

KEYWORD: Guideline H; Guideline J

DIGEST: The Appeal Board had long held that presence of some mitigating evidence does not alone compel the Judge to make a favorable trustworthiness 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. Adverse decision affirmed.

CASE NO: 15-04418.a1

DATE: 01/30/2018

DATE: January 30, 2018

In Re:)	
)	
-----)	ADP Case No. 15-04418
)	
Applicant for Public Trust Position)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Timothy W. Barbrow, Esq.

The Department of Defense (DoD) declined to grant Applicant a trustworthiness designation. On September 12, 2016, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—trustworthiness concerns raised under Guideline H (Drug Involvement and Substance Abuse) and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6

(Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On October 26, 2017, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Edward W. Loughran denied Applicant's request for a trustworthiness designation. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge's decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant, who is 62 years old, has a history of drug abuse. He regularly smoked marijuana between 1990 and 2006. He and friends shared marijuana that was grown adjacent to Applicant's property. In 2006, the police discovered marijuana in the car of one of Applicant's friends. The friend told the police that he received the marijuana from Applicant. The police went to Applicant's home with a search warrant and discovered a gallon zip lock bag full of marijuana. Applicant also admitted to the police that he had OxyContin, a controlled substance, that his mother provided him for back pain. He was charged with possession with the intent to distribute, possession of a controlled substance, and obstruction of justice. In 2007, he pled guilty to the two drug charges, which were both felonies, and the obstruction of justice charge was dismissed. As part of a plea agreement, his car, truck, boat, and two motorcycles were forfeited. He was sentenced to two years of incarceration for one charge and three years for the other, all of which was suspended for five years. His driver's license was suspended for six months for each charge.

Applicant received substance abuse counseling and successfully completed the terms of his suspended sentence. After completing his suspended sentence, he smoked marijuana on at least one occasion in about 2012. He stated he has not used any illegal drugs since then. He no longer associates with the friends with whom he smoked marijuana.

The Judge's Analysis

The Judge found in favor of Applicant on an SOR allegation that he used a certain prescription drug in 2011. He also found for Applicant on the allegation that he used OxyContin in 2006. Even though Applicant admitted to such use of OxyContin, the Judge noted that his use of that drug was not for recreational purposes and occurred more than ten years ago.

Applicant was convicted of felony drug offenses more than ten years ago. He promised to refrain from illegal drug use; however, he smoked marijuana again on at least one occasion in about 2012. Although Applicant appears to be sincere, the evidence was insufficient to mitigate his well-established pattern of illegal drug use and his possession with the intent to distribute a controlled substance. The Judge indicated that he was unable to determine that Applicant's illegal drug involvement is unlikely to recur.

Discussion

Applicant contends the Judge erred in concluding that his criminal activity was disqualifying. He argues that his conviction for the drug offenses in 2006 and his use of marijuana on one occasion

nearly six years later was insufficient to support the Judge’s finding that his criminal conduct is disqualifying. This argument is not persuasive.¹ We find no error in the Judge’s application of disqualifying condition 31(b), which states, “evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted[.]”² The Judge appropriately considered all of the record evidence that established the pertinent Guideline J allegations, including Applicant’s illegal use of marijuana spanning from approximately 1990 to 2012, his cultivation of marijuana from approximately 2002 to 2006, and his conviction for possession of a controlled substance with the intent to distribute. The record evidence was sufficient to support the Judge’s finding that disqualifying condition 31(b) applied.

Applicant contends that Judge erred in applying the mitigating conditions and in his whole-person analysis. Noting that the Judge mitigated his use of OxyContin in 2006, Applicant argues that his marijuana involvement should also be mitigated because he only used that substance once since 2006 and such an isolated recurrence does not support the Judge’s finding that he is unable to determine that Applicant’s illegal drug involvement is unlikely to recur. In his arguments, Applicant also highlights that he has not used marijuana in the past five years, that he self-reported his use of marijuana in 2012, that he no longer has contact with drug-using individuals, and that he has promised to not use illegal drugs in the future. The Appeal Board had long held that presence of some mitigating evidence does not alone compel the Judge to make a favorable trustworthiness 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.*, ADP Case No. 16-01251 at 2 (App. Bd. Jun. 7, 2017). We find no error in the Judge’s mitigation and whole-person analysis, particularly considering that Applicant’s history of drug involvement and his use of marijuana in about 2012 after receiving substance abuse counseling and completing his criminal sentence.

The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The decision is sustainable on this record. The standard applicable to trustworthiness cases is that set forth in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) regarding security clearances: such a determination “. . . may be granted only when ‘clearly consistent with the interests of the national security.’” *See e.g.*, ADP Case No. 16-01251, *supra*, at 2. *See also Kaplan v. Conyers*, 733 F.3d 1148 (Fed. Cir. 2013), *cert. denied*.

Order

¹ We note the length of time that has elapsed since an offense was committed is a factor to be considered in the application of the Guideline J mitigating conditions, but it is not listed as a factor to consider in the application of the disqualifying conditions.

² Directive, Encl 2, App A ¶ 31(b).

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