KEYWORD: Guideline H

DIGEST: Applicant has failed to establish error. Adverse decsion affirmed.

CASENO: 14-00775.a1

DATE: 07/02/2015

DATE: July 2, 2015

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 April 22, 2014, 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). Applicant requested a decision on the written record. On April 24, 2015, after the close of the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Thomas M. Crean 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: whether the Judge's adverse decision is arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge made the following findings: Applicant is 59 years old. In answer to an e-QIP question, Applicant noted that he used marijuana once a month from May 1973 until August 2013. In his security clearance interview, he stated that his use early on was isolated and for short periods of time, starting in high school until he joined the Navy in 1975. He did not smoke marijuana while in the Navy, but resumed it again in 1981 after his discharge. He smoked it again until he married in early 1983, and then stopped. His marriage ended in divorce in 2003. He continued to refrain from smoking marijuana until August 2012. He then used once monthly until April 2013. His use was recreational and he never paid for it since it was provided by the people he smoked with. Applicant no longer associates with anyone who uses marijuana. He has no intention to use marijuana in the future because his new job means a lot to him. He has never received treatment or counseling for drug use. In his response to the Government's File of Relevant Material (FORM), Applicant noted that his e-QIP statement that he used marijuana monthly referred only to the last period of use from August 2012 to April 2013. Prior to that, his use was about once a month during the times that he was using marijuana.

The Judge concluded: If the evidence shows a significant period of time has passed without evidence of drug involvement, there must be an evaluation whether that period of time demonstrates changed circumstances or conduct sufficient to indicate a finding of reform or rehabilitation. Applicant used marijuana monthly from 2012 until 2013, so his use is recent and frequent. He used marijuana willingly so it was not used under any unique circumstances. He stopped using marijuana at times during his 40 years of marijuana use, but always returned to use the drug. As he stated in his response to the FORM, "I believe that I have consistently shown a capability to abstain from use whenever I saw fit and when I determined that circumstances made it necessary." Decision at 5. This is not the statement of an individual who decided not to use an illegal drug in the future. It is the statement of a person who is willing to use an illegal drug whenever he thinks necessary. He has not shown an unequivocal intent not to abuse drugs in the future. Under these circumstances, two years of abstinence from marijuana use is not a sufficient time for Applicant to meet his burden to show changed circumstances or conduct that indicates he has reformed and will no longer use illegal drugs. There is no compelling evidence of a changed circumstance indicating reform or rehabilitation. Applicant has not mitigated th security concerns for illegal drug use.

Applicant asserts that his brief periods of marijuana use have been "played up" and overstated, while his periods of non-use were ignored. Applicant fails to establish error. A review of the Judge's decision and the record evidence indicates that the Judge accurately described Applicant's past history of marijuana use, and accurately acknowledged the significant periods where Applicant abstained from marijuana use. The Board finds no reason to believe that the Judge

did not properly weigh the evidence or that he failed to consider all the evidence of record. *See, e.g.*, ISCR Case No. 11-06622 at 4 (App. Bd. Jul. 2, 2012).

Applicant references his statement that he has "consistently shown the capability to abstain from use when I choose and circumstances made it necessary" and argues that the statement was misinterpreted by the Judge. He states that the statement was intended to show that he has no need or desire to use drugs in the future, and the Judge's failure to see it as the statement of someone who has decided not to use drugs in the future was an erroneous interpretation. The Board disagrees. The Judge's conclusion that the statement evidenced an equivocal state of mind regarding future drug use was reasonable. A party's 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 notes that the Judge mentions his active duty military service and prior employment with a defense contractor, and yet must not have taken these facts into consideration since they conclusively demonstrate his ability to reform himself and act responsibly. The Applicant fails to establish error. 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). Moreover, the presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. *See, e.g.*, ISCR Case No. 06-25157at 2 (App. Bd. Apr. 4, 2008). 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). The Board concludes that the Judge's weighing of the evidence in this case is sustainable.

Some of Applicant's assertions on appeal are directed toward Department Counsel. He asserts that Department Counsel submitted erroneous information and injected his personal opinion into the proceedings, and caused the Judge to have a "slanted" opinion of him. Applicant was given the opportunity to respond to the FORM, and he did, in fact, avail himself of that opportunity. The chance to point out and establish inaccuracies in the Government's case was readily available to him at that time. The Board notes that factual representations made by Department Counsel were well documented and were reasonably supported by the record. The "Argument" section of the FORM was within the bounds of proper advocacy. Applicant was not denied procedural due process by any actions of Department Counsel in this case.

The Board does not review a case *de novo*. 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 Ra'anan
Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board