

KEYWORD: Guideline H; Guideline E

DIGEST: Applicant failed to rebut security concerns arising from his positive urine test for cocaine. Adverse decision affirmed.

CASE NO: 09-06401.a1

DATE: 03/03/2011

DATE: March 3, 2011

_____)	
In Re:)	
)	
-----)	ISCR Case No. 09-06401
)	
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 June 10, 2010, 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 November 30, 2010, after the hearing, Administrative Judge Michael H. Leonard denied Applicant’s request for a security clearance. Applicant appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge’s adverse clearance decision is arbitrary, capricious, or contrary to law.

The Judge made the following essential findings of fact: Applicant is a 42-year-old program manager/client executive who has been employed by a Defense contractor since 2008. He is married and has two children. In September 2008, Applicant was terminated from Federal employment with a DoD agency after testing positive for cocaine on a random drug test in 2007. He has consistently denied knowingly using cocaine, asserting that he may have unknowingly ingested it while attending a professional football game with friends several days before the test. He contested his termination from Federal employment to no avail. Decision at 3-4.

On appeal, Applicant continues to assert that his ingestion of cocaine was unknowing, while acknowledging that his positive test results and subsequent termination from Federal employment “may raise some concern under Guideline H.” Applicant’s Brief at 2. However, he asserts that the Judge should have concluded that any such concern was mitigated under the relevant conditions and factors because: 1) his drug use was isolated, infrequent and unlikely to recur, 2) he has disassociated from the drug using people and their environment, 3) he has had an appropriate period of abstinence, and 4) he has demonstrated an intent not to abuse drugs in the future. *Id.* Applicant’s arguments do not demonstrate that the Judge’s decision is arbitrary, capricious or contrary to law.

Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. 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*. 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.

In this case, the Judge concluded that Applicant had not met his burden of presenting sufficient evidence to rebut, explain, extenuate, or mitigate the security concerns raised by his positive drug test for cocaine while employed by a DoD agency—noting in particular that: “Applicant did not present a written statement or, better yet, the testimony of the person with whom he attended the game. That person may have shed light upon or confirmed Applicant’s recollection of events and provided exculpatory evidence for Applicant. This missing evidence is yet another reason to be unpersuaded by Applicant’s explanation.” Decision at 7. That rational, coupled with his findings as to the Applicant’s age and circumstances, and the recency and seriousness of the misconduct at issue, served as a sufficient, sustainable basis for the Judge’s ultimate adverse conclusion under Guideline H.¹

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.’” *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

¹The Judge’s favorable finding under Guideline E is not at issue on appeal.

U.S. 518, 528 (1988). Therefore, the Judge's unfavorable security clearance decision is sustainable.

Order

The decision of the Judge denying Applicant a security clearance is AFFIRMED.

Signed: Michael D. Hipple

Michael D. Hipple
Administrative Judge
Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board