

KEYWORD: Guideline H

DIGEST: Some of the challenged findings are sustainable, The one error is harmless. Adverse decision affirmed

CASENO: 13-00310.a1

DATE: 08/15/2013

DATE: August 15, 2013

In Re:)
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 -----) ISCR Case No. 13-00310
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 Applicant for Security Clearance)
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)

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On April 1, 2013, DoD issued a statement of reasons (SOR) 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 June 28, 2013, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Rita C. O'Brien denied Applicant's request for a security clearance. Applicant appealed, pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issue on appeal: whether the Judge's decision was arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge's unfavorable security clearance decision.

The Judge found: Applicant is 28 years old. He began using marijuana when he started college in 2003. He used it and occasionally purchased it from 2003 until early 2010. Applicant has two drug-related arrests, both in 2005. In one, a police officer discovered Applicant smoking marijuana from a pipe in a parked car. In the other he smoked marijuana while driving a car when he was stopped for speeding. Applicant used marijuana while serving in the National Guard. He was aware that it was prohibited. Applicant underwent a drug test while in the Guard in 2009, but did not learn the results of the test, which was positive, until 2012. He lost a promotion and left the Guard because he did not want to risk being discharged with less than an honorable discharge. Applicant has declared that he has no intent to use marijuana in the future.

Applicant admits that his signature appears on a 2007 security clearance application. However, he stated that he did not input the information in the document. He claims he was never aware an application had been submitted for a security clearance, or that he had been granted one. When Applicant completed a 2012 security clearance application, he answered "Yes" when asked if he had ever been granted a security clearance. In responding to a question asking if he had used drugs while in possession of a security clearance, he responded, "Yes." He stated in his SOR Answer that he input "Yes" only because his first security clearance application is dated during the time he was using marijuana. However, he contends that he had no knowledge at the time he used marijuana that he had been granted a security clearance. Applicant claimed that he was never informed he held a security clearance while serving in the National Guard and that his work with the Guard did not require a security clearance. He indicated that he first learned he had a security clearance in 2010 when the facility security officer for one of his civilian employers informed him that DOD had granted him a security clearance in 2007.

The Judge concluded: Applicant admits to using marijuana over a period of seven years. He also purchased it. In 2009, he tested positive for illegal drugs while serving in the National Guard. Despite knowing the Guard prohibited such drug use, and knowing that he was subject to drug testing, he continued using marijuana. Applicant was granted a secret security clearance in 2007. His illegal drug use from 2007 to 2010 occurred while he held that security clearance. Regarding the 2007 security clearance application, when he signed the document, shortly after joining the National Guard, it was his responsibility to know the import of the document. It is unclear how another person could have known the detailed information about Applicant that appears in his application. Moreover, it is unlikely that during the three years he worked for the National Guard, he never encountered a situation where the issue of his security clearance status arose. It is not credible that he was unaware for three years that he held a security clearance. While Applicant gets

some credit for a declaration not to use illegal drugs in the future, his use of marijuana over an extended period of time and his use while he had obligations and responsibilities as a member of the National Guard are of special concern. His arrests and convictions in 2005, and his year of probation, should have been a wake-up call. Instead, he continued to use marijuana for almost five more years. Even after his drug test in March 2009, he continued to use marijuana. Finally, his use of marijuana after he received a security clearance raises serious doubts about his suitability for access to classified information.

Applicant argues that the Judge did not assign adequate weight to his years of positive work history, his favorable recommendations, and his demonstrated devotion to the mission. 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. 06-17409 at 3 (App. Bd. Oct. 12, 2007). Portions of Applicant's appeal brief essentially argue for an alternate interpretation of the record evidence. Applicant has not established error on this point.

Applicant asserts that the Judge erred by finding he knew he had a security clearance during the period when he still smoked marijuana. After a review of the evidence, the Board concludes that the Judge's finding is reasonably supported by the record.

Applicant argues that in the decision, the Judge referenced other criminal events in his history, "as to show a pattern." These were a reckless speeding ticket, a brandishing a firearm charge, and an illegal window tint/concealed weapon charge. He states that the way these events were presented and lumped together in the decision led to their not being fairly considered and were extremely prejudicial. The Board construes Applicant's appeal argument as an assertion that the other criminal activity was improperly considered by the Judge.

Conduct not alleged in an SOR may be considered: (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for a whole-person analysis under Directive ¶ 6.3. *See, e.g.*, ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). While the Judge mentioned Applicant's criminal involvements not related to drugs in her findings of fact, she did not comment upon them in her analysis. Thus, the manner in which she factored that evidence into her ultimate conclusions, if any, is not readily apparent. There is no presumption of error below. *See, e.g.*, ISCR Case No. 04-08312 at 2 (App. Bd. Jul. 14, 2005). Applicant has not demonstrated how the Judge used the evidence of his non-drug-related criminal activities improperly. Also, a reading of the Judge's decision reveals that Applicant's drug-related conduct was the overriding, if not the sole, focus of her analysis. Applicant has not established error.

Applicant argues that the Judge made several errors in her findings of fact concerning the frequency of his marijuana use during various periods in the past. He states the Judge erred when

finding that his use of marijuana increased when he returned to college in 2006, when compared to the period 2003-2005. The evidence concerning Applicant's marijuana use during specific time periods is sometimes vague and conflicting. Nevertheless, the Board concludes that her finding that the frequency of marijuana use increased in approximately 2006 is reasonably supported by substantial evidence.¹ Applicant also argues that the Judge erred in stating that he used marijuana once or twice per month in 2009-2010 in the Analysis portion of her decision. He asserts that his frequency of use during this time was once a month if not rarer. Applicant has established error on this point. The Judge's exposition of the facts in her Analysis section does not conform with her findings of fact, wherein she found that Applicant used marijuana once every two months during the time period, 2009-2010. However, the Board concludes that this error is harmless. It involves a two-year interval in an overall span of use of seven years, and is a relatively modest discrepancy when compared to the totality of Applicant's use. The lesser amount of use, even if taken into account by the Judge, would not reasonably be likely to change the outcome of the case, given the extent of the misconduct established on the whole record under Guideline H, and the Judge's emphasis on the circumstances surrounding Applicant's use (while a National Guard member and a holder of a security clearance). *See* ISCR Case No. 01-23362 at 2 (App. Bd. Jun. 5, 2006).

Applicant lists various matters in mitigation he claims support a positive outcome in his case. He characterizes his marijuana use as extremely limited and confined to his college years. He notes that he immediately quit such use and positively changed his lifestyle when offered a position of responsibility. He cites to his statement of intent not to use again and asserts that he has broken off all contact with individuals that continue to use marijuana. Applicant has not established error on the part of the Judge. The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. *See, e.g.*, ISCR Case No. 06-25157 at 2 (App. Bd. Apr. 4, 2008). 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*. *See, e.g.*, ISCR Case No. 06-10320 at 2 (App. Bd. Nov. 7, 2007). In this case, the Judge found two of the four Guideline H mitigating conditions potentially applicable, but explained at some length why they were insufficient to overcome the government's security concerns.

The Board does not review a case *de novo*. The favorable evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-11172 at 3 (App. Bd. Sep. 4, 2007). After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated 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 general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Therefore, the Judge's ultimate unfavorable security clearance decision is sustainable.

¹The Judge's finding appears to be based on Applicant's testimony wherein he stated that "the frequency picked up" when he was at college beginning in 2006. (Tr. At 30).

Order

The decision of the Judge is AFFIRMED.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board