

KEYWORD: Guideline H; Guideline E

DIGEST: Applicant’s use of marijuana qualified as “drug abuse” as defined by the Directive. Applicant failed to rebut the presumption that the Judge considered all of the evidence. We have not established a “bright line” rule as to the recency of drug use. We give deference to a Judge’s credibility determination. Hearing Office Cases are not binding on other Hearing Office Judges or on the Appeal Board. Arguments by either side are not evidence. Adverse decision affirmed.

CASE NO: 14-01847.a1

DATE: 04/09/2015

DATE: April 9, 2015

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In Re:)	
-----)	ISCR Case No. 14-01847
)	
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 July 28, 2014, DoD 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 January 22, 2015, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Darlene D. Lokey Anderson denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge erred in concluding that his circumstances raised concerns under Guideline H; whether the Judge erred in her mitigation analysis; and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact

From 1997 to 1999, Applicant used marijuana about three to four times a week. He did so with his friend. From 1999 to 2004, while in college, Applicant smoked marijuana while at parties, on holidays, and during the summers. He estimates that he has smoked marijuana between 200 and 500 times. In 2005, he began working for a Defense contractor and obtained a security clearance. He passed a pre-employment drug test. Nevertheless, he used marijuana on about four occasions while holding a clearance. Applicant changed jobs and began working for his current employer in 2012. He was required to seek an upgrade of his clearance to Sensitive Compartmented Information access. At this time, he acknowledged his drug use.

In 2005, Applicant completed a security clearance application (SCA). He did not disclose his marijuana use, as he was required to do. He acknowledges that he was not truthful on this earlier SCA, contending that he did not understand the gravity of the clearance application process. Applicant contends that he has made changes over the past several years. He got married and has a child. Moreover, he admitted his prior drug use on his most recent SCA.

Applicant enjoys an excellent reputation for his intelligence, trustworthiness, self-discipline, and leadership. In late 2013, he received a promotion at work and a pay increase. A senior official at Applicant's place of employment recommends him for a clearance.

The Judge's Analysis

The Judge concluded that Applicant's drug use raised concerns under Guideline H. She cited to evidence of the frequency of his use as well as to his having smoked marijuana while holding a clearance. She also stated that Applicant's drug use and his omission from his 2005 SCA raised Guideline E concerns. In concluding that Applicant had not mitigated the concerns raised under either Guideline, she stated that drug use while holding a clearance "raises serious security concerns about his reliability and trustworthiness." Decision at 7. She also relied on evidence that Applicant did not come forward about his drug use until he needed to upgrade his clearance to SCI access. She stated that Applicant's credibility was questionable. At the end of her analysis, the Judge stated, "[T]he evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1 and 2 of the SOR."¹ Decision at 8.

¹Although the Judge concluded that Applicant had not mitigated any of the SOR allegations, she found for Applicant in her Formal Findings regarding the SCA omission. Given the lack of ambiguity in her analysis, we conclude that the Formal Finding was erroneously entered.

Discussion

Applicant argues that his experience with marijuana does not rise to the level of abuse. He argues that the Judge's characterization of his conduct as drug abuse is merely speculative. The Directive defines drug abuse as "the illegal use of a drug." Directive, Enclosure 2 ¶ 24(b). *See* ISCR Case No. 12-06635 at 2 (App. Bd. Mar. 28, 2014). Under the facts of this case, Applicant's use of marijuana meets this definition of abuse. To the extent that Applicant is arguing that his case does not raise concerns under Guideline H, we find no error in the Judge's conclusion that the evidence raises three Disqualifying Conditions, 25(a), (c), and (g).²

Applicant challenges the Judge's conclusion that he had not mitigated the concerns in his case. For example, he cites to evidence that his last use of marijuana was several years ago, that his circumstances have changed in a way that shows increased maturity (marriage, birth of a child, etc.), and that it was he who corrected the omission from his prior SCA. We note, first of all, that the Judge addressed this evidence in her Decision. Applicant has not rebutted the presumption that the Judge considered all of the evidence. *See, e.g.*, ISCR Case No. 10-04413 at 2 (App. Bd. Feb. 16, 2012). Moreover, regarding the length of time since Applicant's last use, we have never established a "bright line" rule as to recency of drug use. The extent to which security concerns may have become attenuated through the passage of time is a question that must be resolved based on the evidence as a whole. Given the number of times Applicant used marijuana, along with evidence that he did so on multiple occasions while holding a security clearance, we cannot say that the Judge's evaluation of this issue was erroneous. *See, e.g.*, ISCR Case No. 11-09172 at 3 (App. Bd. Mar. 19, 2013).

Concerning the SCA omission, the Judge's finding that Applicant did not correct this defect for nine years, and then only when he needed a security clearance upgrade, along with her negative credibility determination, support her treatment of this issue. We are required to give deference to a Judge's credibility determination. Directive ¶ E3.1.32.1. In making his argument about mitigation, Applicant cites to another Hearing Office case. We give this case due consideration as persuasive authority. However, Hearing Office cases are not binding on other Hearing Office Judges or on the Appeal Board. *See, e.g.*, ISCR Case No. 11-14723 at 3 (App. Bd. Oct. 3, 2014). The Judge's examination both of the mitigating conditions and the whole-person factors was consistent with the record that was before her. Applicant's arguments are not enough to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 14-01509 at 2 (App. Bd. Jan. 29, 2015).

Applicant cites to remarks Department Counsel made during his closing argument which were favorable to him. In particular, he notes Department Counsel's opinion that he was forthright and that he was worthy of belief in his promise not to use drugs in the future. Arguments by either side, however, are not evidence. *See, e.g.*, ISCR Case No. 02-07191 at 3, note 1 (App. Bd. Mar. 25,

²Directive, Enclosure 2 ¶ 25(a): "any drug abuse . . .;" (c): "illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;" (g): "any illegal drug use after being granted a security clearance[.]"

2004). A Judge must use his or her independent judgement in evaluating the evidence and making a final determination of an applicant's worthiness for a clearance. Applicant's citation to Department Counsel's remarks is not enough to show that the Judge erred.

The Judge examined the relevant data and articulated a satisfactory explanation for the decision. The 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 Decision is **AFFIRMED**.

Signed: Michael Ra'anan
Michael Ra'anan
Administrative Judge
Chairperson, 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