

KEYWORD: Guideline H; Guideline E

DIGEST: The Board does not review a case de novo. Given the record before the Judge, her unfavorable decision is sustainable. Adverse decision affirmed.

CASENO: 06-12032.a1

DATE: 10/30/2007

DATE: October 30, 2007

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| In Re:<br><br>-----<br><br>Applicant for Security Clearance | )<br>)<br>)<br>)<br>)<br>)<br>) | ISCR Case No. 06-12032 |
|---|---------------------------------|------------------------|

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 20, 2006, 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 that his case be decided on the written record. On May 31, 2007, after considering the record, Administrative Judge Joan Caton Anthony denied Applicant’s request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge’s adverse security clearance decision under Guidelines H and E is arbitrary, capricious, or contrary to law.

Applicant argues that the Judge should have concluded that the security concerns raised under Guidelines H and E had been mitigated, as a matter of law, because Applicant’s drug use occurred in the past, Applicant has demonstrated that he would not use drugs in the future, and Applicant provided clear evidence of rehabilitation.<sup>1</sup> In support of this argument, Applicant points to the favorable evidence in the record, including his statement that he did not intend to use drugs in the future,<sup>2</sup> his outstanding work record, and the fact that he has tested negative for illegal substances on recent drug tests. He also contends that his single use of marijuana in 2004,<sup>3</sup> while holding a security clearance, was an isolated incident—distinct from his approximately ten uses in college from 1996 to 2000. Given the totality of the record evidence, Applicant’s arguments do not demonstrate that the Judge’s decision is arbitrary, capricious, or contrary to law.

“[T]here is a strong presumption against granting a security clearance.” *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9<sup>th</sup> Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. Directive ¶ E3.1.15. “The application of disqualifying and mitigating conditions 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. 01-14740 at 7 (App. Bd. Jan. 15, 2003). “Thus, the presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision.” *See* ISCR Case No. 05-02833 (App. Bd. Mar. 19, 2007). “As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. An applicant’s disagreement with the Judge’s weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law.” *See* ISCR Case No. 05-03143 at 3 (App. Bd. Dec. 20, 2006).

In this case, the Judge made sustainable findings as to a lengthy history of marijuana use by an Applicant who was familiar with the security clearance process. That history included illegal marijuana use from approximately 1996 to at least August 2004. It also included the illegal marijuana use while holding a security clearance granted by the Department of Defense. A review of the decision indicates that the Judge weighed the mitigating evidence offered by Applicant against the record evidence relating to the length, seriousness and recency of the disqualifying conduct, and considered the possible application of relevant mitigating conditions and whole-person factors. The Judge found in favor of the Applicant with respect to one of the factual allegations. However, the Judge reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome all the government’s security concerns. The Board does not review a case *de novo*. Given the record that was before her, the Judge’s ultimate unfavorable clearance decision

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<sup>1</sup>The Judge found in favor of Applicant with respect to SOR paragraph 2.a. That favorable finding is not at issue on appeal.

<sup>2</sup>Applicant elected to have his case decided on the written record. Therefore, the Judge did not have the opportunity to evaluate the credibility of Applicant’s statements in the context of a hearing.

<sup>3</sup>Applicant was granted a security clearance in 2001.

under Guidelines H and E is not arbitrary, capricious or contrary to law. *See, e.g.*, ISCR Case No. 04-12548 at 2-3 (App. Bd. Sep. 18, 2006).

**Order**

The decision of the Judge denying Applicant a clearance is AFFIRMED.

Signed: Jeffrey D. Billett

Jeffrey D. Billett  
Administrative Judge  
Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin  
Administrative Judge  
Member, Appeal Board

Signed: William S. Fields

William S. Fields  
Administrative Judge  
Member, Appeal Board