

KEYWORD: Guideline H; Guideline E

DIGEST: A party’s disagreement with a Judge’s weighing of the evidence is not enough to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. Adverse decision affirmed.

CASE NO: 15-02054.a1

DATE: 02/27/2017

DATE: February 27, 2017

In Re: ----- Applicant for Security Clearance)))))))	ISCR Case No. 15-02054
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Archibald J. Thomas, III, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 10, 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). Applicant requested a hearing. On November 30, 2016, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert Robinson Gales 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 31-year-old employee of a defense contractor. He characterized his use of marijuana from 2004 to 2009 as “a few times on random occasions.” Decision at 3. When he completed his security clearance application in August 2012, he explained that he did not plan to use marijuana because it is against his religious beliefs and illegal, and he did not want to jeopardize his career opportunity. He was granted a security clearance in November 2012.

In mid-March 2014, Applicant smoked marijuana at a friend's residence. Later that month, he tested positive for marijuana during a random drug test. He was immediately placed on medical leave and referred to the employee assistance program (EAP), which he successfully completed. He has not been evaluated or diagnosed for substance abuse or dependence. In May 2014, he returned to work. He denies having any continuous relationships with individuals with whom he used marijuana in the past. He denied using marijuana since he completed his treatment program. He attributed his most recent “isolated” use of marijuana as a lapse in judgment and a huge mistake. Decision at 4.

Applicant's most recent performance appraisal notes he meets or exceeds expectations. He has received a spot award and several salary increases. His manager supports his retention of a security clearance.

The Judge's Analysis

The Judge concluded that disqualifying conditions 25(a) “any drug abuse;” 25(b) “testing positive for illegal drug use;” 25(g) “any illegal drug use after being granted a security clearance;” and 16(e) “. . . conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing . . .” were established. There was nothing unusual about Applicant's marijuana use since it occurred in social settings. While he received therapy from a licensed clinical social worker, there is no evidence that he received “medical treatment” related to substance abuse. When he completed his security clearance application in August 2012, he explained he did not plan to use marijuana in the future for several reasons and was later granted a security clearance. Nothing changed between August 2012 and his last use of marijuana in March 2014. He again claims that he is no longer associating with drug-using individuals, he no longer goes to places where marijuana is used, and that he has abstained. In light of his positive test result in March 2014, his “demonstrated intent not to abuse any drugs in the future” is given less weight than it would have received without that positive test. Decision at 8. He never submitted a signed statement of intent with automatic revocation of clearance for any future violation. His marijuana use may recur and such uncertainty continues to cast doubt on his reliability, trustworthiness, and good judgment.

Discussion

Applicant stated that he agrees with the Judge's findings of fact,¹ but disagrees with his analysis of the adjudicative guidelines, particularly the mitigating conditions. In support of his arguments, he cites to his contributions at work, his self-reporting of his earlier marijuana use, his limited use of marijuana, his successful completion of a drug treatment program, and his abstinence from marijuana use since March 2014. He argues for full application of certain mitigating conditions that the Judge either discounted or determined only partially applied. His arguments amount to a disagreement with the Judge's weighing of the evidence. 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. 14-06440 at 4 (App. Bd. Jan. 8, 2016).

Applicant has not identified any harmful error likely to change the outcome of the case. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. "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." The decision is sustainable on this record.

¹ Applicant did, however, note that the Judge's statement that Applicant ceased his marijuana use one and one-half years ago was wrong, indicating the period was actually two and one-half years ago. Appeal Brief at 4.

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: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board