KEYWORD: Guideline H; Guideline E

DIGEST: Applicant's drug use while holding a clearance; his equivocations as to the extent of that use, and his ambivalent statements concerning his intentions for the future do not support the Judge's favorable conclusions. Favorable decision reversed.

CASENO: 06-18905.a1

DATE: 11/16/2007

DATE: November 16, 2007

In Re:	)	
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	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Eric Borgstrom, Department Counsel

FOR APPLICANT
Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On November 3, 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 a hearing. On May 31, 2007, after the hearing, Administrative Judge Mary E. Henry granted Applicant's request for a security clearance. Department Counsel filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Whether the Judge's analysis of the relevant Guidelines H and E mitigating conditions is arbitrary, capricious, or contrary to law. Finding error we reverse.

Whether the Record Supports the Judge's Factual Findings

A. Facts

Applicant is a "senior civil designer" for a government contractor. While in high school he smoked marijuana once, at a party. Four years after high school graduation, in 1990, he smoked marijuana once, while on vacation.

He married in 1994. He has two children. In 2000, Applicant submitted a security clearance application (SCA) and was subsequently granted a clearance. He submitted an application again in April 2004. The following July he separated from his wife. Between August and October 2004, Applicant occasionally used marijuana with friends.

In November 2004 Applicant submitted to a lifestyle polygraph. He admitted his early use of marijuana to the polygrapher. Upon further questioning, he admitted to his use between August and October 2004. He stated that he would use marijuana again if offered but, after a discussion about agency drug policy, advised that he would not use it in the future. Based on the information obtained by the polygrapher, the agency terminated Applicant's access to Sensitive Compartmented Information (SCI). Applicant has not used marijuana since October 2004.

B. Discussion

The Appeal Board's review of the Judge's findings of facts 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. Department Counsel has not expressly challenged the Judge's findings of fact. Therefore, they are not at issue in this appeal.

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. 518, 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* 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 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).

The Judge favorably applied two mitigating conditions to Applicant's case, Drug Involvement Mitigating Conditions (DIMC) 26(a) and (b). The former reads as follows: "[T]he behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not case doubt on the individual's current reliability, trustworthiness, or good judgement."[1] The Judge concluded that Applicant's earlier use of marijuana occurred far in the past. She further concluded that Applicant's more recent use was directly related to the emotionally disorienting effects of his marital breakup, stating "he is not likely to be involved in an emotionally devastating and unwanted divorce in the future."[2] She therefore concluded that Applicant's past drug use does not impair his qualifications for a clearance.

Department Counsel claims error with regard to the Judge's analysis of the recency of Applicant's drug use, arguing that the totality of circumstances militate against a conclusion that such use occurred so long ago as not to cast doubt on Applicant's trustworthiness. Department Counsel's argument has merit. Elapsed time between an applicant's last drug use and a Judge's decision must be evaluated in light of the record as a whole. In this case, it is true that Applicant's last known use of marijuana occurred approximately two and a half years prior to the hearing.

[1]Directive ¶ E2.26(a).

[2]Decision at 8.

However, as Department Counsel notes, Applicant's last use occurred on 31 October 2004, merely five days prior to the lifestyle polygraph, and that during the interview he initially stated to the polygrapher that he would use marijuana in the future, undercutting a claim of rehabilitation. Department Counsel mentions other aspects of the record which he contends are incompatible with the Judge's favorable application of this mitigating condition, notably the fact that Applicant's more recent use occurred after he had submitted his 2004 SCA, after he had signed an statement acknowledging agency policy forbidding drug abuse,[3] and while he held a top secret clearance.

While Judges have leeway in evaluating the recency of an applicant's drug use,[4] any proposed mitigation must be understood in light of the relevant security concerns. Drug use raises concern because it "may impair judgement and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations."[5] In this case, the record evidence cited by Department Counsel significantly undercuts Applicant's efforts to establish his willingness to comply with the law. Indeed, the evidence shows that, in response to a traumatic event, his divorce, Applicant willingly turned to the use of marijuana, and there is nothing substantive in the record to demonstrate that this is unlikely to recur, the possibility of encountering difficult circumstances being part of life. Though the Judge stated that Applicant will never again be faced with an event this personally devastating, this is speculative as there can be no evidence to support such an opinion. To include this as a matter in mitigation was error. As it is, Applicant's fourteen year hiatus between his 1990 use of marijuana and his frequent use in 2004 forbids an easy conclusion that sufficient time has passed since Applicant's last known use and the date of the hearing so as to ameliorate the security concerns quoted above. After considering the Judge's decision and the evidence as a whole, the Board concludes that the record will not sustain a favorable application of DIMC 26(a).

DIMC 26(b) provides that Guideline H security concerns can be mitigated by "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 . . ."[6] In her favorable application of this mitigating condition, the Judge relied on Applicant's testimony that he is spending more time with his family and is not associating with his former drug-using companions.

The Board gives due consideration to these matters but notes significant record evidence less favorable to Applicant. In addition to the matters discussed above, we draw attention to Government Exhibit 3, an explanation of the agency decision to deny Applicant access to SCI, dated March 4,

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[3]"The improper use of drugs by [agency] affiliates (e.g., [agency] employees, military assignees or representatives, contractors, consultants, and experts) and applicants is strictly prohibited. Improper use includes the illegal use of controlled substances as well as the use, transfer, possession, sale, or purchase of any drug for purposes other than their intended medical use. This policy may be reinforced through drug testing in accordance with [agency] directive . . . Failure to observe the policies summarized above may constitute grounds for disqualification from initial or continued access to [agency] information and facilities. Your signature below indicates your understanding and willingness to comply with these policies." Govt. Ex. 1 at 15.

[4]*See, e. g.*, ISCR Case No. 05-03941 at 2-3 (App. Bd. Aug 2, 2007).

[5]Directive ¶ E2.24.

[6]Directive ¶ E2.26(b).

2005. It states that, during the interview with the polygrapher, Applicant advised that he used marijuana twice in high school and twice in August 2004, during "a low point in his life." The exhibit states that Applicant initially denied any other drug use but, after further questioning, admitted that he had used marijuana weekly between August 2004 and October 31, 2004 and that "he would use marijuana in the future if it was offered to him. After being advised of [agency] drug policy, [Applicant] stated that he 'thought he could abide by it.' Later in the interview [Applicant] advised that he would abide by the drug policy and had no intention of using illegal drugs again."[7] During his testimony, Applicant stated that he had used marijuana only once in high school but that the interview summary was otherwise accurate.[8] Given Applicant's drug use while holding a clearance, his equivocations as to the extent of that use, and his ambivalent statements concerning his intentions for the future, the record does not support the Judge's conclusion that Applicant has met his burden of persuasion as to DIMC 26(b). The Board holds that the Judge's favorable decision under Guideline H is arbitrary, capricious, and contrary to law. In light of this holding the Board need not address the Judge's application of the Guideline E mitigating conditions.

[7]Govt. Ex. 3 at 1-2.

[8]Tr. at 48.

Order

The Judge's favorable security clearance decision is REVERSED.

Signed: Jeffrey D. Billett
Jeffrey D. Billett
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