

KEYWORD: Guideline H; Guideline E

DIGEST: A DOHA proceeding is not a proper forum to debate whether marijuana should be legal for some purposes. The Directive presumes a nexus between proven conduct under any of the Guidelines and an applicant’s eligibility for a clearance. State laws that permit marijuana use in certain limited circumstances do not pre-empt provisions of the Industrial Security Program. State laws do not alter the existing Guidelines. Adverse decision affirmed.

CASE NO: 14-03734.a1

DATE: 02/18/2016

DATE: February 18, 2016

In Re:)	
)	
-----)	ISCR Case No. 14-03734
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

[name redacted]

The Department of Defense (DoD) declined to grant Applicant a security clearance. On December 9, 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 November 24, 2015, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Mary E. Henry 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 issue on appeal: whether the Judge's decision is arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge's unfavorable decision.

The Judge made the following findings of fact: Applicant is 56 years old. He began working for his defense contractor employer in 1984. He has been described as a person of strong character, and a reliable and dependable employee with a strong work ethic. In 1978, while in the military, he was charged with possession of hashish and given non-judicial punishment. In 2005, Applicant sustained serious injuries in a motorcycle accident. As a result of his injuries, he endures constant pain and has short-term memory issues. When seeking professional pain management, Applicant was told to use narcotic drugs, but he declined to do so. Medical marijuana was suggested to him but he declined a prescription for it. Subsequently, when a friend offered him marijuana, he began using small amounts to help him sleep and ease his pain. The marijuana helped with both as verified by his family physician. In 2012, during a traffic stop, the police found two marijuana smoking devices in Applicant's car. He was charged with possession of marijuana and possession of drug paraphernalia. After his arrest, Applicant decided to stop using marijuana for medical purposes. He was successful in doing this after completing an inpatient treatment program.

When he decided to smoke marijuana to relieve his pain and help with his sleep, he understood that marijuana was an illegal drug. He admitted he knew that his use of marijuana was likely against his company's policy, and he knew that he could not use any illegal drugs, including marijuana, while holding a security clearance.

Applicant answered "no" to questions about drug use and criminal offenses on his security clearance questionnaire. One question asked if he had ever been charged with an offense involving alcohol or drugs. The other asked if he had ever illegally used or been involved with a drug or controlled substance while possessing a security clearance. Applicant acknowledged that he intentionally falsified his answer about using illegal drugs while holding a security clearance because he was afraid he would lose his job. He denied intentionally falsifying the question about his police record, as he did not consider his nonjudicial punishment a police record. The SOR also alleged that Applicant falsified his answer to a Government investigator when he stated he did not use marijuana in his car in 2012 before being stopped by police.

The Judge reached the following conclusions: Applicant smoked small amounts of marijuana for medical purposes on a regular basis for six years. Under federal law, marijuana, even that used for medical purposes, is illegal, making such use a security concern. During the time of his use of marijuana, Applicant held a security clearance. He stopped using marijuana in 2012 after his arrest, and he voluntarily sought inpatient treatment to assure the end of his marijuana use. He does not intend to use marijuana in the future. He has mitigated any security concern about his future use of marijuana. However, he knew that marijuana was an illegal drug, and he knew that he could not use it while holding a security clearance. Nevertheless, he chose to do so for six years. In doing so, he exercised poor judgment and betrayed the Government's trust. This use is not mitigated. Applicant acknowledged that he intentionally lied on his security clearance application about his use of marijuana for medical reasons. The Government has not established that applicant

intentionally falsified his answer when he failed to disclose the 1978 nonjudicial punishment action. However, during his interview with an investigator, his denial that he had used marijuana before his 2012 arrest was false, and Applicant knew it. Because Applicant lied, the Government's security concerns have not been mitigated.

Applicant argues that the Judge's decision was not a "fair, impartial, and commonsense decision" in accordance with the Adjudicative Guidelines, and the Judge failed to draw conclusions that were reasonable, logical, and based on the evidence contained in the record. Specifically, Applicant's appeal brief challenges the propriety of federal laws prohibiting the use of marijuana and its classification as a Schedule I drug under the federal Controlled Substances Act.¹ Applicant asserts that there is no nexus between Applicant's use of marijuana for medical purposes and any legitimate security concern. Applicant also asserts that, given the facts in this case, the Adjudicative Guidelines were inflexibly applied, which runs counter to the policy expressed in the Directive. Applicant also asserts that the Judge did not properly evaluate the case under the whole-person concept. Applicant's arguments do not establish error on the part of the Judge.

While emphasizing that his marijuana use was for medical purposes and undertaken to provide relief from chronic pain, Applicant challenges the propriety of current federal law regarding marijuana use given the fact that a significant number of states now allow marijuana use for medical purposes. The purpose of DOHA proceedings is to make security clearance determinations for individual applicants based on the facts in each individual case. DOHA proceedings are not a proper forum to debate the pros and cons of whether marijuana should be legal for some purposes, how it should be classified as a controlled substance, or the merits of DoD policy concerning drug abuse. *See* ISCR Case No. 02-08613 at 3 (App. Bd. Jan. 6, 2005).² The Directive presumes there is a nexus between proven conduct under any of its Guidelines and an applicant's security eligibility. *See, e.g.*, ISCR Case No. 07-08113 at 3 (App. Bd. Jul. 15, 2008). The granting, denial, or revocation of an industrial security clearance is the exclusive province of the Executive Branch of the Federal Government, *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). State laws allowing for the legal use of marijuana in some limited circumstances do not pre-empt provisions of the Industrial Security Program and the Department of Defense is not bound by the status of an applicant's conduct under state law when adjudicating that individual's eligibility for access to classified information. Indeed, as the Judge noted, the Director of National Intelligence issued a memorandum entitled, "Adherence to Federal Laws Prohibiting Marijuana Use." That memo states, in part, that state laws "do not alter the existing National Security Adjudicative Guidelines[.]" The Judge's recognition that Applicant's conduct was in contravention of federal law and DoD policy— and

¹21 U.S.C. § 801, et. seq.

²Indeed, it is beyond the scope of the Boards's authority to pass judgment on the propriety of federal law or federal policy. *Cf.* ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002)(DOHA proceedings are not a proper forum for challenging the validity of federal tax laws); ISCR Case No. 99-0519 at 6 (App. Bd. Feb. 23, 2001)(DOHA proceedings are not a proper forum to debate or adjudicate the formulation of DoD policy concerning foreign passports); ISCR Case No. 99-0457 at 6 (App. Bd. Jan. 3, 2001)(appeal process is not a proper forum to challenge the wisdom or legality of provisions of the Directive); ISCR Case No. 02-00318 at 6-7 (App. Bd. Feb. 25, 2004)(neither DOHA Administrative Judges nor the Appeal Board have the authority to adjudicate foreign policy or foreign relations issues).

would disqualify him from holding a security clearance absent a sufficient showing of mitigation— is not indicative of an “inflexible” approach to the application of the pertinent Adjudicative Guidelines.

Apart from his arguments regarding the appropriateness of federal drug policy, Applicant is basically arguing that the Judge erred by not concluding that the circumstances of his marijuana use and his current period of abstinence from the drug were mitigating. Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. 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 nature of Applicant’s physical injuries and his attempts to alleviate his chronic pain was evidence that the Judge was required to consider. However, such evidence does not mandate a favorable decision. Central to the Judge’s analysis was her conclusion that Applicant knew that marijuana was illegal under any circumstances according to federal law, and was also prohibited by his company’s policy. She concluded that Applicant made a serious error in judgment when he decided to use marijuana while holding a security clearance. Applicant’s arguments are 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).

There is no presumption of error below. *See, e.g.*, ISCR Case No. 04-08312 at 2 (App. Bd. Jul. 14, 2005). The Judge found against Applicant on two subparagraphs alleging falsification under Guideline E. On appeal, Applicant discusses Guideline E only peripherally, and does not assert error on the part of the Judge with the requisite degree of specificity. Thus, the Judge’s decision is sustainable on the basis of Guideline E alone.

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.’” Therefore, the Judge’s ultimate unfavorable security clearance decision is sustainable.

Order

The Judge's decision 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: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board