicant is 40 years old. She first used marijuana in the late summer between 1990 and 1993. She also used it while attending a university between 1993 and 1998. In 1992, at age 22, while working at a university, she received a confidential security clearance. She held the clearance for two or three years while in school. While in college from 1993 to 1998, she used ecstasy twice and from 1993 to June 1999, she used LSD four or five times.

In 2008, Applicant applied for a security clearance. The application was later withdrawn because the clearance was not needed. A subject interview was conducted wherein she stated her marijuana use would most likely continue in the future because it made her feel creative and she did not believe it to be harmful. On a 2008 electronic questionnaire, completed pursuant to the security clearance application, Applicant indicated she had used marijuana from August 1990 to the present (August 2008) with a frequency of once a month to a few times a week. In her 2008 interview, Applicant indicated there may have been periods when she did not use marijuana, but admitted to being a regular user two or three times a week. In a November 2010 personal subject interview, she admitted to the same regularity of use and estimated her use over a year as a quarter ounce of marijuana.

During the summer of 2010, Applicant reevaluated her life and chose to abstain from marijuana use. She came to see the immaturity of her actions and the impact it could have on educational or career advancement. Her decision to stop was influenced in part by her desire to obtain a security clearance. On July 31, 2010, she last used marijuana and has no intention of using it again in the future. In December 2011, she submitted a statement of intent to never use illegal drugs again with automatic revocation of security clearance in the event of illegal drug use. She agrees to abide by a zero tolerance or zero use of drugs policy.

In November and December 2011, Applicant underwent a psychological evaluation. The psychologist found Applicant does not have a substance dependence disorder, substance abuse disorder, or a psychological/psychiatric disturbance. It was the psychologist’s opinion that Applicant was unlikely to resume use. Applicant voluntarily took two drug tests, which were negative for the presence of illegal drugs.

¹The Judge entered formal findings favorable to Applicant with regard to Guideline E. Those findings are not at issue on appeal.

The Judge reached the following conclusions: Applicant's experimentation with ecstasy and LSD ended more than 12 years ago and is no longer of security concern. The issue is whether or not Applicant's one-and-a-half year period of abstinence is sufficient to overcome the security concerns posed by a twenty-year history of marijuana use. The period of abstinence must be considered, but it is only one factor among numerous factors to be reviewed to determine Applicant's security worthiness. Her age must also be considered. It would be one thing had the marijuana use been confined to her college days or even her early 20s, but Applicant did not make her decision to stop smoking marijuana until age 39. Applicant's marijuana use was not infrequent. It ended less than two years ago. The decision to cease her marijuana use was not made and her use continued after the 2008 security clearance application process wherein her prior drug use was discussed. Applicant has a number of factors weighing in her favor. However, the favorable factors are insufficient to overcome the security concerns posed by her 20-year history of illegal drug use, her use after her 2008 interview, and the relatively brief period of abstinence. Applicant has not fully mitigated the security concerns arising from her drug possession and usage.

Applicant asserts that the Judge erred by failing to consider all the evidence presented. Applicant also argues that the Judge erred in his application of Guideline H Mitigating Condition 26(b).² Applicant has not established error on the part of the Judge.

Applicant's complaint that the Judge did not consider her evidence in mitigation lacks merit. A Judge is presumed to have considered all the evidence in the record unless he specifically states otherwise. *See, e.g.*, ISCR Case No. 07-00196 at 3 (App. Bd. Feb. 20, 2009). Applicant has not overcome that presumption. The Judge's decision contains a lengthy discussion of Applicant's favorable evidence, including the testimony of those who knew her and her many letters of recommendation. The gist of Applicant's arguments on appeal is that the Judge did not give appropriate weight to her favorable evidence. 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). Applicant's appeal brief essentially argues for an alternate interpretation of the record evidence. Similarly, Applicant takes issue with the Judge's failure to apply Guideline H mitigating conditions in her favor. The Judge's decision clearly indicates that he specifically considered those mitigating conditions when reaching his conclusions in the case. His decision acknowledges that there was significant evidence in mitigation on the record. The decision also includes a well-articulated explanation as to why the evidence in mitigation was insufficient to overcome the government's security concerns about Applicant's 20-

²“[A] demonstrated intent not to abuse any drugs in the future, such as:

- (1) disassociation from drug-using associates and contacts;
- (2) changing or avoiding the environment where drugs were used;
- (3) an appropriate period of abstinence;
- (4) a signed statement of intent with automatic revocation of clearance for any violation[.]”

year history of marijuana use, much of which took place after Applicant reached the age of 30, and some of which continued after Applicant applied for a security clearance in 2008. After a review of the record, the Board concludes that the Judge appropriately weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct and adequately discussed why the disqualifying conduct established under Guideline H was not mitigated.

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'an

Michael Y. Ra'an
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