

KEYWORD: Guideline H; Guideline E

DIGEST: In his recitation of the policies required for clearance adjudications and in his statement of his ultimate conclusion, the Judge cited to the correct standard. We find no reason to conclude that his various references to Applicant’s estimable qualities mean that he failed to apply the standard mandated by *Egan* and by the Directive. Adverse decision affirmed.

CASENO: 16-00276.a1

DATE: 10/30/2017

DATE: October 30, 2017

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In Re:)	
)	
-----)	ISCR Case No. 16-00276
)	
Applicant for Security Clearance)	
)	

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 8, 2016, 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 August 18, 2017, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Thomas M. Crean 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 employed the correct standard in evaluating Applicant’s clearance eligibility; 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 two bachelor's degrees and a law degree. He is married but has no children. He served in the military for over 23 years, five on active duty and the remainder in the Reserves. He retired as an O-5. During his service, Applicant received numerous awards and decorations as well as letters of appreciation. His fitness reports attest that he is "supremely talented" and that he is a person who follows rules and regulations. Decision at 2. Since his retirement he has worked for Government contractors. His current employment began in May 2007. His civilian performance reports are similar in quality to those he received in the military.

Applicant was first granted access to classified information upon his commissioning as an officer in 1989. "His clearance as a civilian . . . flows from the clearance granted to him when he entered active duty and while serving in [the Reserves]." *Id.* at 3. In 2008, he submitted to a polygraph examination administered under the auspices of another Government agency. At first, he was not granted a clearance, but he lodged a successful appeal and still holds that clearance with his current employer. Applicant enjoys an excellent reputation for following "all of the rules." *Id.* at 4.

In Autumn of 2013, Applicant used marijuana twice in celebration of his birthday. He and his partner were in a foreign country where marijuana use was legal. Applicant has not used marijuana since. He is still with his partner, who has not used marijuana since late 2016. Applicant stated that he does not intend to use marijuana again. In Summer 2006, Applicant used ecstasy. At the time he was recoiling from the breakup of a five-year relationship, one that he had believed would last a lifetime. Applicant was not thinking about the status of his clearance at the time of this misconduct.

In his Answer to the SOR and in his hearing testimony, Applicant contended that at the time of his security-significant conduct he was under a misunderstanding about the status of his security clearance. He did not know that his clearance was still active. He had not worked in a classified environment or on a classified project for some time prior to his misconduct.

The Judge's Analysis

The Judge noted that the mitigating conditions set forth in the Directive must be evaluated in light of the facts of a particular case. With that in mind, he concluded that it "is incomprehensible to believe that Applicant did not know that he was eligible for access to classified information when he used ecstasy in 2006 and marijuana in 2013." He described Applicant as a "highly sophisticated person . . . a lawyer [and] Judge Advocate . . . and high-level civilian [employee] for a . . . contractor." The Judge stated as follows: "I find that Applicant knew his security clearance was active when he used the controlled substances in 2006 and 2013." *Id.* at 7. The Judge cited to evidence that Applicant's misconduct was voluntary and not under unusual circumstances. "These circumstances are not unusual and can easily happen again." *Id.* Accordingly, he concluded that there has not been an appropriate period of abstinence sufficient to show a change in lifestyle.

In the whole-person analysis, the Judge reiterated that “Applicant had to know that he was eligible for access to classified information and recall to active duty when he used controlled substances.” *Id.* at 9. Though he may not have been thinking about his clearance at the time of his misconduct, he was in fact eligible for access at the time. The Judge concluded that Applicant’s excellent reputation and professional attainments were not enough to outweigh the adverse significance of his drug misuse. The Judge noted that Applicant candidly disclosed his misconduct and, had he not done so, it would likely have gone undetected. However, he went on to note that the misconduct was in contravention of Federal law as well as military law and evidenced a lack of judgment.

Discussion

Applicant cites to the Judge’s characterization of him as highly sophisticated and “not your average Applicant for a security clearance.” Appeal Brief at 2. He argues that the Judge held him to a higher standard than is applied to other applicants.

The standard utilized in security clearance determinations is that set forth in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988): “[A] clearance may be granted only when ‘clearly consistent with the interests of the national security.’” *Accord*, Directive ¶E3.1.25. It is binding upon DOHA Judges, who have no authority to apply a different one. In addition, each case must be decided upon its own merits, and a Judge must consider all aspects of the evidence that bear upon the applicant’s eligibility for a clearance. Directive, Encl. 2, App. A ¶ 2(b); ISCR Case No. 04-00540 at 7 (App. Bd. Jan. 5, 2007).

In the case before us, the challenged comments were made as part of the Judge’s evaluation of Applicant’s claim not to have known that he was eligible for access to classified information when he used illegal drugs. In that light, it was perfectly reasonable to note Applicant’s background, experience, and sophistication, insofar as they present him as a person likely to have understood the true status of his clearance. The Judge also cited to Applicant’s experience and accolades as part of the whole-person analysis, which, again, was consistent with the requirements of the Directive. On the other hand, in his recitation of the policies required for clearance adjudications and in his statement of his ultimate conclusion, the Judge cited to the correct standard. We find no reason to conclude that his various references to Applicant’s estimable qualities mean that he failed to apply the standard mandated by *Egan* and by the Directive.

In a related issue, Applicant challenges some of the Judge’s findings, in particular that Applicant knew or “had to know” that he was eligible for a clearance at the time of his misconduct. We 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* ISCR Case No. 16-02402 at 2 (App. Bd. Aug. 16, 2017).

The evidence, viewed as a whole, is consistent with the challenged finding. For example, the Judge engaged in the following colloquy with Applicant:

[Judge]: [T]here’s a difference between having the eligibility and actually looking

at classified information.

[Applicant]: Yes, your honor.

[Judge]: You didn't—you probably did see it—

[Applicant]: No sir.

[Judge]: —but you knew that you could at any time be given classified information because you're eligible to—you were eligible for it?

[Applicant]: Yes, your honor . . .

[Judge]: What was the purpose for submitting that application . . . in December 2013 that the Government introduced? . . .

[Applicant] It's a periodic reinvestigation as . . . they instructed me.

[Judge] So as a periodic reinvestigation, did you realize that you still had access to classified information at that time?

[Applicant]: I had eligibility for access was clear to me at that time . . .

[Judge]: At the time you used in 2013, what was your thought process as, "Hey, can I do this, because I'm eligible for access to classified information?"

[Applicant] . . . I was not thinking of it. If I had, it wouldn't have occurred. Tr. at 59, 62-63

Given Applicant's testimony, his professional experience, his education, and his experience in completing clearance applications and in holding a clearance, the Judge's finding that Applicant knew or reasonably should have known that he was eligible for access to classified information is supportable.¹ The Judge's material findings of security concern are based upon substantial evidence or constitute reasonable inferences that could be drawn from the evidence. *See, e.g.*, ISCR Case No. 14-04724 at 3 (App. Bd. Aug. 18, 2017).

Applicant challenges the Judge's mitigation analysis, arguing, among other things, that it is contradictory. He notes that the Judge made extensive findings that were favorable to him, such as his excellent military and civilian work records and his reputation for following the rules, contending that these things should have led the Judge to issue a favorable decision. However, the presence of some mitigating evidence does not compel a favorable decision. The Judge must weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable or

¹Applicant also challenges the Judge's comment to the effect that the precipitating circumstances associated with his misconduct might occur again. He argues that this is speculative and supported by no evidence. However, we conclude that this was a reasonable inference from the evidence.

vice versa. *See, e.g.*, ISCR Case No. 15-08711 at 3 (App. Bd. Aug. 24, 2017). In this case, it was not contradictory for the Judge to note Applicant’s many positive qualities and achievements but to conclude that they were not enough to outweigh concerns arising from multiple uses of an illegal drug while holding a security clearance. Applicant’s argument is not enough to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *Id.*

The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. *See* ISCR Case No. 14-03450 at 3 (App. Bd. Sep. 11, 2015) (An applicant’s use of illegal drugs after having completed a security clearance application raises questions about his or her judgment, reliability, and willingness to comply with laws, rules, and regulations). The decision is sustainable on this record. *See* 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: Michael Ra'anan
Michael Ra'anan
Administrative Judge
Chairperson, 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