

KEYWORD: Guideline H; Guideline J; Guideline E; Guideline F

DIGEST: In 2006, Applicant used marijuana. At the time he was an armed special agent on protection assignment for a high-ranking federal official. Also, Applicant incurred \$20,000 in personal charges on a government cell phone. Adverse decision affirmed

CASENO: 08-07988.a1

DATE: 12/04/2009

DATE: December 4, 2009

In Re:)
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 ----) ISCR Case No. 08-07988
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 Applicant for Security Clearance)
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)

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT

Charles Tucker, Jr., Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On April 23, 2009, 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), Guideline E (Personal Conduct), and Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On September 9, 2009, after the hearing, Administrative Judge Joan Caton Anthony 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 was arbitrary, capricious or contrary to law. For the following reasons, the Board affirms the Judge’s unfavorable decision.

The Judge found, *inter alia*, that in March 2006, Applicant used marijuana as an off-duty federal law enforcement officer who held a security clearance. She found that, at the time of the incident, Applicant was assigned as an armed special agent on the protection detail of a high-ranking federal official and had held a security clearance for about four years. The Judge also found that prior to his position as a federal law enforcement officer, Applicant had worked as a special investigator who conducted background investigations for security clearance applicants. As such, he was thoroughly familiar with the security concerns relating to illegal drug use because he was required to inquire about and investigate illegal drug use by individuals who sought access to classified information. The Judge also found that, at the time of the incident, Applicant took evasive action to hide the marijuana from the police and to deter their investigation. The Judge also found that in 2005, Applicant incurred over \$20,000 in personal charges on a government cell phone while working overseas.

The Judge concluded that although Applicant’s 2006 drug use was not recent and occurred only once, Applicant’s status as a security clearance holder and a special agent who was thoroughly familiar with government security concerns related to illegal drug use and his status as a special agent authorized to carry a firearm and charged with protecting a high government official, raised serious questions about his judgment, trustworthiness, and reliability. She also concluded that despite Applicant’s stated remorse and the negative impact the 2006 incident had on his career, insufficient time had passed to demonstrate a positive and permanent change in behavior. The Judge also concluded that when Applicant’s marijuana use and failure to follow his employer’s instructions about the use of his government cell phone is viewed from a whole person perspective, unmitigated questions remain about his judgment, reliability, and trustworthiness. In doing so, the Judge asserted that because of his status as a federal law enforcement officer with a clearance who took evasive action on the night of the marijuana incident in an attempt to protect himself, Applicant’s marijuana use was not simply an isolated use of an illegal drug.

Applicant argues that his single instance of marijuana use sufficiently invoked pertinent considerations under Guideline H so as to mitigate any security concerns raised by a single aberrational event. He argues that his gross deviation from his customary behavior is not indicative

of his judgment, reliability or trustworthiness, nor is it likely to recur. Applicant's arguments in this regard do not establish error on the part of the Judge.

Applicant'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). In this case, the Judge noted Applicant's favorable characteristics, professional accomplishments and responsible behavior since the 2006 drug incident, but indicated why these factors were insufficient to overcome the government's security concerns given his status as a federal law enforcement officer and a former background investigator and his actions in attempting to cover up his illegal activity. The Judge's conclusions in this regard are sustainable on this record.

Applicant also argues that the Judge's decision is erroneous in part because it analyzes his drug use under two different guidelines and reaches opposite conclusions. It is permitted to do so. *See, e.g.*, ISCR Case No. 04-09251 at 3 (App. Bd. Mar. 27, 2009). In this case, however, the Judge's reasoning is at least somewhat problematic in that she used contradictory language. In concluding for Applicant under Guideline J the Judge applied ¶32(a), "so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment." Whereas in concluding against Applicant under Guideline H for the same conduct the Judge wrote, "This conduct casts doubt on his reliability, trustworthiness, and good judgment." Similarly, she applied Guideline J, ¶ 32 (d), "there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement;" in Applicant's favor, but wrote under Guideline H, "Even though he expressed remorse for his behavior and the negative impact it had on his career, he also suggested that his arrest was unwarranted. I conclude that insufficient time has passed to demonstrate a positive and permanent change in behavior." Applicant is correct that there appears to be a contradiction and such contradiction is error. However, the Board concludes that the error is harmless, as the Judge's adverse conclusions regarding Applicant's drug use under Guideline H are sustainable and provide an adequate basis for her ultimate adverse security clearance decision.

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 her 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 denying Applicant a security clearance is AFFIRMED.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairperson, Appeal Board

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

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