

KEYWORD: Guideline H; Guideline E

DIGEST: DOHA Judge are required to use the Adjudicative Guidelines in the Directive, not the Adjudicative Desk Reference. Given Applicant's previous patterns of drug use, the Judge's conclusion that Applicant's three year abstinence from marijuana was not sufficient to mitigate the government's security concerns is sustainable. Adverse decision affirmed.

CASENO: 08-01583.a1

DATE: 12/04/2009

DATE: December 4, 2009

In Re:))	
))	
-----))	ISCR Case No. 08-01583
))	
Applicant for Security Clearance))	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Alfred S. Donau, III, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On January 30, 2009, DOHA 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 September 18, 2009, after the hearing, Administrative Judge Edward W. Loughran denied Applicant’s request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: (1) whether the Judge’s characterization of Applicant’s marijuana use as “extensive” is supported by the record evidence; (2) whether the Judge’s analysis of the Guideline H mitigating conditions is erroneous; and (3) whether the Judge misapplied the whole-person concept. For the following reasons, the Board affirms the Judge’s unfavorable decision.¹

The Judge made the following pertinent findings of fact: (a) Applicant was 55 years old at the time of the hearing; (b) Applicant started smoking marijuana in college, and then did not smoke marijuana for an extended period; (c) he smoked marijuana again during the period between about 1992 and 1993, when he did not have a clearance; (d) he did not smoke marijuana between 1993 and May 2005; (e) Applicant smoked marijuana on 25 to 30 occasions between May 2005 and April 2006, using it every weekend or two during a month; (f) Applicant had a security clearance while he was using marijuana in 2005 and 2006, and he was aware of his company’s anti-drug policy, as well as the DoD’s policy against illegal drug use; (g) Applicant was stopped by his facility’s security officers for a random vehicle inspection on May 1, 2006; (h) the facility officers found a small amount of marijuana inside a wooden case; (i) Applicant was arrested for unlawful possession of marijuana and possession of drug paraphernalia; (j) Applicant pled guilty to possession of drug paraphernalia, entered a diversion program, completed the program, and the charges were dismissed; (k) Applicant signed a “last chance” agreement with his employer on June 5, 2006; (l) Applicant successfully completed an outpatient chemical dependency program from May 3, 2006 through June 21, 2006; (m) the discharge summary listed a diagnostic impression of cannabis dependence and a favorable prognosis; (n) Applicant states that he will not use illegal drugs again and he has disassociated himself from any drug-using associates and contacts; and (o) three witnesses attest to Applicant’s job performance, reliability, honesty, trustworthiness, and good judgment.

The Judge reached the following conclusions: (i) there is no bright-line rule as to whether conduct is recent, and Applicant has not used illegal drugs in more than three years; (ii) however, his drug use was very extensive, occurred over a long period of time, and was interrupted by other long periods of abstinence followed by additional drug use; (iii) Applicant returned to illegal drug use when he was 50 years old and held a security clearance; (iv) he used the drug knowing it was illegal, contrary to his company’s anti-drug policy, and counter to the DoD’s policy against illegal

¹The Judge made formal findings in favor of Applicant under Guideline E. Those favorable findings are not at issue on appeal.

drug use; (v) the Judge was unable to make a determination that Applicant's drug use is completely in his past; (vi) security concerns are still present despite the presence of some mitigation.

Applicant's reliance on portions of the Adjudicative Desk Reference (ADF) is misplaced. DOHA judges are required to decide cases by using the Adjudicative Guidelines, not the ADF. The ADF itself contains language indicating that it may not be cited as authority for denial or suspension of access. *See, e.g.*, ISCR Case No. 03-04090 at 6 (App. Bd. Mar. 3, 2005). Given that language, Applicant cannot reasonably contend that the portions of the ADF cited by him constituted official U.S. government policy that the Judge was required to follow.

Applicant asserts that Applicant's drug use was not extensive. His assertion fails to demonstrate error on the part of the Judge. The record demonstrates that Applicant went through significant periods of marijuana use juxtaposed with significant periods of abstinence. 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). Although the record is not clear as to how many times Applicant used marijuana during his college years and during the period between 1992 and 1993, these periods of usage, coupled with the 25-30 instances of use admitted to by Applicant during the 2005-2006 time frame, reasonably support the Judge's characterization of Applicant's drug use as extensive. The level of usage established by the evidence, in addition to a pattern of usage that stretched, with breaks, over a 30-year period, undercuts Applicant's characterization of his marijuana use as an aberration.

Applicant's statements concerning the Guideline H mitigating conditions and the whole-person concept can be discussed together. Applicant argues that proper application of Guideline H mitigating conditions should have resulted in a decision in his favor. Specifically, Applicant maintains that the three-year passage of time since his last marijuana use and the evidence of rehabilitation overcome the government's security concerns. He also emphasizes his successful completion of a drug rehabilitation program and the maturity and responsible behavior he demonstrated by immediately reporting the May 1, 2006 incident to his supervisor when arguing that the Judge misapplied the whole-person concept. A review of the record and the Judge's decision reveals that the Judge weighed the mitigating evidence offered by Applicant against the length, seriousness, and pattern of the disqualifying conduct and considered the possible application of relevant mitigating conditions and whole-person factors. The Judge reasonably explained why the evidence Applicant presented in mitigation was insufficient to overcome the government's security concerns. In doing so, the Judge emphasized the fact that Applicant's position as an intelligent, mature, and highly-regarded engineer made his choice to return to illegal drug use at the age of 50, and while holding a security clearance, particularly disturbing.

The Board does not review a case *de novo*. After reviewing the record, the Board concludes that the Judge examined the relevant evidence and articulated a satisfactory explanation for his decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfgs. 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)). Therefore, the Judge's ultimate unfavorable security clearance decision under Guideline H is sustainable.

Order

The decision of the Judge is AFFIRMED.

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

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

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