

KEYWORD: Guideline H; Guideline E

DIGEST: It is the Administrative Judge, not either party that makes findings of fact. The Directive authorizes the Board to review a Judge's findings, not to engage in de novo fact-finding. The Judge considered factors in addition to the passage of time. The Board need not agree with a Judge's decision in order to sustain it. Favorable decision affirmed.

CASENO: 05-03941.a1

DATE: 08/02/2007

DATE: August 2, 2007

In Re:	)	
	)	
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	)	
Applicant for Security Clearance	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer I. Goldstein, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security

clearance. On September 21, 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 January 12, 2007, after the hearing, Administrative Judge Martin H. Mogul granted Applicant’s request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Before addressing the main appeal issues, the Board will discuss “alternative findings of fact” that were not made by the Administrative Judge, but are supported by the record evidence. Although the parties are free—within the bounds of zealous advocacy—to argue about what the record evidence shows, it is the Administrative Judge, not either party, that makes the findings of fact in a case. Moreover, the Directive authorizes the Board to review a Judge’s findings of fact, not engage in *de novo* fact-finding.<sup>1</sup> Accordingly, the Board will consider Department Counsel’s proffered “findings of fact” only to the extent they constitute argument about the record evidence in support of any of the specific appeal issues raised by Department Counsel. *See, e.g.*, ISCR Case No. 03-06174 at 3 (App. Bd. Feb. 28, 2005).

Department Counsel raised the following issue: whether the Administrative Judge’s application of Guideline H Mitigating Condition (DIMC) 1<sup>2</sup> and DIMC 3<sup>3</sup> was arbitrary and capricious and not supported by the record evidence.<sup>4</sup>

The record indicates that Applicant used marijuana with varying frequency between 1991 and 2004. Applicant also used psilocybin mushrooms between 1993 and 2003, but testified that he used them only a few times. In a signed, sworn statement dated November 18, 2004, Applicant stated that he had last used marijuana in August 2004. He stated that he now understood the impact that drug use would have on his job and that he would no longer use marijuana or mushrooms.

The Administrative Judge found that Applicant’s drug use was mitigated due to the passage of time (DIMC 1) and Applicant’s stated intention not to use illegal drugs in the future (DIMC 3). The Judge stated that Applicant testified credibly that he had not used marijuana since he signed the affidavit in November 2004, over two years before the hearing. Decision at 3. The Judge based his application of DIMC 3 in part on Applicant’s statement that marijuana was not worth damaging his career and in part on changes in Applicant’s life—the fact that Applicant had since married and was contemplating starting a family.

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<sup>1</sup>If a party believes the Judge’s decision does not set forth pertinent findings of fact, then the party can consider whether to raise a claim that the Judge failed to comply with the requirements of the Directive ¶ E3.1.25. If a party believes the Judge reached conclusions that do not rationally follow from, or are not adequately supported by, the Judge’s findings of fact, then the party can consider whether to raise a claim that the Judge’s conclusions are arbitrary or capricious. *See, e.g.*, ISCR Case No. 02-20365 at 3 (App. Bd. May 27, 2005).

<sup>2</sup>“The drug involvement was not recent;” Directive ¶ E2.A8.1.3.1.

<sup>3</sup>“A demonstrated intent not to abuse any drugs in the future;” Directive ¶ E2.A8.1.3.3.

<sup>4</sup>The Judge’s findings and conclusions under Guideline E were not appealed and are not at issue here.

Department Counsel argues that the Administrative Judge's application of DIMC 1 and DIMC 3 is not supported by record evidence and that the Judge substituted a credibility determination for record evidence in applying DIMC 3.

As Department Counsel points out, the Board has declined to set a "bright-line" rule as to what constitutes recency under the Directive regarding drug use. The Board has indicated that the matter requires an Administrative Judge to evaluate the record evidence as a whole and reach reasonable conclusions as to the recency of an applicant's conduct. Application of a mitigating condition such as DIMC 1 can depend on a number of factors in addition to the simple passage of time. *See, e.g.*, ISCR Case No. 03-02374 at 5 (App. Bd. Jan. 26, 2006). Here, in addition to the passage of time, the Judge noted changes in Applicant's life in support of his application of DIMC 1.

Likewise, the Administrative Judge stated reasons for his application of DIMC 3, beyond his conclusion that Applicant's testimony was credible. He noted Applicant's written statement that he would not use drugs because doing so would damage his career. He also noted Applicant's marriage and contemplation of starting a family, as well as the testimony of Applicant's wife that Applicant has forsworn the use of drugs. Decision at 3.

Department Counsel has not demonstrated error on the part of the Administrative Judge. The Board need not agree with the Judge's decision to sustain it.

### **Order**

The Administrative Judge's favorable security clearance decision is AFFIRMED.

Signed: Michael Y. Ra'anan  
Michael Y. Ra'anan  
Administrative Judge  
Member, Appeal Board

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

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