

KEYWORD: Guideline H; Guideline J; Guideline E

DIGEST: The judge found that Applicant has a lengthy and serious history of illegal drug use. The Judge's material findings of security concern are based on substantial evidence or constitute reasonable inference that could be drawn from the record. It is not error to consider an applicant's past misconduct. Adverse decision affirmed.

CASENO: 07-05613.a1

DATE: 07/22/2008

DATE: July 22, 2008

In Re:	)	
	)	
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	)	
Applicant for Security Clearance	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 29, 2007, DOHA issued a statement of reasons (SOR) advising Applicant of the

basis for that decision—security concerns raised under Guideline H (Drug Involvement), Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested that the case be decided on the written record. On April 28, 2008, after considering the record, Administrative Judge Thomas M. Crean denied Applicant’s request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge’s findings are based on substantial evidence; and whether the Judge’s adverse security clearance decision under Guidelines H and J is arbitrary, capricious, or contrary to law.<sup>1</sup>

The Judge found Applicant had a lengthy and serious history of illegal drug use. From 2001 to 2002, while serving on active duty in the U.S. Marine Corps, Applicant used ecstasy about 13 to 15 times, marijuana about 50 times, cocaine two times, LSD once, GHB once, and Ketamine once or twice. From 2002 to 2006, Applicant used marijuana about 15 times. His last use of illegal drugs occurred 18 months before the issuance of the decision in his case.

While in the Marine Corps, Applicant received non-judicial punishment in December 2001 for driving under the influence of alcohol. He was found guilty and was sentenced to 45 days of restriction, 45 days of extra duty, a reduction of one pay grade, and a forfeiture of \$900. Applicant was also court-martialed for violating Article 112(a) of the Uniform Code of Military Justice for using controlled substances while on active duty with the Marine Corps. He was sentenced to restriction and a reduction in rank. In August 2002, he was administratively discharged from the Marine Corps with an Other than Honorable Discharge.

Applicant elected to have his case decided on the written administrative record. As a result, the Judge did not have an opportunity to question him and evaluate his credibility in the context of a hearing. However, three fellow workers or supervisors provided letters attesting to Applicant’s honesty and reliability, which the Judge fully considered.

Applicant argues that the Judge’s adverse clearance decision should be reversed because the Judge’s findings contain several errors. Applicant also argues that his prior drug use does not present a problem because his last use, which occurred 18 months prior to the decision, was an isolated incident. Prior to that use, Applicant had not used drugs for four years. Applicant’s arguments do not demonstrate that the Judge erred.

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<sup>1</sup>The Judge’s favorable decision under Guideline E is not at issue on appeal.

The Board's review of a Judge's findings 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, (1966). After reviewing the record, the Board concludes that the Judge's material findings of security concern are based on substantial evidence, or constitute reasonable inferences that could be drawn from the record, and are sustainable. *See, e.g.*, ISCR Case No. 06-21025 at 2 (App. Bd. Oct. 9, 2007).

Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. Directive ¶ E3.1.15. The presence of some mitigating evidence does not alone compel the Judge to make a favorable clearance decision. 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*. An applicant's disagreement with the Judge's weighing of the evidence, or a party's 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. 06-26061 at 2 (App. Bd. Mar. 17, 2008).

It is not error to consider an applicant's past misconduct. “[T]he security eligibility of an applicant cannot be meaningfully assessed by looking only at the applicant's present situation and ignoring the applicant's past conduct. Such a piecemeal approach is not practical and it would be inconsistent with the ‘whole person’ concept of security clearance determinations.” *See* ISCR Case No. 96-0776 at 2 (App. Bd. Jun. 5, 1997). In this case, the Judge properly considered the significance of Applicant's pattern of conduct as a whole, rather than analyzing each separate incident of drug use in a piecemeal fashion. *See, e.g.*, ISCR Case No. 04-12648 at 3-4 (App. Bd. Oct. 20, 2006) citing *Raffone v. Adams*, 468 F. 2d 860 (2<sup>nd</sup> Cir. 1972)(taken together, separate events may have a significance that is missing when each event is viewed in isolation).

The Board has examined the Administrative Judge's decision in light of the record as a whole and concludes that the Judge has drawn “a ‘rational connection between the facts found’” under Guidelines H and J and his adverse decision. *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). Accordingly, the Judge's adverse decision is not arbitrary, capricious, or contrary to law.

**Order**

The decision of the Judge denying Applicant a security clearance is AFFIRMED.

Signed: Michael D. Hipple  
Michael D. Hipple  
Administrative Judge  
Member, Appeal Board

Signed: Jean E. Smallin  
Jean E. Smallin  
Administrative Judge  
Member, Appeal Board

Signed: William S. Fields  
William S. Fields  
Administrative Judge  
Member, Appeal Board