

KEYWORD: Guideline E; Guideline H

DIGEST: A person who broke a promise to abide by drug laws after having been placed on notice that drug use is not compatible with access to classified information has not demonstrated the quantum of reliability expected of those with access to classified information. Accordingly, we find persuasive Department Counsel’s argument that the Judge’s decision appears to substitute a favorable impression of Applicants demeanor for record evidence. Under the facts of this case, the Judge’s favorable decision offers an explanation for its conclusions that runs contrary to the weight of the evidence and is not sustainable. Favorable decision reversed.

CASENO: 16-03460.a1

DATE: 05/24/2018

DATE: May 24, 2018

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In Re:)	
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-----)	ISCR Case No. 16-03460
)	
Applicant for Security Clearance)	
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Julie R. Mendez, Deputy Chief Department Counsel

FOR APPLICANT

Jesse Winograd, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On January 7, 2017, 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 January 25, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Erin C. Hogan granted Applicant’s request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: whether the Judge’s mitigation analysis under Guidelines H and E was unsupported by the record when viewed as a whole and whether the Judge’s whole-person analysis was erroneous. Consistent with the following, we reverse.

The Judge’s Findings of Fact

Applicant works for a DoD contractor. This is his first application for a security clearance. In March 2015, Applicant submitted a security clearance application (SCA). In it, he disclosed that he used and purchased marijuana from mid-1994 until early 2015. He stated the following: “I do not intend to use marijuana in the future. I understand the importance of refraining from using marijuana with my new position, and I do not want to jeopardize my security clearance by continuing to use marijuana.” Decision at 2.

However, in the summer of 2015, Applicant resumed using marijuana, sometimes after getting home from work, and on other occasions with friends and relatives. In mid-2016, Applicant completed a security questionnaire for his employer. He disclosed his resumption of marijuana use. When queried, he stated that he had intended to refrain from such use after completing his SCA but resumed anyway. “He was not aware that he was prohibited from using marijuana while his [SCA] was being processed.” *Id.* Applicant admits that he used poor judgment when he resumed using marijuana after having submitted his SCA. “Once he discovered his mistake, Applicant stopped using marijuana and has not used marijuana since [mid-]2016.” *Id.*

Applicant began using marijuana when he was 17, and his use continued through college and professional school. He would sometimes go for periods of time without using it but on other occasions might use it daily. Applicant understood that his marijuana use was illegal, though he did not believe that it was a serious crime. He submitted a statement of intent to refrain from marijuana use in the future with the understanding that his clearance can be revoked if he re-offends.

Analysis

Though acknowledging that Applicant should have stopped using marijuana long before he actually did, the Judge stated that Applicant lives in a jurisdiction with permissive drug laws. She cited to his statement of intent not to use marijuana in the future and cited to evidence that Applicant is focused on supporting his family. In examining Applicant’s marijuana use under Guideline E, the Judge commented that Applicant was honest in his disclosure of his security significant conduct and that he stopped using it “once he understood that his marijuana use was an issue.” *Id.* at 7.

In the whole-person analysis, the Judge stated that this is Applicant's first time to seek a clearance and that he did not at first realize the seriousness of marijuana use. However, once he understood that seriousness, he stopped using it. She cited to his need to support his family and to evidence that Applicant's job performance is excellent.

Discussion

There is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). The applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate admitted or proven facts. The applicant has the burden of persuasion as to obtaining a favorable decision. Directive ¶ E3.1.15. The standard applicable in security clearance decisions "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). "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." Directive, Encl. 2, App. A ¶ 2(b).

In deciding whether the Judge's rulings or conclusions are erroneous, we will review the decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See ISCR Case No. 14-02563 at 3-4 (App. Bd. Aug. 28, 2015)*.

Department Counsel argues that the Judge's favorable findings under Guideline H are not supported by the weight of the record evidence. She cites to evidence that she contends undermines the Judge's conclusion. We find Department Counsel's argument to be persuasive. The concern under Guideline H is that the

illegal use of controlled substances . . . can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. Directive, Encl. 2, App. A ¶ 24.

An applicant's use of illegal drugs after having completed a security clearance application raises 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)*.

In the case before us, the Judge's favorable conclusions rested in large measure upon Guideline H mitigating condition 26(b):

[T]he individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to: . . . (3) providing a signed

statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.¹

The principal evidence in support of this mitigating condition is Applicant's contention that he has come to realize the importance of abstaining from marijuana use and his signed statement of intent. While these things are matters that the Judge was required to consider, along with all the other evidence in the record, the Judge's analysis does not address why she finds his recent promise to refrain to be conclusive, despite a similar promise in the SCA which he broke soon after submitting the document. That is, in 2015, Applicant stated in his SCA that he understood the importance of not using marijuana and that such misconduct could imperil his clearance. Nevertheless, his abstinence did not last more than a few months, insofar as he resumed marijuana use. The next year he disclosed his subsequent use and again promised not to use marijuana again. There is nothing in the Judge's decision to demonstrate why this second realization is sufficiently credible to mitigate the concerns in Applicant's case. There is no evidence of any event or circumstance that would render Applicant's recent assurance of abstinence credible or that would explain why, this time, he is serious about complying with the law and his stated commitment. The Judge's comment that Applicant did not realize that marijuana use was prohibited pending the adjudication of his clearance suggests that his security concerns resulted from an honest mistake. However, this comment misstates Federal law. Marijuana use is prohibited before, during, and after a clearance has been brought to a decision. Indeed, it is prohibited without reference to clearance adjudications, and there is no reason to believe that Applicant, who is a lawyer, was unaware of this, any more than he would have been unaware that other criminal acts are forbidden at all times.

Department Counsel cites to Applicant's testimony that appears to minimize the seriousness of marijuana use: "I have issues with . . . the legal regime and I have personal beliefs about the enforcement of marijuana laws generally and I probably, you know, never took it that seriously[.]" Tr. At 48. When asked about his future intentions, Applicant replied, "I'd say the requirements of possessing a security clearance, both my professional aspirations and goals, greatly outweigh my personal views. I'll still hold those personal views but I don't think I will act upon them as I guess I have in the past." Tr. 50.

Department Counsel emphasizes Applicant's use of the phrase "I don't think," is a word choice that could reasonably appear to be something of an equivocation. Without question, a security clearance decision is not an effort to compel an applicant to refrain from the use of illegal drugs. There are other laws directed toward that end. A clearance adjudication is aimed at determining if an applicant has the requisite judgment and reliability to abide by rules designed to protect classified information. Applicant's own doubt that he will abide by drug laws is enough to doubt his compliance with them. It follows that there is doubt as to whether he will follow the regulatory requirements for handling classified information, which might, in the event, appear burdensome. Access to national secrets entails a fiduciary duty to the U.S. A person who enters into such a fiduciary relationship is charged with abiding by legal and regulatory guidance regardless of whether he or she believes that guidance to be wise.

¹Directive, Encl. 2, App. A ¶ 26(b).

A person who broke a promise to abide by drug laws after having been placed on notice that drug use is not compatible with access to classified information has not demonstrated the quantum of reliability expected of those with access to classified information. Accordingly, we find persuasive Department Counsel's argument that the Judge's decision appears to substitute a favorable impression of Applicants demeanor for record evidence. *See, e.g.*, ISCR Case No. 15-05565 at 4-5 (App. Bd. Aug. 2, 2017). Under the facts of this case, the Judge's favorable decision offers an explanation for its conclusions that runs contrary to the weight of the evidence and is not sustainable. In light of this, we do not need to address Department Counsel's challenge to the Judge's analysis of the Guideline E concerns.

Order

The Decision is **REVERSED**.

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