

KEYWORD: Guideline H

DIGEST: The Judge failed to address significant evidence which ran contrary to her favorable conclusions. Specifically that Applicant's last admitted drug use, in 2005, was after she had submitted her security clearance application and after she had submitted to a drug test. Applicant's own testimony also undercuts claims to have a demonstrated intent not to use drugs. Favorable decision reversed.

CASENO: 06-18270.a1

DATE: 11/07/2007

DATE: November 7, 2007

In Re: ----- Applicant for Security Clearance)))))))	ISCR Case No. 06-18270
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 28, 2006, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guideline H (Drug Involvement) of Department of

Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive).¹ Applicant requested a hearing. On April 17, 2007, after the hearing, Administrative Judge Kathryn Moen Braeman granted Applicant's request for a security clearance. Department Counsel filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether certain of the Judge's factual findings were supported by substantial evidence; and whether the Judge's favorable security clearance decision is arbitrary, capricious, or contrary to law. Finding error, we reverse.

Whether the Record Supports the Administrative Judge's Factual Findings

The Judge made the following pertinent findings of fact: Applicant is a recent college graduate working for a federal contractor as a software engineer. She completed a Security Clearance Application in March 2005 but was not granted an interim clearance due to drug use. On her SCA she disclosed that she had used marijuana approximately 20 times between 2000 and 2005. Applicant provided the names of some of the persons with whom she had used marijuana. In her findings, the Judge described in detail significant conflicts between the Government's evidence and that of Applicant on the question of Applicant's intent for future drug use. Ultimately the Judge concluded that Applicant had credibly demonstrated an intent not to use drugs in the future. We will address the sufficiency of this last finding below.

Whether the Record Supports the Administrative 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.

"[T]here is a strong presumption against granting a security clearance." *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th 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 any appropriate mitigating conditions. *See* Directive ¶ E3.1.15. "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, e.g.*, ISCR Case No. 05-03635 at 3 (App. Bd. Dec. 20, 2006).

In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between

¹The SOR was subsequently amended on the motion of the Government to add an allegation under Guideline E (Personal Conduct).

the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

We have examined the Judge's decision in light of the record as a whole. She took into account such matters as Applicant's testimony that she has not used marijuana since July 2005² and that her intention is never to use illegal drugs in the future.³ On the other hand, we note contrary record evidence, principally the fact that Applicant's last admitted use of marijuana occurred after she had submitted her SCA and after she had submitted to a drug test as a condition of employment. The Judge did not discuss these matters in the Conclusions section of her decision. In the Board's view, this is significant record evidence which undercuts the Judge's favorable conclusion and in all reasonableness should have been addressed. In the first place, given Applicant's having used marijuana over a period of five years, her use after submitting her SCA undercuts a favorable application of DIMC 1. Although Judges have leeway in determining what is recent for the purposes of mitigating security concerns, that leeway is not without its limits. *See, e.g.*, ISCR Case No. 04-09239 at (App. Bd. Dec. 20, 2006) ("The Directive is silent on what constitutes a sufficient period of reform and rehabilitation. However, such silence does not mean an Administrative Judge has unfettered discretion in deciding what period of time is sufficient . . . [The Judge must conduct] a reasoned analysis of the facts and circumstances of an applicant's case based on a careful evaluation of the totality of the . . . evidence within the parameters set by the Directive.") *See also* ISCR Case No. 03-13934 at (App. Bd. Mar. 17, 2005) ("Applicant's use of marijuana was recent at the time he completed the SF-86); ISCR case 02-10454 at 10-11 (App. Bd. Nov. 23, 2004). In this regard, the Judge failed to consider an important aspect of the case.

Furthermore, this evidence also qualifies Applicant's claim that she has demonstrated an intent not to use drugs in the future. As a matter of common sense, one would expect that a person who has taken a drug test as a condition of employment would understand the importance of future abstinence. That Applicant used marijuana after such a test raises a substantial question as to whether she has demonstrated a serious intent to obey the law or whether she has refrained from drug use simply in order to qualify for employment.⁴ Again, the Judge's failure to discuss the timing of

²*See* Directive ¶ E2.A8.1.3.1 (Drug Involvement Mitigating Condition 1) (DIMC 1): "The drug involvement was not recent."

³*See* Directive ¶ E2.A8.1.3.4 (Drug Involvement Mitigating Condition 4) (DIMC 4): "A demonstrated intent not to abuse any drugs in the future."

⁴Applicant's own testimony further undercuts her efforts to demonstrate a commitment to being drug free. "[I interpreted the interviewer's question to be] is it possible that some day in your future you might decide that you want to smoke marijuana and so at that point I did say, yes it's possible, but I can't imagine ever using it more than one or two times per year recreationally . . ." Tr. at 66. Compare Applicant's testimony with Government Exhibit 2, a summary of the case agent's interview with Applicant: "Although [Applicant's] future intent is to use marijuana recreationally two times at most per year, she is not going to use marijuana in the near future because she has to take a drug test and wants to pass." Compare also the agent's testimony, in response to Applicant's question: "Q: Do you remember asking me about my future intent to use marijuana? A: Yes . . . Q: Do you remember my first response to your question? A: I

Applicant's July 2005 drug use impairs her application of DIMC 4. While a Judge is presumed to have considered all the evidence, he or she must address "significant record evidence that a reasonable person could expect to be taken into account in reaching a fair and reasoned decision." ISCR Case No. 02-19479 at 6 (App. Bd. Jun. 22, 2004). Viewed in light of the record as a whole, the Judge's favorable conclusions under Guideline H are arbitrary, capricious, and contrary to law. In light of this holding, we need not address the Guideline E security concerns.

Order

The Judge's decision granting Applicant a security clearance is REVERSED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan
Administrative Judge
Chairman, 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

remember your response very well. Q: What was it? A: It was, well I suppose I'm not going to because I've got to take a drug test for my job, so I won't be using it until after that." Tr. at 55-56.