KEYWORD: Guideline E; Guideline H

DIGEST: Department Counsel's alternative interpretation of the evidence under Guideline E does not demonstrate harmful error. The Administrative Judge used language with regard to Guideline H which could be construed as inconsistent with DOD policy and prior Appeal Board decisions. Favorable decision remanded.

CASENO: 06-22755.a1

DATE: 12/17/2007

DATE: December 17, 2007

In Re:	)	
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Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Francisco Mendez, Esq., Department Counsel

FOR APPLICANT
Robert R. Sparks, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On December 22, 2006, DOHA issued a statement of reasons (SOR) 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 July 20, 2007, after the hearing, Administrative Judge Christopher Graham granted Applicant's request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Judge's favorable decision under Guideline E is arbitrary, capricious or contrary to law; whether the Judge's application of Guideline H mitigating conditions was arbitrary, capricious, and contrary to law. We remand the case to the Judge.

Whether the Record Supports the Administrative Judge's Factual Findings

A. Facts

The Judge made the following relevant findings: Applicant has no prior military service and was granted a security clearance in 2003. Prior to the events of September 11, 2001, he was employed in the financial industry for 19 years. His company's offices were destroyed in the attack on the World Trade Center. Applicant also lost a close friend, and his mother was hospitalized with a nervous breakdown. In November 2001, his employer laid off 400 people, including Applicant. During this time, Applicant used marijuana approximately six times, due to the stress. There were other friends who had also lost jobs and lost friends in the tragic events. This group of friends would socialize and on occasion smoke marijuana. This lasted between one and two months. Applicant moved when he found employment, and has not seen these people since 2001.

Applicant found work in October 2002, and his employer required a drug test. He passed the test. In March 2003 Applicant accepted employment with his current employer and again passed a drug test, which was a condition of employment. He was granted a security clearance in July 2003.

In November 2004, Applicant and his wife were on a camping trip with some couples that they recently met. One evening after the children were in bed, Applicant was sitting around the campfire talking with some of the men. At some point, someone lit up a marijuana cigarette and started passing it around. Without thinking, Applicant took a couple puffs and passed it on. At that point, his wife told him what he had just done. He immediately left the area, and he and his wife retired for the evening. There was no evidence prior to that evening, nor did he expect, that this group would be smoking marijuana. After that trip, Applicant his wife disengaged from the people, and only see them sometimes at school events.

On April 14, 2003, Applicant executed a security clearance application (SF 86) and answered "No" to the following question: **"**Question 27. Your Use of Illegal Drugs and Drug Activity - Illegal Use of Drugs. Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone,[1] tranquilizers, etc.), hallucinogenic (LSD, PCP, etc.), or prescription drugs?" He failed to disclose his marijuana use in the late fall of 2001.

[1]This was typed incorrectly in the Judge's decision.

In 2005, Applicant submitted an application with a federal government agency and took and passed a drug screening test. He was also required to complete a SF 86. In filling out the form, he noticed for the first time that question 27 asked about drug use for the last seven years. He realized he had misread the SF 86 he completed in 2003. Most employee applications in the financial community generally went back only for a 12 month period. He had no knowledge of the security clearance process. In the 2005 application, he correctly listed his marijuana usage in 2001 and 2004.

Applicant took full responsibility for his mistakes. He signed a statement of intent with automatic revocation of clearance for any future violation of Guideline H (Drug involvement). If he were exposed to illegal drug use anywhere, he would remove himself from the situation. When he received the SOR, he reported it to his employer's ethics committee, which referred him to the director of security. Applicant talked to the director of security and followed his advice regarding the process.

The vice president and division manager of Applicant's employer testified that he was surprised when Applicant told him about the SOR. He said it was out of character, and he advised him to work through the system as hard as he could and be as straightforward and honest as he had been. He believed the incidents were lapses of judgment, he saw no change in character from the person that he hired, and felt that there was no discrepancy between the person he hired and in the person that had been working for him. Applicant's performance had significantly increased. He wanted Applicant to continue to work for him. That witness has held a security clearance since 1966, and he believed that Applicant should be granted a clearance.

B. Discussion

The Appeal Board's review of the Judge's findings of fact 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 finding 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.

The Judge's findings will be discussed below insofar as they relate to his conclusions.

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 choice 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 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. Our scope of review under this standard is narrow and we may not substitute our judgment for that of the Judge. We review matters of law *de novo*.

(1) Guideline E. The Judge's favorable conclusion under Guideline E is sustainable given the fact that the omission on his 2003 SF 86 was an isolated incident, it occurred at a time when Applicant was unfamiliar with the security clearance process, prior to being asked about the omission Applicant subsequently provided the correct information in response to the same question on his 2005 SF 86, and Applicant had otherwise favorable character recommendations. On this record, the Judge could plausibly conclude that Applicant's explanations were not unreasonable when viewed in their time sequence and context, and Applicant's initial lack of awareness of the seriousness of the issue. Therefore, the Judge's conclusion, although not the only reasonable interpretation in that regard, is not *per se* arbitrary, capricious, or contrary to law.

Department Counsel for his part offers a plausible alternative interpretation of the record evidence consistent with an adverse resolution under Guideline E. That alternative interpretation of the record evidence does not demonstrate harmful error. The Board does not review a case *de novo*. A party'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, e.g.,* ISCR Case No. 06-08116 at 2 (App. Bd. Jul. 2, 2007).

(2) Guideline H. The Judge's analysis of Applicant's conduct under Guideline H is problematic. The record contains significant evidence which could arguably support a favorable application of Guideline H Mitigating Conditions 26 (a)[2] and (b),[3] including the fact that Applicant had used marijuana on only a few occasions, that his last use occurred in 2004, that his use had happened under unusual circumstances that were not likely to recur, that he had disassociated himself from drug using individuals and the environment where drugs were used, and that he had signed a statement of intent with automatic revocation of clearance for any future violations. However, in his conclusions, the Judge used language which could be construed as not being consistent with DoD policy or prior Appeal Board decisions, in particular, describing illegal drug use in a way that suggested it was "reasonable" under certain circumstances.[4] The objectionable nature of the language significantly detracts from the Judge's overall analysis of Applicant's circumstances and leaves the decision unsustainable as written. The Board, therefore, remands the case to the Judge for the issuance of a new decision which analyzes Applicant's conduct under Guideline H in a manner consistent with DoD policy, prior Appeal Board decisions, and the provisions of the Directive.

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[2]"[T]he 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."

[3]"[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."

[4]"Applicant's marijuana use in 2001 is understandable considering the circumstances of dealing with the collapse of the World Trade Center, the loss of his job, the loss of his best friend, and the hospitalization of his mother. Several other acquaintances had similar problems." Decision at 7. "It's plausible to see Applicant sitting around with these persons, consoling each other by sharing alcohol and an occasional joint. It is reasonable to believe that given the impact of 9/11 and the loss of one's job, a group might join to (sic) together to drown their sorrows with beer and a few joints get passed around." Decision at 8.

Order

The decision the Judge granting Applicant a security clearance is REMANDED.

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