

KEYWORD: Guideline H

DIGEST: A Judge is presumed to have considered all of the evidence in the record. An ability to argue for a different interpretation of the evidence is not sufficient to show that the Judge’s weighing of the evidence was in error. Adverse decision affirmed.

CASE NO: 14-00228.a1

DATE: 10/07/2014

DATE: October 7, 2014

In Re:)	
)	
-----)	ISCR Case No. 14-00228
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Ryan C. Nerney, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On March 18, 2014, 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 July 30, 2014, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Darlene D. Lokey Anderson 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 is arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge's unfavorable security clearance decision.

The Judge made the following findings: Applicant is 31 years old and unmarried. He started using the drug ecstasy in late 2000 while in high school. In his own words, he became addicted to the substance, using it at least once a month. He continued to use it and purchase it until early 2013. He also used marijuana on a sporadic basis. He last used any illegal drug in February 2013.

In February 2002, Applicant was arrested for possession of a controlled substance. At the time of his arrest, he was in a hotel room with a group of underage girls, and everyone was consuming some kind of drug, including ecstasy. As a consequence of his arrest, Applicant was sentenced to a one-year court-ordered drug rehabilitation program. He successfully completed the program in the spring of 2003. Following the treatment program, Applicant remained drug-free for about two or three years before relapsing and resuming his use of ecstasy and marijuana.

Applicant attended college from 2003 to 2013, where he lived close by and associated with other drug users. He held a job in a management position and never let his use of illegal drugs interfere with his work. Beginning in 2011, he began to focus on his education and became involved in community outreach programs. In 2013 he moved from coast to coast, stopped using ecstasy and marijuana, and stopped associating with drug users. Applicant wanted to make a better life for himself and live a sober lifestyle. He signed a Statement of Intent indicating that he would never use illegal drugs again while consenting to the loss of his security clearance if he did resume use. Two drug tests that he took in 2014 were negative. He is not involved in any after-care drug programs or Narcotics Anonymous. A letter of recommendation from a person who has known Applicant for three years indicates that Applicant has exceptional leadership skills and noble qualities. Applicant is involved in community outreach programs and philanthropic work.

The Judge reached the following conclusions: The totality of the evidence indicates poor judgment, unreliability, and untrustworthiness on the part of the Applicant. Based upon his past drug history, simply because he has been able to remain drug-free for the past year or so does not demonstrate that he can continue to remain drug free. While it is commendable that Applicant has abstained from drugs for more than a year, he was previously drug-free for several years before he relapsed. No pattern of abstinence has been established. More time in rehabilitation is necessary in order to guarantee the Government that he will not return to his old habits and place the Government at risk. The totality of the evidence, including his favorable letters of recommendation, support a whole-person assessment of poor judgment, untrustworthiness, unreliability, a lack of candor, an unwillingness to comply with rules and regulations, and other characteristics indicating that Applicant may not properly safeguard classified information.

Applicant argues that the Judge failed to consider all the evidence submitted by him, and that this failure resulted in her improper application of the Mitigating Conditions under Guideline H. Applicant also asserts that the Judge did not properly factor in the whole-person concept into her decision. He recites favorable aspects of his case, including his completion of a drug rehabilitation

program, his statement of intent not to use drugs, his willingness to refrain from future drug use by ceasing communication with past drug users, his sobriety for over one year, solid job performance, and favorable references attesting to his good character. Applicant asserts that this positive evidence establishes good judgment and trustworthiness, and strongly indicates that his drug use is unlikely to recur. Applicant has failed to establish error on the part of the Judge.

A Judge is presumed to have considered all the evidence in the record unless he or she specifically states otherwise. *See, e.g.*, ISCR Case No. 07-00196 at 3 (App. Bd. Feb. 20, 2009). Applicant has failed to overcome that presumption. The favorable evidence that Applicant cites in support of this argument is specifically mentioned in the Judge's decision.

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). 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).

Here, Applicant essentially argues for a different interpretation of the record evidence. The gravamen of the Judge's decision is the fact that Applicant has only one year of abstinence after drug use that spanned more than a decade, albeit with a period of approximately three years when he did not use drugs. He then relapsed, and the Judge focused on the relapse when concluding that Applicant's current period of abstinence is not sufficient to overcome the Government's concerns about future drug use. The Judge's conclusions are sustainable. The Board finds no reason to believe that the Judge did not properly weigh the evidence. *See, e.g.*, ISCR Case No. 11-06622 at 4 (App. Bd. Jul. 2, 2012). We have considered the totality of Applicant's arguments on appeal and find no error in the Judge's ultimate conclusions regarding mitigation.

In support of his appeal, Applicant points to decisions by the Hearing Office which he argues support his request for a favorable determination. The Board gives due consideration to those cases. However, each case "must be decided upon its own merits." Directive, Enclosure 2 ¶2(b). Nothing in the decisions cited by Applicant demonstrate error on the part of the Judge in this case.

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.

Order

The decision of the Judge is AFFIRMED.

Signed: Michael Ra’anan
Michael 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