

KEYWORD: Guideline H, Guideline J, Guideline E

DIGEST: Applicant documents submitted on appeal on the premise that they should have submitted by a local court to the Judge. Those documents fall into two categories: some were created after the pertinent time frame and others merely findings made by the Judge. Adverse decision affirmed.

CASENO: 09-00629.a1

DATE: 07/30/2010

DATE: July 30, 2010

In Re:)
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 -----) ISCR Case No. 09-00629
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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 July 7, 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), and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On January 27, 2010, after the hearing, Administrative Judge Roger C. Wesley 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 certain of the Judge’s findings of fact were supported by substantial record evidence and whether the Judge’s conclusion that Applicant had not met his burden of persuasion as to mitigation was erroneous. Consistent with the following discussion, we affirm the Judge’s decision.

The Judge made the following pertinent findings of fact: Applicant is an engineer for a Defense contractor. He received a Bachelor of Science degree from a noted U.S. university.

Between 2004 and 2005, while in college, Applicant used marijuana on three different occasions. He also tried psilocybin mushrooms on one occasion while in college.

In March 2008 Applicant was arrested for (1) possession of psilocybin mushrooms and (2) possession of marijuana. He pled guilty to the first charge, receiving a deferred entry of judgment. He was placed on three years probation, ordered to complete drug counseling, attend four 12-step meetings, and pay a fine. The court dismissed the charge relating to possession of marijuana.

Although offered an opportunity to submit additional evidence as to completion of the terms of his probation, he did not do so. He did, however, complete required 12-step meetings. Since completing his drug counseling program, he has continued to attend 12-step classes weekly.

He used psilocybin mushrooms in May 2005. However, he continued to carry a packet of the drug in his backpack for an additional two years. He provided no clear reasons why he did so for such an extended period of time.

Applicant is indebted to a U.S. city for unpaid parking tickets totaling nearly \$2,200. He provided no documentation or other evidence as to when he will be able to pay these fines.

Applicant contends that the Judge erred in some of his findings of fact. For example, he states that he has never been on probation. Rather, his court case involved a deferred entry of judgement. Having examined the record, we conclude that Applicant is correct. The essence of his deferred adjudication is that he would satisfy certain requirements—12-step counseling, etc.—and remain free of other criminal offenses for a period of 18 months, after which the case would be dismissed. Applicant Brief at 1. Although it appears to have certain features that are analogous to probation, the record does not support the Judge’s use of that term.

However, the context in which the Judge addressed this issue was Applicant’s having failed to provide documentation concerning the deferred adjudication, though he had been given an

opportunity to do so. Tr. at 70. There is no reason to believe that the Judge’s error in terminology affected either his opinion of Applicant’s failure to provide evidence or his ultimate resolution of the case. Therefore, the error is harmless. *See* ISCR Case No. 08-07528 at 2 (App. Bd. Dec. 29, 2009). Otherwise, the Judge’s material findings of security concern are based upon substantial record evidence or constitute reasonable characterizations of the record. *See* Directive ¶ E3.1.32.1. (Substantial evidence is “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.”)

In support of his appeal, Applicant has submitted evidence outside the record pertaining to his criminal case. Applicant asserts that this document should have been submitted by a local court to the Judge and should be considered by the Board in that light. *Compare* Directive ¶ E3.1.29. (“No new evidence shall be received or considered by the Appeal Board”). However, some of the documents were clearly produced outside of the pertinent time frame. The remaining documents merely confirm the Judge’s findings that Applicant attends 12-step programs. Therefore, even if the documents had made it to the Judge in a timely fashion they would not have altered the Judge’s analysis.

After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for the decision, “including a ‘rational connection between the facts found and the choice made,’” both as to the mitigating conditions and the whole-person factors. *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 Judge’s adverse 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).

Order

The Judge’s adverse security clearance decision is AFFIRMED.

Signed: Michael Y. Ra’anan
Michael Y. 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