KEYWORD: Guideline H

DIGEST: The Judge's denial of Applicant's request for the testimony of two witnesses was not arbitrary capricious, or contrary to law. His conclusion that the witnesses' testimony would have been merely cumulative was supported by the record. Adverse decision affirmed.

CASE NO: 09-02839

DATE: 06/22/2011

DATE: June 22, 2011

In Re:	)	
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	)	
	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Gina Marine, Esq., Department Counsel

FOR APPLICANT
Alan V. Edmunds, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 15, 2009, DOHA issued a statement of reasons (SOR) advising Applicant 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 appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30. The Appeal Board issued a remand decision, dated May 17, 2010, instructing the Judge to issue a new decision correcting certain identified errors. On July 30, 2010, the Judge issued a Decision on Remand, again granting Applicant's request for a security clearance. Department Counsel appealed again pursuant to the Directive ¶¶ E3.1.28 and E3.1.30. The Appeal

Board issued a second remand decision, dated October 29, 2010, wherein the Board identified errors and then determined that the case should be remanded to a new Judge. The Board's remand order authorized the holding of a new hearing upon the request of either party. Applicant requested a hearing. On March 31, 2011, after the hearing, Administrative Judge Paul J. Mason issued a decision denying Applicant's request for a security clearance. Applicant appealed, pursuant to ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issues on appeal: (1) whether the Judge's decision to not allow two of Applicant's witnesses to testify at the hearing was error; and (2) whether the Judge's adverse security decision was arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge's unfavorable decision.

The Judge made the following pertinent findings of fact: Applicant is 50 years old and has two adult children. She worked in a facility as an electrician in 1985 with a Q clearance received through the Department of Energy. She understood the importance of not using drugs while working at the facility. Applicant sporadically used marijuana since she was 14 years old. She engaged in limited marijuana use during her marriage from September 1982 to December 1999. In a security clearance application she filled out in 1985 to work as an electrician, she admitted using marijuana. In a security clearance application she filled out in February 2009, Applicant indicated that from January 2001 to February 2009, she used marijuana once or twice a year. In an interview with an OPM investigator in March 2009, Applicant indicated she took one or two "tokes" on a marijuana cigarette when she attended parties at the home of a girlfriend, generally during the holidays. She also stated that under similar circumstances, she would take a toke in the future if she desired. On June 30, 2009, Applicant notified DOHA in interrogatory answers that she agreed with the investigator's summary of her March 2009 interview and made no additions or modifications to the interview summary. During the hearing on December 7, 2009, Applicant testified the investigator asked the future drug use question vaguely, and she responded in a similar fashion, stating that she didn't know, or she didn't think so. In her September 2009 answer to the SOR, Applicant stated that she intended to abstain from all future drug use. She signed a separate letter of intent expressing an intent to never use marijuana and illegal drugs in the future, and consenting to a revocation of her security clearance for an infraction. Applicant also provided an affidavit indicating she does not use drugs. She took five random drug tests between September 24, 2009 and November 16, 2010. All tests produced negative results. Applicant told three co-workers about her past drug use. Collectively, the three witnesses had little knowledge of Applicant's marijuana use. They still recommended her for a security clearance based on her professionalism and honesty. These coworkers also have character statements in the record. Nine additional individuals submitted character statements praising Applicant's professionalism and honesty. None of the statements provided any indication that the authors were aware of Applicant's past marijuana use. A licensed clinical health counselor evaluated Applicant in October 2009 and concluded Applicant had no mental health issues and did not have current or past drug-abuse problems.

The Judge reached the following conclusions: Applicant claims she stopped using marijuana in 2008 after a one-time use between Thanksgiving and Christmas 2008. However, Applicant did not fully express that claim until December 2009, after she had stated contradictory positions in February 2009, March 2009, and June 2009 about her drug use and future drug use. Applicant's conflicting positions undermine her overall credibility and prevent a finding that she

terminated her drug use in 2008. Considering the evidence as a whole, Applicant's future intent to use drugs in certain situations continues to raise doubt regarding her current reliability and good judgment. Applicant's statement in March 2009, and verification of that statement in June 2009 that she would continue to use drugs in certain future circumstances substantially diminishes the mitigation available to her. The October 2009 medical report has questionable probative value because the report does not indicate whether the counselor was aware of the information Applicant furnished to the Government in February, March and June 2009 about her marijuana use. The record is unclear about whether Applicant has changed her environment where drugs are used. Had there been no evidence in March and June 2009 of an intention to use drugs in the future, then Applicant may have established an appropriate period of abstinence. Because her SOR answer and intent not to use affidavit were executed shortly after she received the SOR, it appears that Applicant changed her mind because she wanted to improve her chances of getting a security clearance, not because her drug use involved illegal conduct. Though the nine written references provide glowing appraisals of her professionalism and honesty, they furnish no probative value into the nature, scope, and frequency of Applicant's drug use. While the testimony of the three witnesses indicated they were aware of Applicant's drug use, their corresponding references do not discuss Applicant's drug use. In light of Applicant's infrequent marijuana use since she was 14 years old, her marijuana use after holding a security clearance in 1985, and her recent conditional statements about future marijuana use, the more recent affidavit in June 2010 and negative drug test reports are insufficient to carry Applicant's ultimate burden of persuasion under the drug involvement guideline.

Applicant argues that the Judge's decision was "inequitable" in that he did not consider all the relevant evidence available to him. This is because the Judge did not allow two witnesses for Applicant to testify at the hearing. Applicant quotes from the Board's first remand decision in the case, dated May 17, 2010, wherein the Board directed the Judge "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."[1] Applicant asserts that the Judge cannot properly evaluate the effect of the character witnesses' knowledge of the drug use unless the Judge allows the witnesses to testify to their knowledge of said drug use.

The Board will overturn a Judge's evidentiary ruling if it is arbitrary, capricious, or contrary to law. *See*, ISCR Case No. 08-04604 at 2-3 (App. Bd. Feb. 17, 2010). In his decision, the Judge indicated that he denied Applicant the opportunity to present the testimony of the two witnesses because of the anticipated cumulation of testimony and the fact that written character statements of the two witnesses had been entered into the record at the previous hearing on December 7, 2009. Perhaps even more significant for the resolution of this issue, the Board notes that the same two character witnesses gave live testimony at the initial December 7, 2009 hearing (albeit with a different Judge). At that time they provided evidence of their knowledge of Applicant's marijuana use during both direct examination and on cross examination. Applicant's proffer of expected testimony at the most recent hearing included only the statement that Applicant had two questions each for these witnesses and their testimony was to speak to the issue of whether they had

[1]The Board notes that its direction on remand on May 17, 2010 did not imply that the Judge needed to obtain additional evidence to determine the character witnesses' state of knowledge about Applicant's marijuana use. Rather, the direction to the Judge was to consider properly the evidence of the witnesses' state of knowledge that was already part of the record.

knowledge of Applicant's use of marijuana.[2] Given this proffer, and the evidence of record from the earlier December 7, 2009 hearing wherein the same two witnesses testified that Applicant had informed them of her marijuana use prior to asking them to furnish character reference letters, it is unclear to the Board what significant additional evidence would have been provided by these witnesses in the second hearing. Under these circumstances, the Judge did not err when he concluded that the witnesses' testimony would be cumulative, and the Judge's ruling that he would not receive their testimony was not arbitrary, capricious, or contrary to law.

Applicant argues that the Judge erred by not concluding that Applicant had mitigated the case against her under ¶ 26(a)[3] and ¶ 26(b)[4] of the Adjudicative Guidelines. She also claims that the Judge ignored evidence that was favorable to her and did not properly engage in a whole-person analysis. Applicant's assertions do not establish error on the part of the Judge.

Once the government presents evidence raising security concerns, the burden shifts to the applicant to mitigate those concerns. Directive ¶ E3.1.15. The presence of some mitigating evidence does not alone compel the Judge to make a favorable security 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*. *See*, *e.g.*, ISCR Case No. 06-10320 at 2 (App. Bd. Nov. 7, 2007). 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). In this case, the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct and considered the possible application of relevant conditions and factors. The Judge discussed the mitigating conditions and provided reasonable explanations for his ultimate conclusion that Applicant had not mitigated the Government's case, foremost of which were his conclusions that (a) Applicant's overall credibility was undermined by her conflicting positions concerning future drug use, and (b) Applicant's statement in March 2009 and verification of that statement in June 2009 that she would continue to use drugs in certain future circumstances substantially diminished the weight of the mitigating conditions applicable in the case.

A Judge is presumed to have considered all the evidence in the record unless he specifically states otherwise. *See*, *e.g.*, ISCR Case No. 07-00196 at 3 (App. Bd. Feb. 20, 2009). Applicant fails to overcome that presumption in this case. The Judge gave detailed descriptions of the evidence he considered, including the transcript and exhibits from the earlier hearing. He made numerous references to individual exhibits in the case, and there is no indication that he did not consider the many favorable character references and favorable job performance of Applicant. The Board also

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[2]Transcript of December 7, 2010 hearing at 7.

[3]"[T]he behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment[.]"

[4]"[A] demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation[.]"

concludes that the Judge properly applied a whole-person analysis to the case.

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