

KEYWORD: Guideline H

DIGEST: The doctrine of ineffective assistance of counsel is not applicable in DOHA proceedings. Applicant has not identified a harmful error in the Judge’s findings. Adverse decision affirmed.

CASENO: 15-08068.a1

DATE: 09/08/2017

DATE: September 8, 2017

In Re:  -----  Applicant for Security Clearance	) ) ) ) ) ) )	ISCR Case No. 15-08068
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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 security clearance. On June 17, 2016, 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 2, 2017, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Martin H. Mogul 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 he was denied due process; whether the Judge's findings of fact contained errors; whether the Judge erred in his analysis of the disqualifying conditions, 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 a Defense contractor since 2002 and has held a clearance since 2005. He first used marijuana when he was in his early 30s, and from 2007 until 2014, he used the drug with varying degrees of frequency. The total number of uses was about 35. Applicant signed a statement of intent not to use illegal drugs in the future, with an automatic revocation of his clearance should he re-offend. Applicant called several witnesses. Applicant appears not to have disclosed to at least two of them the full extent of his drug use. A licensed social worker provided a written opinion that Applicant was not likely to return to his drug use. However, the letter does not show that the social worker had been advised of the extent of Applicant's misconduct.

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

The Judge cited to Applicant's favorable evidence. However, he noted that Applicant had used marijuana about 35 times over several years, all while holding a clearance. The Judge cited to his conclusion that Applicant had not been forthcoming in disclosing the full extent of his drug use to his witnesses. He stated that he did not find the testimony and written statements of two witnesses to be credible. The Judge concluded that Applicant had not mitigated the concerns arising from his security-significant conduct.

### **Discussion**

Applicant contends that he submitted evidence that did not make it into the record. He surmises that either his attorney at the hearing did not pass this evidence on to the Judge or that it may have been lost in the mail, etc. Applicant did not corroborate his claims to have provided evidence to his attorney or otherwise to have attempted to submit additional material. Moreover, the doctrine of ineffective assistance of counsel is not applicable in DOHA proceedings. *See, e.g.*, ISCR Case No. 15-02040 at 2 (App. Bd. Feb. 16, 2017).

Applicant contends that the Judge's findings contained errors. In particular, he states that his marijuana use was less extensive than the 35 times that the Judge found. He contends that the total number of times was no more than 25. However, even if the Judge's finding is high, it did not likely affect the overall outcome of the case. The Judge's material findings are supported by substantial evidence. Applicant has not identified a harmful error in the Judge's findings. *See, e.g.*, ISCR Case No. 15-01285 at 3 (App. Bd. Dec. 22, 2016).

Applicant contends that the Judge did not perform a sufficient whole-person analysis. He cites to evidence of his good work performance, his character witnesses, the statement by the social worker, etc., which, he argues, the Judge did not properly consider or weigh. The Judge made

findings about Applicant's evidence. Given that Applicant used marijuana numerous times while holding a clearance, we cannot say that the Judge's analysis is erroneous. Applicant has not rebutted the presumption that the Judge considered all of the evidence. Neither has he demonstrated that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 13-00502 at 3 (App. Bd. Mar. 7, 2017). We conclude that the Judge took into account all aspects of the record evidence which bore upon Applicant's trustworthiness and reliability, which is what a whole-person analysis requires. *See, e.g.*, ISCR Case No. 04-00540 at 7 (App. Bd. Jan. 5, 2007). We give deference to a Judge's credibility determinations. Directive ¶ E3.1.32.1. Applicant's contention that the Judge erred in his treatment of the various character witnesses and evidence is not sufficient to undermine the Judge's conclusions about the credibility of this evidence. Moreover, we find no reason to disturb the Judge's conclusion that Applicant's use of marijuana on multiple occasions while holding a clearance raised questions about Applicant's ability to comply with laws, rules, and regulations. *See* Directive, Encl. 2, App. A ¶ 24.

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, Encl. 2, App. A ¶ 2(b): "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

**Order**

The Decision is **AFFIRMED**.

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

Signed: James E. Moody

James E. Moody

Administrative Judge

Member, Appeal Board

Signed: James F. Duffy

James F. Duffy

Administrative Judge

Member, Appeal Board