

KEYWORD: Guideline H; Guideline E

DIGEST: From our review of the record, we conclude the Judge’s material findings about Applicant ‘s 2014 cocaine use are based upon substantial evidence or constitute reasonable inferences or conclusions that could be drawn from the evidence. Adverse decision affirmed.

CASENO: 16-02005.a1

DATE: 06/02/2017

DATE: June 2, 2017

In Re: ----- Applicant for Security Clearance)))))))	ISCR Case No. 16-02005
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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 September 2, 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 March 8, 2017, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Jennifer I. Goldstein 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 erred in her findings of fact 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 and Analysis

Applicant is a 37-year-old employee of a Government contractor. He used cocaine infrequently from 1996 to 2014, helped a friend harvest marijuana in 2014, and used peyote in 2015 after submitting a security clearance application. At the time of his 2014 cocaine use, he was aware illegal drug use was in violation of his employer's policies, but he was between contracts at that time. He testified that he had no intent to use illegal substances again and signed a statement of intent to that effect. He is subject to random urinalysis tests. He no longer associates with known drug users. He provided a psychological evaluation. A substance abuse subtle screening inventory reflected he has "a low probability of having a substance dependence disorder." Decision at 3. His friends and coworkers hold him in high regard. Only two years passed since Applicant's use of a controlled substance. One month before his use of peyote, he explicitly stated, "I never intend on using a controlled substance again" on his security clearance application. The Judge could not find that future use is unlikely to occur without the passage of more time.

Discussion

Applicant contends that the Judge erred in her finding "regarding breaking employment policies, which could not have happened as [Applicant] was unemployed at the time of his drug use." Appeal Brief at 12. Applicant's security clearance application reflects that he was working for a company at the time of his 2014 cocaine use. At the hearing, Applicant testified about his employer's drug policy, but indicated that his employment contract had ended when he used cocaine in 2014. Tr. at 37-38. Of note, the Judge did not find that Applicant violated the employer's drug policy, but that he was aware of the policy and was in-between contracts when that cocaine use occurred. From our review of the record, we conclude the Judge's material findings about Applicant 2014 cocaine use are based upon substantial evidence or constitute reasonable inferences or conclusions that could be drawn from the evidence. *See, e.g.*, ISCR Case No. 12-03420 at 3 (App. Bd. Jul. 25, 2014).

Applicant argues that the Judge did not consider record evidence. However, he failed to rebut the presumption that the Judge considered all the evidence in the record. *See, e.g.*, ISCR Case No. 14-06093 at 3 (App. Bd. Dec. 4, 2015).

In his arguments, Applicant cites to, among other matters, the period that has elapsed since his last illegal drug use, his disassociation with known drug users, his favorable psychological evaluation, and his submission of a signed statement of intent to never use illegal drugs again. The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. A party's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR

Case No. 15-00650 at 2 (App. Bd. Jun. 27, 2016).

We give due consideration to the Hearing Office cases that Applicant cited, but they are not binding precedent on the Appeal Board, distinguishable from the present case, and of little persuasive value. *See, e.g.*, ISCR Case No. 14-03747 at 3 (App. Bd. Nov. 13, 2015). In this regard, we note an applicant's use of illegal drugs after having completed a security clearance application raises substantial questions about his or her judgment, reliability, and willingness to comply with laws, rules, and regulations. *See, e.g.*, ISCR Case No. 14-03450 at 3 (App. Bd. Sep. 11, 2015). Additionally, the Judge complied with the requirements of the Directive in her whole-person analysis by considering the totality of the evidence in reaching her decision.

Applicant has failed to identify any harmful error. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The decision is sustainable on the 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: 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