

KEYWORD: Guideline E; Guideline H; Guideline J

DIGEST: A Judge may weigh the same evidence differently under different guidelines. In the case before us, the Judge’s analysis under Guideline E devoted particular attention to Applicant’s drug use while holding a clearance. This was reasonable, in view of the inclusion under Guideline E of conduct that evidences questionable judgment. Applicant has not shown that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. Neither has he rebutted the presumption that the Judge considered all of the evidence in the record. Adverse decision affirmed.

CASENO: 16-02483.a1

DATE: 06/11/2018

DATE: June 11, 2018

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In Re:)	
-----)	ISCR Case No. 16-02483
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Victoria Williamson, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On September 9, 2016, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline H (Drug Involvement), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On March 19, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Arthur E. Marshall, Jr. 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. The Judge’s favorable findings under Guidelines H and J are not at issue in this appeal. Consistent with the following, we affirm.

The Judge’s Findings of Fact and Analysis

Applicant, who is 27 years old, first received a security clearance in 2013. In 2014, he and his fiancée broke off their engagement. Applicant began associating with friends he had met at a local bar. In May 2014, he noticed one of them smoking marijuana, and he joined in despite knowing that such conduct was not consistent with holding a clearance. He used the drug at least three times more. Applicant no longer associates with his friends who use marijuana, and he does not intend to use it in the future. Applicant enjoys a good reputation for his character.

Applicant’s drug use was alleged under all three Guidelines. Though resolving two in Applicant’s favor, the Judge concluded that he had not mitigated the concerns under Guideline E. He cited to evidence that Applicant used marijuana while holding a clearance and while knowing that such use was not consistent with the requirements for holding a clearance. He stated that Applicant’s excuses—loneliness after a breakup, intoxication, etc—were not unique nor sufficient to justify a clearance. The Judge acknowledged that Applicant has been abstinent for four years. However, he found Applicant’s drug use while holding a clearance to be aggravating and “a grievous breach of trust.” Decision at 8. He stated that more time is required for Applicant to show that his security-significant conduct is behind him.

Discussion

Applicant challenges the Judge’s mitigation analysis. He notes in particular what he views to be an inconsistency in the decision, the different result under Guideline E from the other two guidelines. He argues that the circumstances that justified favorable findings under Guidelines H and J should apply with equal force to Guideline E. He also cites to his breakup with his fiancée, his four years without re-offense, and other favorable evidence.

A Judge may weigh the same evidence differently under different guidelines. *See, e.g.*, ISCR Case No. 14-00715 at 3 (App. Bd. Dec. 10, 2014). In the case before us, the Judge’s analysis under Guideline E devoted particular attention to Applicant’s drug use while holding a clearance. This was reasonable, in view of the inclusion under Guideline E of conduct that evidences questionable

judgment. *See* Directive, Encl. 2, App. A ¶ 15. *See also* ISCR Case No. 13-01281 at 4 (App. Bd. Aug. 4, 2014), in which the Judge evaluated drug use differently under Guidelines H and E. In the case before us, Applicant has not shown that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. Neither has he rebutted the presumption that the Judge considered all of the evidence in the record. *See, e.g.*, ISCR Case No. 16-01077 at 2-3 (App. Bd. Apr. 25, 2018).

The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision, regarding both the mitigating conditions and the whole-person factors. 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 ¶ 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