

KEYWORD: Guideline H; Guideline E

DIGEST: Applicant failed to rebut the presumption that the Judge was unbiased. We give deference to a Judge’s credibility determinations. Inconsistent statements can undermine an applicant’s credibility. The Judge’s finding that Applicant deliberately failed to disclose his drug use was supported by substantial evidence. Hearing Office decisions are not binding precedent. Adverse decision affirmed.

CASE NO: 14-02696.a1

DATE: 07/01/2015

DATE: July 1, 2015

In Re:)	
)	
-----)	ISCR Case No. 14-02696
)	
Applicant for Security Clearance)	

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 August 19, 2014, DoD 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 April 27, 2015, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Noreen A. Lynch denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge was biased against him, whether the Judge's findings of fact contained errors; and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant works for a Defense contractor. He has held a security clearance since 2005. Applicant used marijuana on several occasions in March and April 2011. He did so while attending engagement parties prior to his wedding. He stated that the social occasions left him vulnerable to peer pressure. Twice in February 2015 he submitted to drug screening tests, which came back negative. He has signed a letter of intent not to use drugs again, with automatic revocation of his clearance should he fail to honor the terms of the letter.

Applicant completed a security clearance application (SCA) in March 2013, in which he did not disclose his 2011 drug use. He did not disclose it during the subsequent clearance interview. He submitted another SCA in early 2014 to another Government agency, in which he disclosed his drug use. Applicant denied intentionally omitting this information during 2013. He stated that he had filled out the form using an older copy and, in haste to complete it, failed to pay sufficient attention to detail. He stated that he disclosed the misconduct in the later SCA because he completed it by hand.

Applicant's admission in the 2014 SCA that he has used drugs at a time when he held a security clearance prompted the filing of an incident report. After this report was filed, Applicant was questioned by the security office. He stated to an official in this office that he had omitted the drug use because he had just become a father and could not sleep. "The reasons that Applicant has given for omitting the drug use in 2011 have changed several times." Decision at 3. The Judge also found that Applicant had not been candid when he claimed that he had sent a corrected version of the SCA to his facility security officer (FSO). The incident report stated that the FSO noticed the discrepancy between the 2013 and 2014 SCAs and then spoke to Applicant.

Applicant enjoys a good reputation for ethics and professionalism. His witnesses believe that he is worthy of a clearance. One witness testified that Applicant had told him that, once he discovered the error in the 2013 SCA, "he went back into the system and fixed" it. *Id.* at 4.

The Judge's Analysis

The Judge noted Applicant's letter of intent and his claim to have used drugs due to peer pressure. She concluded, however, that the Guideline H allegations raised questions about his judgment that he failed to mitigate. Regarding the allegations of falsification under Guideline E, the Judge stated that Applicant had given differing explanations for his misconduct. She concluded that Applicant was not credible. She found that he had not made a prompt, good-faith effort to correct the error. Moreover, she found the omissions were recent and serious. She concluded that Applicant had not mitigated these concerns.

In the whole-person analysis, the Judge cited to Applicant's good work record, his letter of intent not to use drugs in the future, and his having held a clearance since 2005. Contrary to Applicant's claims that he had attempted to correct his omission, the Judge stated that the information came to light by means of the 2014 SCA, which was submitted to an agency other than DoD. She concluded that Applicant had not shown good judgment or honesty.

Discussion

Applicant contends that the Judge did not decide his case on the evidence but, rather, on the basis of her prejudices. A Judge is presumed to be unbiased, and an applicant claiming otherwise has a heavy burden of persuasion. *See, e.g.*, ISCR Case No. 12-07751 at 2 (App. Bd. Apr. 7, 2015). We have examined the Judge's decision along with the entire record, including the transcript of the hearing, and find nothing therein that would prompt a reasonable person to conclude that the Judge lacked the requisite impartiality. Applicant has not met his burden of persuasion on this issue.

Applicant takes issue with the Judge's conclusion that he lacked credibility. He denies that he made inconsistent statements about the reason for his omission of his drug use. We give deference to Judges' credibility determinations. Directive ¶ E3.1.32.1. The record contains evidence that Applicant claimed that his omission was due to his having hastily completed the 2013 SCA from an older copy. It also contains evidence that he attributed it to his having been tired. These explanations are not totally consistent with one another, and a reasonable person could find in them a basis for concluding that Applicant had not been candid about his security significant conduct.

Applicant challenges the Judge's findings of fact, including her finding that his omission of his drug use was deliberate. We examine a Judge's findings to see if they are supported by substantial record evidence, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." Directive ¶ E3.1.32.1. When examining an applicant's *mens rea*, the Judge should evaluate the false statement or omission in light of the record as a whole. *See, e.g.*, ISCR Case No. 12-03415 at 3 (App. Bd. Jul. 25, 2014).

In this case, the Judge's reliance on Applicant's inconsistent statements, along with evidence of Applicant's prior experience with holding a clearance and completing SCAs, support the challenged finding about Applicant's intent. Applicant points to an error by the Judge concerning the year in which he submitted to a polygraph exam. This error did not likely affect the overall outcome of the case. Therefore, it is harmless. The Judge's material findings of security concern are supported by substantial evidence or constitute reasonable inferences that could be drawn from the evidence.

Applicant refers us to some Hearing Office cases that, he believes, support his case for a clearance. We give these cases due consideration. However, Hearing Office cases are not binding on other Hearing Office Judges or on the Appeal Board. *See, e.g.*, ISCR Case No. 14-03223 at 2 (App. Bd. Apr. 17, 2015).

The Judge examined the relevant data and articulated a satisfactory explanation for the decision. The decision is sustainable on this record. “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). *See also* Directive, Enclosure 2 ¶ 2(b): “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.”

Order

The Decision is **AFFIRMED**.

Signed: Michael Ra’anan
Michael Ra’anan
Administrative Judge
Chairperson, 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