

KEYWORD: Guideline H

DIGEST: Applicant argues the Judge did not apply all of the mitigating conditions and whole-person factors. However, he failed to identify any specific condition or factor that the Judge did not consider or apply. This assignment of error fails for lack of specificity. An applicant must set forth an assignment of error with sufficient specificity to permit review on appeal. Adverse decision affirmed.

CASENO: 17-00599.a1

DATE: 04/24/2018

DATE: April 24, 2018

_____)	
In Re:)	
)	
-----)	ISCR Case No. 17-00599
)	
)	
Applicant for Security Clearance)	
_____)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Ryan C. Nerney, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On April 3, 2017, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that

decision–security concerns raised under Guideline H of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On January 31, 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 issues on appeal: whether the Judge erred in his findings of fact and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The SOR alleged that Applicant used different illegal drugs with varying frequency over certain periods, *i.e.*, marijuana from 2002 to 2015; ecstasy and cocaine from 2009 to 2015; LSD from 2009 to 2013; and psilocybin mushrooms from 2008 to 2013. It also alleged that he purchased those drugs during certain periods. In his Answer to the SOR, Applicant admitted each of the SOR allegations with an explanation.

In concluding that Applicant failed to mitigate the alleged security concerns, the Judge emphasized two factors. The first factor involved the nature and recency of Applicant’s drug involvement. Although Applicant has been drug-free since October 2015, he used an assortment of drugs over a decade and acquired some of those substances over the “dark web.” Under these circumstances, the Judge concluded that less than three years of abstinence was insufficient to demonstrate a firm commitment to being drug-free. The second factor involved Applicant’s continued socialization with individuals with whom he once used illegal drugs. Although these encounters are now limited due to him moving to a new location, he failed to extricate himself from these individuals when they used controlled substances in his presence. “Such circumstances not only present temptation, but, more importantly, demonstrate poor judgment.” Decision at 6.

The Judge found that Applicant’s employer has a policy against on-duty and off-duty drug use, conducts random drug tests, and Applicant was subject only once to drug testing when he initially applied for his job. In the appeal brief, Applicant claimed “the record evidence shows that the Administrative Judge made presumptions about the drug policy at [his] place of work, without evidence to support this assumption.” Appeal Brief at 2. At the hearing, Applicant testified as follows:

[Department Counsel]: Does [your employer] have a drug policy?

[Applicant]: Yes, sir.

[Department Counsel]: What is it?

[Applicant]: That - - I shall abstain from all illegal drugs. I don’t --.

[Department Counsel]: Both on and off duty, in other words --?

[Applicant]: Yes, sir.

[Department Counsel]: Okay.

[Applicant]: At all times.

[Department Counsel]: Did they -- do they drug test?

[Applicant]: They drug tested me when I applied for the job and was initially accepted, but I haven't been tested subsequent to that although I know it is policy that I can be tested at any time.¹

The Judge's findings about the employer's drug policy and drug testing are based upon substantial evidence or constitute reasonable inferences or conclusions that could be drawn from the evidence. *See, e.g.*, ISCR Case No. 12-03420 at 3 (App. Bd. Jul. 25, 2014).

Applicant argues the Judge did not apply all of the mitigating conditions and whole-person factors. However, he failed to identify any specific condition or factor that the Judge did not consider or apply.² This assignment of error fails for lack of specificity. *See, e.g.*, ISCR Case No. ISCR Case No. 14-05920 at 3 (App. Bd. Jan. 8, 2016) for the proposition that an applicant must set forth an assignment of error with sufficient specificity to permit review on appeal.

Applicant also contends the Judge did not consider all of the evidence in the record and misweighed the evidence. He argues he mitigated the alleged security concerns. In his arguments, he emphasizes that the amount of time that has passed since he last used illegal drugs, his voluntary reporting of his drug involvement, his signed statement of intent, and his actions to avoid illegal drugs. The Judge, however, made findings about those matters. Applicant's arguments are neither enough to rebut the presumption that the Judge considered all of the evidence in the record nor sufficient to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 15-01717 at 4 (App. Bd. Jul. 3, 2017). We give due consideration to the Hearing Office cases that Applicant has cited, but they are neither binding precedent on the Appeal Board nor sufficient to undermine the Judge's decision. *Id.* Additionally, we find no basis for concluding the Judge erred in his whole-person analysis.

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."

¹ Tr. at 26.

² In the decision, the Judge specifically addressed the two mitigating conditions (Directive, Encl. 2, App. A ¶ 26(a) and 26(b)) that Applicant raised in his appeal brief.

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