

KEYWORD: Guideline F; Guideline H; Guideline J

DIGEST: The Board concludes that the error demonstrated by Applicant was harmless because the Judge would have reached the same ultimate conclusion without the error. Adverse decision affirmed.

CASENO: 14-04509.a1

DATE: 02/12/2016

DATE: February 12, 2016

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| In Re:) | |
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| -----) | ADP Case No. 14-04509 |
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|) | |
| Applicant for Public Trust Position) | |
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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 trustworthiness designation. On February 4, 2015, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—trustworthiness concerns raised under Guideline F (Financial Considerations), Guideline H (Drug Involvement), and Guideline J (Criminal Activity) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On November 21, 2015, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Matthew E. Malone denied Applicant’s request for a trustworthiness designation. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. The Judge’s favorable findings under Guideline F are not at issue in this appeal. Consistent with the following, we affirm.

The Judge’s Findings of Fact

The Judge made the following findings pertinent to the issue raised on appeal: Applicant started smoking marijuana in 1997, stopping in 2012. In 2009, he was arrested and charged with misdemeanor possession of marijuana. His drivers license was suspended for 12 months, and he was ordered to complete drug counseling as a condition of probation and of the restoration of his license. His counseling records show that he was diagnosed as being cannabis dependent and was advised to remain abstinent. Applicant denied being aware of the diagnosis, but the discharge summary shows that he was given a copy of the diagnosis and discussed his treatment plan with the counselor. Applicant again used marijuana, in 2012. He claimed that his use was not constant over the years and that he stopped for long periods when seeking employment and having to pass pre-employment drug tests. Applicant still has occasional contact with friends with whom he used marijuana and who still use marijuana. Applicant has a good work record. He has a reputation for reliability and professionalism. There is no indication that he has informed anyone of his marijuana use.

The Judge’s Analysis

In concluding that Applicant had not mitigated the Guideline H or J concerns, the Judge cited to evidence that Applicant had returned to marijuana use after his diagnosis of cannabis dependence. He noted that Applicant had stopped using in the past, though for purposes of pre-employment drug testing. He also noted Applicant’s continued contact with friends who use marijuana. The Judge stated that, under the facts of this case, he was not satisfied that Applicant’s misconduct was behind him. In his discussion of the whole-person concept, the Judge acknowledged Applicant’s character and employment references. However, he concluded that this positive evidence was not enough to overcome the concerns raised by Applicant’s conduct.

Discussion

Applicant challenges some of the Judge’s findings of fact. For example, he denies that he had previously abstained from drug use merely due to job searches. He denies that he continues to associate with his drug-using friends. He also argues that he was not arrested for marijuana

possession but only cited. On this last point, we find Applicant’s argument persuasive. In his clearance interview, included in the record as Government Exhibit 2, Applicant states that the officer cited him for possession but did not arrest him. There is no other evidence in the record that addresses this matter. However, even if the Judge had found that Applicant was merely cited, he would not likely have made a different decision. Therefore, this error is harmless. *See, e.g.*, ISCR Case No. 14-03601 at 3 (App. Bd. Jul. 1, 2015). We have examined the remainder of the challenged findings and conclude that they satisfy the requirements of the Directive for factual sufficiency.¹ Applicant challenges the Judge’s conclusion that he has not demonstrated an intent to abstain from drug use sufficient to mitigate the concerns arising from his misconduct. However, Applicant’s argument is in essence a disagreement with the Judge’s weighing of the evidence, which is 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. 14-06440 at 4 (App. Bd. Jan. 8, 2016).

After considering the entirety of Applicant’s appeal arguments, we conclude that the Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The decision is sustainable on this record. The standard applicable to trustworthiness cases is that set forth in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) regarding security clearances: such a determination “may be granted only when ‘clearly consistent with the interests of the national security.’” *See, e.g.*, ADP Case No. 12-04343 at 3 (App. Bd. May 21, 2013). *See also Kaplan v. Conyers*, 733 F.3d 1148 (Fed. Cir. 2013), *cert. denied*.

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

¹We examine a Judge’s findings to see if they “are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record.” Directive ¶ E3.1.32.1. *See also* ISCR Case No. 14-04226 at 3 (App. Bd. Aug. 18, 2015).

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board