KEYWORD: Guideline H; Guideline E

DIGEST: The Record evidence supports the Judge's finding that Applicant knowingly falsified his 2000 security clearance application. Adverse decision affirmed.

CASENO: 05-03948.a1

DATE: 05/21/2007

DATE: May 21, 2007

In Re:	)	
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SSN: -------	)	
	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Philip D. Cave, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 22, 2005, DOHA issued a statement of reasons 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 October 23, 2006, after the hearing, Administrative

Judge John Grattan Metz, Jr. denied Applicant's request for a security clearance. Applicant submitted a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant submits the following issues on appeal: whether the Judge properly evaluated the available mitigating factors; whether the Judge properly applied the whole person concept; and whether the Judge's adverse clearance decision is arbitrary, capricious, or contrary to law. Finding no error, we affirm.

Whether the Record Supports the Administrative Judge's Factual Findings

A. Facts

Applicant first applied for a security clearance in 2000. In completing the application, he denied that he had used drugs, deliberately concealing his use of marijuana between January 1997 and May 2000. In early 2002, he executed another application, for a higher level clearance. The answers on this form were identical to those supplied in 2000, including the denial of wrongful drug use. Applicant asserted that he was not aware that he had been proposed for a higher clearance, denying that it was he who had completed the 2002 security clearance application. The Judge concluded that "[t]his statement is incredible because Applicant signed the application and because he was interviewed by an investigator from the Defense Security Service (DSS) in 2003, as part of the investigation for a higher clearance. He variously claimed that he must have signed the second application without reviewing it." Decision at 2 (internal citation omitted).

During this interview in 2003, he did not inform the investigator of his drug history. However, in 2004 he was nominated by his employer for special access to work on contracts for a non-DoD client. In September 2004, he completed a third application and on this one he disclosed his marijuana use. In response to Question 27, he admitted that he had used marijuana 15 times between January 1997 and May 2004. In response to Question 28, he stated that he had used marijuana 7 times between April and August 2004. Concerning the latter period of use, Applicant advised that he had been on a leave of absence from his employer at the time, hiking the Appalachian Trail and had used marijuana in the company of other hikers.

Applicant stated that he finally reported his drug use because "he now understood the importance of the drug questions and wanted to make a clean breast of things." Decision at 3 (internal citation omitted). Applicant denied that he disclosed his drug use only because he knew he was facing a polygraph as part of the 2004 application, although the Judge found that this denial is contradicted by Applicant's own evidence and by the testimony of a company investigator.

B. Discussion

The Appeal Board's review of the Judge's findings of fact is limited to determining if they are supported by substantial evidence–such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record." Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S.

607, 620-21 (1966). In evaluating the Judge's findings, we are required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

Applicant has not explicitly challenged the Judge's findings. However, Applicant's appeal brief denies that he deliberately falsified his application forms, implying a challenge to the Judge's contrary findings. We will address this issue in our discussion below.

Whether the Record Supports the Judge's Ultimate Conclusions

A Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision, "including a 'rational connection between the facts found and the choices made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(quoting *Burlington Truck Lines, Inc. V. United States*, 371 U.S. 156, 168 (1962)). "The general standard is that a clearance may be granted only when 'clearly consistent with the interests of national security.'" *Department of the Navy v. Egan*, 484 U.S. 581, 528 (1988). The Appeal Board may reverse the Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶¶ E3.1.32.3 and E3.1.33.3.

"The application of disqualifying and mitigating conditions and whole person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole." *See* ISCR Case No. 05-03635 at 3 (App. Bd. Dec. 20, 2006). As stated above, Applicant contends that it is error for the Judge to have found his false answers to be deliberate. However, the record evidence supports the Judge's findings that Applicant knowingly falsified his 2000 application. The record also supports the Judge's conclusion that Applicant had knowingly falsified his 2002 application. The Judge could reasonably conclude that Applicant's explanations (that he was not aware that the application had been submitted or that he signed it without verifying its contents) were implausible. Applicant's credibility was further diminished by his efforts to explain his decision finally to admit his drug use. Though implying that he did so because he had come to realize the "seriousness of the question," his own evidence suggested that his actual motivation was the upcoming lifestyle polygraph which his proposed new duties necessitated, through which his drug use would have most likely been discovered. Therefore, the Judge's finding that Applicant knowingly provided false information about his drug history is supported by substantial record evidence.

We note that "there is a strong presumption against granting a security clearance." *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert den* 499 U.S. 905 (1991). Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish any appropriate mitigating conditions. *See* Directive ¶ E3.1.15. The Judge's findings of fact, including the one challenged on appeal, support his decision that Applicant had failed in meeting his burden.[1] Furthermore, we find no error in his whole person analysis. The Judge took

[1]Applicant contends that the Judge should have found his drug use to be not recent as of the close of the record. However, the Directive does not define "recent." The Judge is required to evaluate the record evidence as a whole and reach a reasonable conclusion as to the recency of an applicant's conduct. ISCR Case 04-03849 (App. Bd. Jan. 26, 2006).

into account Applicant's evidence as to his good work record and integrity. However, he also balanced that against contravening matters, such as the fact that Applicant's most recent use of marijuana occurred while he held a security clearance and that the circumstances surrounding his eventual admission of drug use vitiates his claims of good faith. Decision at 5. We conclude that the Judge's whole person analysis complies with the requirements of Directive ¶ E2.2.1, in that the Judge considered the totality of Applicant's conduct in reaching his decision. *See* ISCR Case No. 04-09959 at 6 (App. Bd. May 19, 2006). Accordingly the Judge's adverse clearance decision is neither arbitrary, capricious, nor contrary to law.

Order

The Judge's decision denying Applicant a clearance is AFFIRMED.

Signed: Jean E. Smallin
Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board