

KEYWORD: Guideline H

DIGEST: A decision in another DOHA Hearing Office case does not demonstrate error by the Judge. Nor is it legally binding precedent on other Judges or the Board. Adverse decision affirmed.

CASENO: 06-18340.a1

DATE: 10/03/2007

DATE: October 3, 2007

In Re:)	
)	
-----)	ISCR Case No. 06-18340
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

Alan V. Edmunds, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 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). Applicant requested a hearing. On February 20, 2007, after the hearing, Administrative Judge Robert J. Tuider 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 Guideline H is arbitrary, capricious, or contrary to law.¹

Applicant argues that the Judge should have concluded that the security concerns raised under Guideline H had been mitigated, as a matter of law, because Applicant's marijuana use was not recent, and Applicant had demonstrated that he would not use drugs in the future and had provided clear evidence of rehabilitation.² In support of this argument, Applicant submits additional documentary evidence which was not submitted at the hearing. He also cites to several DOHA Hearing Office decisions in which an applicant in ostensibly similar circumstances was granted a clearance. 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.

The Board may not consider Applicant's new evidence on appeal. *See* Directive ¶ E3.1.29. Its submission does not demonstrate error on the part of the Administrative Judge. *See, e.g.*, ISCR Case No. 02-12789 at 3 (App. Bd. May 13, 2005).

The decision in another DOHA Hearing Office case does not demonstrate error by the Judge in this case. A decision by a Hearing Office Judge is not legally binding precedent on that Judge's colleagues or the Board. *See* ISCR Case No. 01-22606 at 3-5 (App. Bd. Jun. 30, 2003).

"[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 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

¹The Judge found in favor of Applicant with respect to SOR paragraphs 1.c through 1.f. Those favorable findings are not at issue on appeal.

²The Board construes Applicant's brief as arguing that the Judge erred in not applying Guideline H Mitigating Conditions 26(a) ("the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment"); 26(b) ("a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation"); and 26(d) ("satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional").

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. That history included illegal marijuana use, on at least 1,000 occasions and at times including daily use, from approximately 1977 to January 2005. It also included the illegal purchase of marijuana during the same period of time. 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 four of the factual allegations.³ 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.⁴ The Board does not review a case *de novo*. Given the record that was before him, the Judge’s ultimate unfavorable clearance decision under Guideline H 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: 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

³The Judge found Applicant’s use of cocaine, psilocybin mushrooms, PCP, and LSD to be mitigated.

⁴Applicant’s Exhibit B is a statement, signed by Applicant, in which he swears never to use illegal drugs again. He further states that he expects that any violation of this promise will result in the automatic revocation of his clearance. See Guideline H Mitigating Condition 26(b)(4). This is evidence which a Judge must consider, but it is not binding. Rather, its mitigating effect must be evaluated in light of the record as a whole.

Administrative Judge
Member, Appeal Board