

KEYWORD: Guideline H; Guideline E

DIGEST: Use of marijuana following a pre-employment drug test and after submitting a SCA significantly undercuts an applicant's claim to have demonstrated an intent not to use drugs. One would expect that at that point a person would understand the importance of abstention. Applicant's use of marijuana after such a test raises a substantial question as to whether he has demonstrated a serious intent to obey the law or whether he has refrained from drug use simply to qualify for employment. Applicant's use of marijuana despite his employer's policy, and his use after submitting his SCA, raise serious questions about his judgment and, therefore, under Guideline E. Favorable decision remanded.

CASENO: 07-00852.a1

DATE: 05/27/2008

DATE: May 27, 2008

In Re: ----- Applicant for Security Clearance)))))))	ISCR Case No. 07-00852
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APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Alison O'Connell, Esq., Department Counsel

FOR APPLICANT

Holly Walker, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 17, 2007, 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 February 7, 2008, after the hearing, Administrative Judge Martin H. Mogul granted Applicant’s request for a security clearance. Department Counsel filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Judge erred in applying Drug Involvement Mitigating Condition (DIMC) 26(b);¹ whether the Judge erred in concluding that Applicant’s case did not raise security concerns under Guideline E; and whether the Judge erred in his whole-person analysis. Finding error, we remand the case to the Judge.

Whether the Record Supports the Judge’s Factual Findings

A. Facts

The Judge made the following pertinent findings of fact: Applicant started using marijuana in college in 1995. His use was sporadic, though during 1998 it increased to one or two times a week. After graduating in 2000, his use decreased to one or two times a year. His last usage was in July 2006, and prior to that his next to last in October 2005. The use in 2006 took place after Applicant had submitted his security clearance application (SCA). Applicant has purchased some of the marijuana he has used. Additionally, he used psychogenic mushrooms once, during a trip to the Netherlands in 1999, and used Ecstasy once in 2002. Applicant has promised his girlfriend that he will not use drugs in the future. He also knows that drugs will hurt his career. He has decided not to use drugs even if he did not need a security clearance.

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 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.

¹Directive ¶ E2.26(b). “[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[.]”

Department Counsel has not challenged the Judge's findings. Therefore, they are not at issue in this appeal. In arguing the issues on appeal, Department Counsel contends that the Judge's decision does not take into account significant contrary record evidence. The Board will address this contention below.

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 the 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.

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After 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, e.g.*, 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 DIMC 26(b), concluding that Applicant had demonstrated an intent not to use drugs in the future. Department Counsel persuasively argues that this conclusion was reached without appropriate consideration of significant contrary record evidence, specifically that Applicant used marijuana after submitting to a pre-employment drug test and that he used marijuana after submitting the SCA. The Board has previously held that use of marijuana following a pre-employment drug test and after submitting a SCA significantly undercuts an applicant's claim to have demonstrated an intent not to use drugs in the future. "As a matter of common sense, one

would expect that a person who has taken a drug test as a condition of employment would understand the importance of future abstention. That Applicant used marijuana after such a test raises a substantial question as to whether she has demonstrated a serious intent to obey the law or whether she has refrained from drug use simply in order to qualify for employment.” ISCR Case No. 06-18270 at 3 (App. Bd. Nov. 7, 2007).

In the case under consideration here, the Judge noted Applicant’s having used marijuana after completing his SCA in evaluating whether the Government has presented a *prima facie* case for Guideline H disqualifying conditions. However, he did not provide a serious discussion of Applicant’s future intent in the context of Applicant’s burden of persuasion as to mitigation. To the contrary, the Judge’s analysis of future intent consisted simply in repeating almost verbatim three of the illustrative examples listed under DIMC 26(b).² Such conclusory language does not explain why it is that Applicant can be said to have demonstrated, rather than merely having promised, an intent to refrain from future drug use. While Judges are presumed to have considered all the record evidence, some matters, such as those under discussion here, are sufficiently significant to warrant discussion of them.³ The Judge’s decision is deficient in that regard .

Department Counsel also contends that the Judge erred in concluding that Applicant’s having used marijuana after submitting his SCA did not raise a security concern under Guideline E. Again, the Board finds this argument persuasive. The disqualifying conditions listed under each Guideline are illustrative only, not exhaustive and exclusive. In analyzing cases before them, Judges must be guided by common sense and with a view toward making a reasoned determination consistent with the interests of national security. The general security concern raised by Guideline E is that “[c]onduct involving questionable judgment . . . or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information.” Directive ¶ E2.15. The Board agrees with Department Counsel that Applicant’s having used marijuana despite his employer’s policy against such activity,⁴ and his use after submitting his SCA, raise serious questions about his judgment and, therefore, his fitness for a clearance. Under the facts of this case, this activity raises a security concern under Guideline E, and the Judge’s decision on this matter should have been made in the context of Applicant’s burden of persuasion as to mitigation. The Judge’s conclusion that the Government had not met its initial burden of producing substantial evidence of a Guideline E security concern is not sustainable.

²Directive ¶ E2.26(b). “(1) [D]isassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence[.]”

³See ISCR Case No. 02-22603 at 6 (App. Bd. Sep. 3, 2004): “. . . the Judge’s decision cannot simply be silent about what, as a matter of common sense, appears to be . . . an important aspect of the case.”

⁴See Tr. at 96-99. “Q: [F]rom about 2000 to 2005, your marijuana use was approximately one to two times a year? A: Yes . . . Q: Now, you started working . . . for [defense contractor] in 2003. Correct? A: Yes. . . Q: So, you at least understood that you shouldn’t be using illegal drugs when you started working at [defense contractor]? A: Based on the drug test . . . Q: [H]ow often did you have to take that drug test . . . A: One time . . . there is a time period within your application or within your acceptance letter, I think that’s it . . . Q: So, do you recall when the drug test was? A: It would have been around December 2003.”

The Board concludes that the best way to address the errors described above is to remand the case to the Judge for a new decision. This decision should examine the extent to which Applicant has met his burden of persuasion, both as to mitigation as well as to the whole-person, under both Guidelines E and H. In doing so, the decision should address the extent to which Applicant's circumstances fall within the precedent set forth in ISCR Case No. 06-18270 *supra*.

Order

The Judge's favorable security clearance decision is REMANDED.

Signed: Jean E. Smallin
Jean E. Smallin
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