

KEYWORD: Guideline H

DIGEST: Because the Judge’s material findings about the drug charge are based on substantial evidence or constitute reasonable inferences that could be drawn from the record, they are sustainable. Adverse decision affirmed.

CASE NO: 15-02920.a1

DATE: 08/17/2016

DATE: August 17, 2016

In Re:  -----  Applicant for Security Clearance	) ) ) ) ) ) )	ISCR Case No. 15-02920
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**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

Ryan C. Nerney, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On December 16, 2015, 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 hearing. On June 6, 2016, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Carol G. Ricciardello denied Applicant’s request for a security clearance. 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. Consistent with the following, we affirm.

### **The Judge's Findings of Fact**

Applicant is a 56-year-old employee of a Federal contractor. He is married and has an adult child and adult stepchildren. He was granted a security clearance in 2003.

Applicant began using marijuana in high school in about 1976. In about 1979 and 1980, he received three punishments under Article 15 of the Uniform Code of Military Justice for possession of marijuana and received a General Under Honorable Conditions discharge from the military for misconduct due to drug abuse. In a sworn statement in 2002, he stated that he used hashish on a daily basis while in the military, used cocaine three or four times between 1979 and 1982, experimented with LSD four or five times in the military, and continued to use marijuana on a recreational basis from 1980 to 1996.

In 1995, Applicant was arrested for the felony offense of manufacturing marijuana. He was growing about 280 marijuana plants for his own use and also sold small amounts to friends on a not-for-profit basis. He agreed to assist law enforcement in exchange for having the charge adjudicated in state, vice Federal, court and a reduction in the sentence. He pled guilty to the felony offense, but appears to have been sentenced as a first offender, remained on probation for five years, and then the charge was dismissed. In the 2002 sworn statement, he stated that he learned from his mistakes and had no intention of using illegal drugs in the future.

From June through October 2012, Applicant resumed using marijuana until he tested positive for that substance. At that time, he was aware that use of marijuana was prohibited while holding a security clearance. He was suspended from work for two weeks. He was advised not to return to work until the drug was no longer in his system. He did not return to work for an additional three weeks. He attributed his 2012 drug use to stress over his mother's illness and death, his father's illness, and his brother offering him marijuana to help him sleep. He also stated that his brother notified his employer about his marijuana use because his brother was contesting their father's will.

Applicant stated that he last used marijuana in October 2012. He signed a statement for automatic revocation of his security clearance if he uses illegal drugs in the future. He has sought medical help for his anxiety and sleeping problems. He no longer associates with drug abusers. He provided the results of a alcohol/drug evaluation conducted in April 2016 in which he was not diagnosed as drug dependent and his level of risk was determined to be low. He also provided character letters that describe him as loyal, trustworthy, and dedicated.

### **The Judge's Analysis**

The Judge noted that Applicant has not used marijuana for the last three and a half years, no longer associates with those who use drugs, and has signed a letter of intent with automatic revocation of his security clearance if he uses illegal drugs again. However, given his significant history of drug use and his subsequent use of drugs after stating back in 2002 that he had no intent

to do so in the future, the Judge concluded the evidence in mitigation did not outweigh the lifestyle choices Applicant made when he repeatedly used marijuana, including while holding a security clearance.

## **Discussion**

Applicant contends that the Judge committed an “egregious error” when she viewed Applicant’s 1995 arrest as a felony and notes that the charge was dropped as a “No-Case Misdemeanor.”<sup>1</sup> In his 2002 sworn statement, however, Applicant stated, “I pleaded “Guilty” to the initial charge of Manufacturing Marijuana, a felony offense in violation of the [state’s] Controlled Substance Act . . . .” In response to his counsel’s questions at the hearing, Applicant testified that he thought he pled guilty to a felony offense, but did not learn until years later that it was reduced to a misdemeanor. Tr. at 26. In her decision, the Judge notes this charge was dismissed after Applicant completed his five years of probation. Because the Judge’s material findings about the drug charge are based on substantial evidence or constitute reasonable inferences that could be drawn from the record, they are sustainable. *See, e.g.*, ISCR Case No. 12-03420 at 3 (App. Bd. Jul. 25, 2014).

Applicant also contends that the Judge’s interpretation of his 2016 Alcohol/Drug Clinical Evaluation was flawed because she concluded the evaluation determined Applicant’s level of risk for future marijuana use is low. Applicant claims that evaluation stated he was a low risk to national security. A review of the evaluation reveals that it makes six “low risk” assessments for alcohol/drug-related issues such as alcohol or substance use intoxication/withdrawal potential. Although the evaluator concludes there is no reason for holding up Applicant’s security clearance based on substance abuse/misuse or dependence, the risk assessments make no reference to national security. Moreover, the evaluator is a licensed professional counselor who worked at a counseling center in the private sector and has no apparent background for making national security assessments. The Judge’s interpretation of the evaluation is sustainable because it is based on reasonable inferences drawn from the record evidence. *Id.* Applicant further contends the Judge erred in her assessment that Applicant “was not honest or trustworthy,” but a review of the decision reveals that the Judge did not make any specific findings or assessment of that nature.

Additionally, Applicant asserts that the Judge did not consider all of the evidence in the record in applying the mitigating conditions and whole-person concept. For example, he argues the Judge ignored that his brother was the root cause of his 2012 marijuana use. However, the Judge made findings about his brother’s involvement in his most recent marijuana usage. Applicant has not rebutted the presumption that the Judge considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 14-04959 at 2 (App. Bd. Apr. 6, 2016). Applicant further argues that the Judge should have found the security concerns mitigated. This argument amounts to a disagreement with the Judge’s weighing of the evidence, which is not sufficient 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. 14-04719 at 2 (App. Bd. Apr. 6, 2016). We give due consideration to the Hearing Office case that Applicant has cited, but it is neither binding precedent on the Appeal Board nor sufficient to

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<sup>1</sup> The court document that apparently dismissed the charge was entitled “No-Case Misdemeanor.”

undermine the Judge’s decision. *See, e.g.*, ISCR Case No. 14-03747 at 3 (App. Bd. Nov. 13, 2015). Contrary to Applicant’s contention, the Judge complied with the whole-person analysis requirements by considering the totality of the evidence in reaching her decision. *See* Directive, Enclosure 2 ¶ 2.

The Judge examined the relevant evidence 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 Y. Ra’anan

Michael Y. Ra’anan  
Administrative Judge  
Chairperson, Appeal Board

Signed: Catherine M. Engstrom

Catherine M. Engstrom  
Administrative Judge  
Member, Appeal Board

Signed: James F. Duffy

James F. Duffy  
Administrative Judge  
Member, Appeal Board