

KEYWORD: Guideline E; Guideline H; Guideline J

DIGEST: Applicant states that he does not remember receiving Department Counsel’s File of Relevant Material (FORM) and, if he had received it, he would have responded to it. The record reflects that a copy of the FORM was mailed to Applicant on April 11, 2017, and he signed a receipt for it on April 16, 2017. He was given 30 days from receipt of the FORM to file objections and submit additional matters. In a document dated June 12, 2017, this case was forwarded for assignment of a Judge and noted Applicant did not submit a response to the FORM. From our review of the record, Applicant was not denied any due process rights. Adverse decision affirmed.

CASENO: 16-03639.a1

DATE: 08/28/2018

DATE: August 28, 2018

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| In Re: |) | |
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| ----- |) | ISCR Case No. 16-03639 |
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| 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 February 2, 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 Substance Misuse), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On June 1, 2018, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Nichole L. Noel 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 36-year-old employee of a Federal contractor. After disclosing in a security clearance application (SCA) that he used marijuana monthly from 1998 to 2001, he was granted a security clearance in 2006. In 2016, he completed another SCA in which he disclosed that he was arrested for leaving the scene of an accident after consuming alcohol in February 2016 and was arrested for driving under the influence of alcohol (DUI) in March 2016. As a result of those arrests, he was convicted of leaving the scene of the accident and of a reduced charge of failure to submit to alcohol testing. In the later SCA, he also disclosed using marijuana monthly from 1997 to 2007 and then occasionally until 2014.¹ He decided to stop using marijuana because of the ages of his children. He acknowledges that his 2006 SCA may have inaccurate information about his drug use, but those inaccuracies were not done deliberately and were based on his best recollection when completing the SCA.

The Judge’s Analysis

Applicant’s 17-year history of drug use is disqualifying. While his last reported use of marijuana occurred two years ago, the passage of time does not mitigate such conduct. He has not submitted a signed statement of intent. “Given his pattern of disregard of federal law and his responsibilities as a clearance holder, Applicant’s promises to abstain from future marijuana use carry little weight.” Decision at 4.

Applicant was convicted of two alcohol-related crimes in 2016. When considered in combination with his illegal drug use, he has demonstrated a pattern of poor judgment. He has shown a disregard for the law and has not presented sufficient evidence of rehabilitation.

Applicant’s 2006 and 2016 SCAs contain inconsistencies about his marijuana use for the period covered in both applications. His claim that his disclosures in his 2006 SCA were his best

¹ In the decision, the Judge noted that Applicant listed the date “1007” instead of “2007” in his 2016 SCA and acknowledged that typographical error in a subsequent background interview. Decision at 2, n.5, citing Government Exhibit 4.

recollection at the time is not credible. It is unlikely his memory improved over time. His 2006 disclosures were not due to an inaccurate memory, but were intentional and material misstatements.

Discussion

Applicant challenges the Judge's adverse falsification findings. He states that there were extended periods when he did not use marijuana, and he tried to be as transparent as possible. The Judge's findings about the inconsistencies in Applicant's disclosures of his marijuana use in his 2006 and 2016 SCAs are supported by substantial evidence, that is, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." Directive ¶ E3.1.32.1. *See also* ISCR Case No. 16-04094 at 2 (App. Bd. Apr. 20, 2018). In her analysis, the Judge logically concluded that Applicant's more extensive disclosure in his later SCA of his marijuana use during the overlapping period was evidence that he intentionally falsified the earlier SCA. The Judge's adverse falsification findings are sustainable.

In his appeal brief, Applicant states that he does not remember receiving Department Counsel's File of Relevant Material (FORM) and, if he had received it, he would have responded to it. The record reflects that a copy of the FORM was mailed to Applicant on April 11, 2017, and he signed a receipt for it on April 16, 2017. He was given 30 days from receipt of the FORM to file objections and submit additional matters. In a document dated June 12, 2017, this case was forwarded for assignment of a Judge and noted Applicant did not submit a response to the FORM. From our review of the record, Applicant was not denied any due process rights provided in Directive ¶ E3.1.7.

Applicant also indicated that he did not know that he had the option of submitting a statement of intent to abstain from future drug use.² In her decision, the Judge noted that Applicant was provided a complete copy of the Directive when the FORM was submitted to him. Although *pro se* applicants cannot be expected to act like lawyers, they are expected to take timely, reasonable steps to protect their rights under the Directive. *See, e.g.*, ISCR Case No. 12-02371 at 3 (App. Bd. Jun. 30, 2014).

Applicant further argues, among other matters, that he has not used drugs in over four years, that he has no desire to do so in the future, that he is ashamed of his conduct, and that he has been open and honest about these matters. These arguments amount to a disagreement with the Judge's weighing of the evidence and are not sufficient to show that the Judge weighed the evidence 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 also requests that we contact his character references. The

² Directive, Encl. 2, App A ¶ 26(b) states: "the 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: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; and (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[.]"

Appeal Board, however, has no authority to interview witnesses, conduct investigations, or make findings of fact. *See, e.g.*, ISCR Case No. 16-03072 at 2 (App. Bd. Mar. 7, 2018).

Applicant has failed to establish that the Judge committed any harmful error. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. 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: Charles C. Hale
Charles C. Hale
Administrative Judge
Member, Appeal Board

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