

KEYWORD: Guideline H; Guideline E

DIGEST: Applicant argues that the Judge erred in evaluating his candor, character, and integrity, which we construe as a challenge the Judge’s comments about the credibility of Applicant’s case for mitigation. Applicant contends that the Judge drew the wrong conclusions from his interrogatory answer that his last use of drugs was in 2006, which Applicant admits is not true. Part of a Judge’s job is to make credibility determinations, and we give deference to them. Adverse decision affirmed.

CASENO: 15-05229.a1

DATE: 01/31/2018

DATE: January 31, 2018

In Re:))	
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-----))	ISCR Case No. 15-05229
))	
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 March 4, 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 decision on the written record. On October 17, 2017, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Eric H. Borgstrom 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’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 been employed by a Defense contractor since 2008. During that year, he was investigated for a security clearance and disclosed prior use of illegal drugs. He stated that he had no intention for future drug use. Applicant was granted a security clearance. In 2013, Applicant submitted an updated security clearance application in which he admitted to multiple uses of marijuana from 1998 until 2012. He confirmed his understanding of the consequences of illegal drug use, including a negative impact to his professional standing. However, in an answer to DOHA interrogatories, Applicant stated that his last use of illegal drugs was in 2006.

Applicant’s response to the SOR neither admitted nor denied the specific allegations. He did admit that he had exhibited poor judgement by using marijuana. His SOR response included numerous assertions about his work performance but he did not submit independent evidence on this matter. Applicant responded to the File of Relevant Material (FORM), in which he stated that he had used marijuana on a few occasions during the five years that followed his December 2007 college graduation. He stated that his last use was November 2012.

The Judge’s Analysis

The Judge acknowledged that there is no absolute rule as to whether drug use is recent. That determination must be made in regard to the totality of the evidence. He stated that Applicant’s admitted instances of drug use spanned fourteen years, continuing until late 2012. Applicant presented no evidence about the underlying circumstances or evidence that would show that he has rehabilitated himself. Accordingly, the Judge found that the five years that had intervened between Applicant’s last use of marijuana and the close of the record were not sufficient to show that his security-significant conduct was behind him. The Judge noted that Applicant had submitted a signed statement of intent not to use drugs in the future. However, he concluded that Applicant’s failure to keep a prior such promise made during his previous investigation vitiated the mitigating force of this evidence. He concluded that Applicant’s use of marijuana while holding a clearance

demonstrated poor judgment, and he found no evidence to show that Applicant disclosed his more recent drug use to his employer. He also stated that Applicant was not “forthright” in his interrogatory answer. Decision at 8.

Discussion

Applicant challenges some of the Judge’s findings. For example, he states that he admitted his drug use in his SOR response, contrary to the Judge’s finding that he had neither admitted nor denied the allegations. He also contends that he did not say that drug use would have a negative impact on his career. Rather, he argues that he stated that his few uses of marijuana should not impair his clearance. Regarding the first challenge, the Judge was merely acknowledging that Applicant had not explicitly admitted or denied each of the SOR allegations, which is correct. *See* Directive ¶ E3.1.4 (“The applicant must submit a detailed written answer to the SOR that shall admit or deny each listed allegation”). We find nothing to persuade us that the Judge held Applicant’s apparent failure to comply with this procedural requirement against him. The other finding is consistent with Applicant’s answers during his clearance interview and his comments submitted in response to the SOR and to the FORM. The Judge’s findings of fact are based upon substantial evidence or constitute reasonable inferences that could be drawn from the evidence. Applicant has cited to no harmful error in the Judge’s findings. *See, e.g.*, ISCR Case No. 14-04724 at 3 (App. Bd. Aug. 18, 2017).

Applicant argues that the Judge erred in evaluating his candor, character, and integrity, which we construe as a challenge the Judge’s comments about the credibility of Applicant’s case for mitigation. Applicant contends that the Judge drew the wrong conclusions from his interrogatory answer that his last use of drugs was in 2006, which Applicant admits is not true. Part of a Judge’s job is to make credibility determinations, and we give deference to them. Directive ¶ E3.1.32.1. In this case, given the relative paucity of mitigating evidence, we find no reason to disturb the Judge’s conclusion that Applicant’s false answer impugned his candor. The balance of Applicant’s brief is a challenge to the Judge’s weighing of the evidence. Considering Applicant’s brief as a whole, we note that an ability to argue for an alternative reading 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.¹ *See, e.g.*, 15-07062 at 2 (App. Bd. Nov. 21, 2017).

The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. Illegal drug use while holding a clearance “raises significant questions about [an applicant’s] willingness to abide by rules and regulations.” ISCR Case No. 15-03924 at 3 (App. Bd. Jun. 16, 2017). 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 ¶

¹Applicant also contends that Department Counsel’s arguments in the FORM are erroneous. However, arguments by parties are not evidence. *See, e.g.*, ISCR Case No. 14-02290 at 3 (App. Bd. Jan. 30, 2017). We find nothing in the Decision that would suggest that the Judge extended evidentiary significance to Department Counsel’s arguments or that he was unduly influenced by them.

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: Charles C. Hale
Charles C. Hale
Administrative Judge
Member, Appeal Board