



of the basis for that decision—security concerns raised under Guideline H (Drug Involvement) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 23, 2010, after the hearing, Administrative Judge Mary E. Henry granted Applicant’s request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raises the following issues on appeal: (a) whether the Judge’s application of Drug Involvement Mitigating Condition 26(b) is arbitrary, capricious, and unsupported by the record evidence; and (b) whether the Judge’s “whole-person” analysis is arbitrary, capricious, contrary to law, and unsupported by the record evidence. For the following reasons, the Board remands the Judge’s favorable security clearance determination.

The Judge made the following findings of fact: Applicant sporadically used marijuana beginning at age 14. She admitted her early marijuana use when completing an application for an earlier security clearance.<sup>1</sup> When filling out her most recent security clearance application in February 2009, Applicant self-reported drug use in the seven years prior to February 2009. She indicated that she used marijuana one or two times a year and “very infrequently” during this time. Applicant met with a security clearance investigator in March 2009. Applicant explained that she occasionally took one or two “tokes” on a marijuana cigarette when she attended parties at the home of a friend. She never smoked an entire marijuana cigarette, and she never attended the parties for the purpose of smoking marijuana. Rather, if offered, she might or might not smoke the marijuana. Additionally, the investigator noted that Applicant did not have intentions to use marijuana in the future but could not say she would not. At the hearing, Applicant explained that when the investigator asked her about future marijuana use, the question was fairly vague and she answered it similarly. The investigator asked, “well, do you think that you’ll ever do it again?” and Applicant answered, “well, I don’t know. I don’t think so.”

The Judge also found: Applicant decided to stop using marijuana as it is not a smart move on her part. She does not want her marijuana use to affect her career or job. Applicant last used marijuana at a friend’s holiday party between Thanksgiving and Christmas 2008. She has decided not to associate with this friend anymore. Applicant prepared and signed a Statement of Intent on September 25, 2009, indicating she would not use drugs in the future. She further consented to automatic revocation of her clearance if she did. She has taken three random drug tests between September 24, 2009 and December 10, 2009. The results of these tests were negative. Co-workers knew Applicant smoked marijuana in the past and still expressly recommended her for a security clearance without reservation. Nine other letters of recommendation express confidence in Applicant’s professionalism and honesty. These individuals did not indicate that they had any knowledge that she used marijuana and that this use was the reason for her security clearance issues. On her own initiative, Applicant sought a mental health evaluation, which was performed on October

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<sup>1</sup>The Judge does not include the date of the application for this earlier clearance in her findings of fact, but there is record evidence which indicates it was in 1985 and was granted by a federal agency (Government Exhibit 1).

27, 2009. The mental health professional concluded that Applicant did not have any mental health issues and that her responses did not show current or past substance abuse problems.

The Judge reached the following conclusions: Because of Applicant's marijuana use, the government has established a *prima facie* case under Guideline H. Applicant stopped her infrequent use of marijuana about 14 months ago, which is not in the distant past, but the near past. Applicant signed a statement of intent not to use marijuana or illegal drugs in the future. She has agreed to the revocation of her security clearance should she do so. In light of her honesty, Applicant's stated intent is credible. Given she has credibly demonstrated she is a person of her word, her agreement not to use any illegal drugs in the future is reliable and credible. Applicant no longer associates with her friend who permits marijuana at parties and no longer attends social functions at her friend's house. She has not smoked marijuana in over 14 months. Applicant has mitigated the government's security concerns under AG ¶ 26(b).<sup>2</sup> Under the whole person concept, the Judge concluded that Applicant smoked marijuana infrequently and sporadically in recent years and even less in past years. Applicant's honesty is not in question in this case. She reported her marijuana use and made no attempt to hide it. When she completed her security clearance application, she reconsidered her marijuana use and decided to stop. Applicant is highly respected at her workplace and by her co-workers. There is little likelihood that her infrequent past use of marijuana can be used to coerce, pressure, or exploit her to release classified information.

Department Counsel argues that Applicant's professed intent not to abuse drugs in the future falls short of a demonstrated intent not to use them, such demonstrated intent being a requirement for the application of AG ¶ 26(b). Department Counsel also argues that the Administrative Judge's acceptance of Applicant's assertion that she will not use illegal drugs in the future ignores record evidence of previous equivocal statements that she is uncertain whether or not she will use drugs in the future. Additionally, Department Counsel asserts that by ignoring Applicant's long history of sporadic marijuana use, the lack of a track record of sustained abstinence and Applicant's failure to proclaim definitively an intent not to use in the future, the Judge has substituted a credibility determination for record evidence. Department Counsel's arguments have merit.

The Judge concluded that in light of the fact that Applicant has credibly demonstrated that she is a person of her word, her agreement to not use any illegal drugs in the future is reliable and credible. As Department Counsel points out, the Judge overlooked significant evidence in reaching that conclusion and in mitigating Applicant's conduct. Applicant indicated in her March 2009 interview with the investigator that she had no intention to use marijuana in the future but could not say she would not. More importantly, the investigator's report also indicates that Applicant stated

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<sup>2</sup>“[A] demonstrated intent not to abuse any drugs in the future. . . .” The Board notes that the actual text of the Judge's decision indicates that the case is mitigated under AG ¶ 26(d). This is an obvious typographical error, given the context in which the Judge concludes that the case has been mitigated, and given the fact that the Judge explicitly rejected the application of AG ¶ 26(d) earlier in her analysis.

“if she is attending a party and it’s available and she wants to take a toke she will.”<sup>3</sup> This statement indicates an intent to use marijuana in the future under the same circumstances in which most of Applicant’s past use of marijuana as an adult took place. In June 2009, DOHA sent Applicant a copy of the statement she made to the investigator. She was asked to authenticate it, and was given the opportunity to add additional information. In her response, dated June 30, 2009, Applicant verified that the investigator’s written summary accurately reflected the information that she provided. She also agreed to adopt the investigator’s summary as accurately reflecting the information provided in the interview and, by doing so, consented to the admission of the investigator’s summary of the interview into evidence at any hearing held to determine her suitability to hold a security clearance. Applicant did not challenge the accuracy of the investigator’s report during her hearing testimony.

In her answer to her SOR in September 2009, Applicant indicated that she intended to abstain from all future drug use. On the same date, Applicant signed a separate letter of intent expressing an intent never to use illegal drugs and/or marijuana again. An important part of Applicant’s testimony at the hearing acknowledged the difference between her statements to the investigator in March 2009 and the statements made subsequent to her receipt of the SOR regarding her statements about future intent to use drugs. The Judge does not refer to this conflict in the analysis portion of her decision, merely stating that Applicant’s agreement not to use any illegal drugs in the future is “reliable and credible.” The Board has held that while a Judge’s credibility determination is entitled to deference, such an assessment does not relieve the Judge of the obligation to decide how much weight can properly be given to an Applicant’s testimony and other statements in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 03-02486 at 7 (App. Bd. Aug. 31, 2004), citing *Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985). The credibility of Applicant’s post-SOR statements and hearing testimony of changed intent toward the future use of drugs is a critical aspect of the case, and by not squarely addressing it the Judge committed error. Given the self-serving nature of Applicant’s statements of future intent starting in September 2009, as well as record evidence of Applicant’s earlier marijuana use after being required to reveal it on an earlier clearance application, it is not reasonable for the Judge merely to accept the credibility of statements of future intent without a clear explanation of why she found it credible. *See, e.g.*, ISCR Case No. 07-10804 at 4 (App. Bd. Jun. 19, 2008).

Department Counsel also argues that, both in assessing Applicant’s credibility and analyzing the case under the whole-person concept, the Judge placed too much reliance on the written statements of character references. In her decision, the Judge concluded that the authors of these letters expressed the same level of confidence, trust, reliability, respect, professionalism, and honesty in her as [Applicant’s] hearing witnesses. A reading of the Judge’s decision as a whole reveals that the Judge assigned considerable weight to these character statements. However, the Judge specifically acknowledged that none of the authors of the written character statements had any awareness of Applicant’s past marijuana use, or the government’s concern about her involvement

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<sup>3</sup>Government Exhibit 2. This specific and revealing indication of future intent is not mentioned anywhere in the Judge’s decision.

with drugs. Department Counsel correctly points out that the Judge failed to consider or comment upon the effect this lack of knowledge might have had upon the character references' assessment of Applicant's character, integrity and judgment. The Board has held that it is error for a Judge to rely on character letters that do not reveal any knowledge of the underlying issues in a case to mitigate security concerns based on those same issues. *See, e.g.*, ISCR Case No. 01-03132 at 4 (App. Bd. Aug. 8, 2002). Thus, the Judge's substantial reliance on these character statements to mitigate the government's case against Applicant is significantly undercut by the statement authors' lack of knowledge about the case.

Additionally, Department Counsel asserts the Judge drew an improper inference from the fact that none of the character witnesses indicated knowledge about Applicant's marijuana use and then improperly concluded that none of the character references had ever observed her using illegal drugs at work or saw her at work showing the effects of drug use. Given the fact that the SOR did not allege impaired judgment at work or use of drugs while at work, Department Counsel correctly asserts that the Judge missed the point of the character witnesses' lack of knowledge by using it to speculate about the parameters of Applicant's drug use in a setting not made relevant by the allegations in the SOR, instead of considering such lack of knowledge when evaluating the usefulness of the references' unqualified opinions about Applicant's personal integrity and judgment. To the extent the Judge relied on this speculation about lack of workplace drug use to bolster her overall analysis of mitigation, such reliance was error.

The Board remands the case to the Judge with instructions to consider the conflicts in the evidence—specifically the Applicant's statement regarding possible future use at parties—when evaluating Applicant's credibility and her more recent stated intent not to use marijuana or other drugs in the future. After taking these matters into consideration, the Judge should then address the viability of AG ¶26(b) as a basis for mitigation. Additionally, the Judge is instructed to evaluate the effect of the character witnesses' lack of knowledge about Applicant's marijuana use when weighing the relative importance of the character witness statements to the overall case. The character witnesses' lack of knowledge as to Applicant's marijuana use and the government's corresponding security concern is not to be used to create inferences favorable to Applicant.

### **Order**

The Judge's favorable security clearance decision is REMANDED in accordance with the decision above.

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