

KEYWORD: Guideline H

DIGEST: The Appeal Board has not adopted a “bright-line” rule for what constitutes recent conduct. Rather, this is a matter for the Judge to evaluate in light of the record as a whole. Adverse decision affirmed.

CASE NO: 11-12165.a1

DATE: 01/29/2014

DATE: January 29, 2014

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 Department of Defense (DoD) declined to grant Applicant a security clearance. On January 7, 2013, DoD 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). The Government requested a hearing. On November 6, 2013, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Arthur E. Marshall Jr. denied Applicant’s request for a security clearance. Applicant appealed, pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: (1) whether certain statements of fact by the Judge were erroneous; and (2) whether the Judge’s decision is arbitrary, capricious, or contrary to

law. For the following reasons, the Board affirms the Judge's unfavorable security clearance decision.

The Judge made the following findings of fact: Applicant is 33 years old. He first received a security clearance in 2004. He is currently pursuing a bachelor's degree. Applicant was married in 2010. He and his wife have an infant child, and he is also the father of an eight-year-old child. Applicant used marijuana about 15 times between January 1999 and August 2000 when he was in college. He was 19 years old and under the influence of a college roommate. The drug did not do much for him and he only used it socially. By late 2000, Applicant asked the roommate to move out and Applicant stopped using the drug. At Applicant's bachelor party in June 2010, a former friend showed up with marijuana. Applicant knew he should not use the drug because he had a security clearance and because it was illegal. Despite a decade of abstinence, he accepted the drug because of a lack of judgment. Between New Year's Eve of 2010 and New Year's morning of 2011, Applicant was outside of a home where a holiday party was underway. He was with about six other people when he was again offered marijuana. Without thinking, he used the drug a second time.

Applicant has not had any drug counseling. He stated that he was inebriated during both his 2010 and 2011 lapses. He attributed his bachelor party lapse to not being in the best state of mind. He partly attributed his New Year's lapse to being with some of the same people in the same type of gathering. He knew he should decline the offer of marijuana, but cannot explain why he accepted it. He stresses that he no longer associates with those individuals or with those who use drugs. He also stresses that he has changed his environment and now avoids places where drugs may be available. He prefers instead to spend time with his family at home and at work. He emphasizes his new commitments as a husband and father, and his mature commitment as a responsible professional. In addition, after the hearing, Applicant submitted a Statement of Intent not to use illegal drugs in the future. Applicant offered three reference letters and two witnesses who praise his capabilities, integrity, judgment, and character. Applicant's wife credibly testified that he has made positive efforts to make sure he never again is tempted by marijuana. Personally, she does not use drugs, notes that they are illegal, and has little patience for their use.

The Judge reached the following conclusions: Applicant's admissions regarding marijuana use are sufficient to raise security concerns. With disqualifying conditions thus raised, the burden shifts to Applicant to mitigate those concerns. Applicant stresses that he has not handled classified material. That is not the point. The point is that in 2004, he was entrusted with a security clearance based on certain criteria and conditions. Such conditions included his remaining abstinent from both illegal drugs and illegal activity while maintaining the security clearance. It similarly obligated him to report any transgressions as soon as practicable.

By the time he received a security clearance in 2004, the earlier period of youthful indiscretion regarding marijuana use was behind Applicant. What breathed new life into such old security concerns, however, was Applicant's use of marijuana at his June 2011 bachelor party and a January 1, 2011 New Year's day party. While the former incident is sufficient to move drug involvement security concerns forward into the recent past, the latter incident increases the frequency of Applicant's lapses, doubles the instances at issue, and makes the conduct even more

recent. Moreover, given the circumstances, the repeated lapses cast serious doubts on Applicant's trustworthiness and judgment. Under these facts, a period of less than three years of abstinence is insufficient to demonstrate the level of commitment to abstinence Applicant previously demonstrated until June 2010, and falls short of demonstrating a renewed commitment to remaining drug-free. Applicant failed to mitigate the security concerns arising under the drug involvement guideline.

Applicant asserts that the Judge's decision erroneously speaks to Applicant's more recent drug use being over a period of two years, from 2010 to 2011. He states that the usage was actually twice over a period of six months, in June 2010 and again on New Year's Eve 2010. He also states that to say the use was over a period of two years is to misrepresent time line of usage and makes the drug use appear as though it was much more extensive and over a more significant period of time than it actually was. Applicant's argument lacks merit. After a review of the Judge's decision, the Board concludes that at no time did the Judge find, or even imply, that Applicant's drug use was over a full two-year period of time. Rather, the Judge's findings and his discussion of the facts in the Analysis portion of his decision specifically mention that there was one instance of marijuana use in June 2010, and a second instance on New Year's Eve 2010. No other incidents are discussed or implied.

Applicant points out that the Judge stated he used marijuana in June 2011, which is a full year off from the date of actual use, which was June 2010. Applicant is correct in that, during a discussion of the facts in the Analysis section, the Judge does make one reference to marijuana use in June 2011. However, the Board does not consider portions, passages, or words used in a decision in isolation. Rather, the Board considers the Judge's decision in its entirety to discern what the Judge found and concluded. *See, e.g.*, ISCR Case No. 01-22311 at 4 (App. Bd., Apr. 4, 2003). A review of the decision indicates that his single reference to a June 2011 instance of marijuana use is a typographical error. The Judge correctly refers to the June 2010 date four times elsewhere in the decision, and there is no indication that the single error influenced the Judge in his mitigation analysis relating to the passage of time since Applicant's last use.

Applicant lists several factors in mitigation that he argues support a favorable result in his case, including the passage of three years since the last incident, his declaration of intent never to use drugs again,<sup>1</sup> his good character and position as a family man and church member, and his career position. He states that his use of marijuana was not reflective of the person he is when compared

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<sup>1</sup> Applicant asserts that the Judge asked him to submit a letter of intent not to use controlled substances in the future and that he promptly did so. Applicant's description of the dialogue during the hearing, although not precisely accurate, is not unreasonable either. That discussion could arguably be interpreted as the Judge advising the Applicant. The Board has previously noted that "[g]iving advice to Applicant on what to do to qualify for a security clearance would be inconsistent with the Board's obligation to conduct itself in a fair and impartial manner," and "the Board cannot and will not advise Applicant about what action or actions he can or should take." *See* ISCR Case No. 03-01578 at 4 (App. Bd. May 27, 2004). However, the Board has also noted "that it does not have supervisory jurisdiction or authority over the conduct of Department Counsel or Hearing Office Administrative Judges." *See* ISCR Case No. 02-04344 at 3 (App. Bd. Sep. 15, 2003). On this record, the Board concludes that Applicant has not raised an issue within the Appeal Board's jurisdiction.

to these favorable attributes. Applicant's argument concerning mitigation does not establish error on the part of the Judge.

Regarding the passage of time since Applicant's last involvement with marijuana, the Board has declined to adopt any "bright-line" definition for what constitutes "recent" conduct, or the lack thereof. Rather, the Board has indicated the matter requires a Judge to evaluate the record evidence as a whole and reach a reasonable conclusion as to the recency of an applicant's conduct for purposes of mitigation. *See, e.g.*, ISCR Case No. 02-22173 at 4 (App. Bd. May 26, 2004). In this case, the Judge concluded that the passage of less than three years since Applicant's drug involvement was insufficient to establish a solid commitment to remain drug-free and did not serve to mitigate security concerns. This conclusion is reasonably supported by the record 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).

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 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 ultimate unfavorable security clearance decision is sustainable.

**Order**

The decision of the Judge 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: James E. Moody  
James E. Moody  
Administrative Judge  
Member, Appeal Board