

KEYWORD: Guideline H; Guideline E

DIGEST: After reviewing the record, we conclude that the Judge's material findings are based on substantial evidence, or constitute reasonable characterizations or inferences that could be drawn from the record. Applicant has not identified any harmful error likely to change the outcome of the case. The Judge's material findings of security concern are sustainable. Adverse decision affirmed.

CASE NO: 14-05084.a1

DATE: 06/27/2016

DATE: June 27, 2016

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In Re:)	
)	
-----)	ISCR Case No. 14-05084
)	
)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Jennifer Aronson, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On February 27, 2015, 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). On April 15, 2016, after conducting a hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert J. Tuider 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’s findings of fact contained errors 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

Applicant has worked for his current employer, a Defense contractor, since 2010. He held a security clearance for part of that time while serving in the military. In 2002, Applicant attempted to sell ecstasy to undercover police officers. He was arrested and charged with trafficking in ecstasy and flunitrazepan, felony offenses. He participated in a diversion program, contingent on serving in the military. Applicant stated that he told his recruiter about the arrest. The recruiter advised him not to disclose the arrest on his application forms. At the hearing, Applicant testified that he had been distributing drugs in order to supply his friends, purchasing about 100 pills over a two-year period. However, on cross-examination he was confronted with his clearance interview, in which he stated that he purchased as many as 500 pills a month and was making a 50% profit. The Judge noted that these statements were contradictory.

In 2005, after he enlisted in the military, officials discovered evidence of his drug arrest. The agency adjudication facility issued Applicant an SOR. He prepared a response, in which he addressed the advice he claimed to have received from the recruiter. He also asserted that he was not involved in the incident that resulted in his arrest. Applicant was granted a clearance, with a warning that subsequent misconduct could result in suspension of his access to classified information. Applicant smoked marijuana on one occasion in 2009, while holding a clearance. When he completed his current security clearance application (SCA), Applicant failed to disclose his felony arrest and his 2009 use of marijuana while holding a clearance. Applicant claimed that these false answers were honest mistakes due to haste. Applicant enjoys a good reputation for his work performance. He is viewed as trustworthy, hardworking, and professional. He received numerous decorations while in the military.

The Judge’s Analysis

The Judge concluded that Applicant had not met any of the Guideline H mitigating conditions. He found Applicant’s drug use while holding a clearance to be “particularly troubling,” given his extensive prior history with drugs that was addressed in his 2005 clearance adjudication. He also cited to evidence that Applicant had entered the military under false pretenses. The Judge stated that, when weighed against the totality of the evidence, the years that had passed since the

2009 marijuana use were not enough to show that Applicant's misconduct was behind him. Noting that clearance holders are expected to disclose security-significant conduct or circumstances, the Judge stated that Applicant had failed to provide an adequate explanation for his omissions on the SCA. In the whole-person analysis, the Judge cited to evidence of Applicant's previous false statements to various officials concerning his background. He stated that Applicant had shown a lack of judgment.

Discussion

Applicant challenges the Judge's findings, particularly that his omissions were deliberate. A Judge should evaluate an applicant's *mens rea* in light of the entirety of the record evidence. *See, e.g.*, ISCR Case No. 14-04226 at 3 (App. Bd. Aug. 18, 2015). We conclude that the finding is sustainable, given Applicant's prior false statements and his inconsistent statements at the hearing. The balance of Applicant's argument is a disagreement with certain comments and conclusions by the Judge, for example that Applicant may be unwilling to report adverse information to the Government. After reviewing the record, we conclude that the Judge's material findings are based on substantial evidence, or constitute reasonable characterizations or inferences that could be drawn from the record. Applicant has not identified any harmful error likely to change the outcome of the case. The Judge's material findings of security concern are sustainable. *See, e.g.*, ISCR Case No. 12-03420 at 3 (App. Bd. Jul. 25, 2014).

Applicant cites to a DOHA case (ISCR Case No. 14-0730) as precedent. Applicant characterizes it as an Appeal Board decision, although it is actually one from the Hearing Office. We give this decision 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. 14-04839 at 3 (App. Bd. May 27, 2016).

Applicant cites to evidence that he believes favorable to him. His argument is not sufficient to rebut the presumption that the Judge considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 14-05795 at 2 (App. Bd. Apr. 26, 2016). We conclude that 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 Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairperson, Appeal Board

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

Signed: Catherine M. Engstrom
Catherine M. Engstrom
Administrative Judge
Member, Appeal Board