

KEYWORD: Guideline E

DIGEST: Clearance Decision Statement from other government agency supports Judge’s finding that Applicant intended to mislead investigators as to the extent of his drug use. Judge’s findings of fact were based upon substantial record evidence. Adverse decision affirmed.

CASE NO: 10-02011.a1

DATE: 05/10/2011

DATE: May 10, 2011

In Re:)	
)	
-----)	ISCR Case No. 10-02011
)	
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 September 17, 2010, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 28, 2011, after the hearing, Administrative Judge Joan Caton Anthony 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 some of the Judge's findings were supported by substantial evidence; whether the Judge erred in concluding that he had deliberately provided false answers during previous security clearance processing; and whether the Judge's adverse security clearance decision was arbitrary, capricious, or contrary to law. Consistent with the following discussion, we affirm the decision of the Judge.

The Judge made the following pertinent findings of fact: Applicant is employed by a Government contractor as a lead subcontracts representative. He holds a bachelor's degree and has worked for his current employer since February 2009.

Applicant began using marijuana in September 1998, when he was a freshman in college. He continued using marijuana throughout his college career while socializing with friends. About 30% of the time, Applicant purchased the marijuana that he and his friends used. Once, in March or April 2003, Applicant was on a trip for spring break. He smoked marijuana several times with friends during this trip. Also, he ate a brownie containing marijuana or some other drug, which caused him to hallucinate and lose control of his body. After recovering, he decided never to use illegal drugs again.

In April 2004, Applicant completed a security clearance application (SCA). His security officer told him that the Government agency through which he was seeking the clearance did not want applicants who had been involved with illegal drugs within two years of applying. The SCA asked about any illegal drug use by Applicant. He stated that he had used marijuana once, in September 1998, and that he had not used it again.

In August 2004, Applicant was interviewed by an investigator from another Government agency pursuant to his request for a clearance. He stated that he had used marijuana once per month between September 1998 and December 1999 and ate a brownie spiked with marijuana in March 2003. He told the investigator that he had not provided the full extent of his marijuana use because he was afraid that if he told the truth he might not be hired by his employer. He admitted that he had intended to mislead the Government concerning his involvement with drugs.

In April 2009 Applicant completed another SCA. In response to a question about the extent of any illegal drug use, he stated that he had used marijuana from September 1998 to April 2003. He estimated that he had used marijuana "about 1 time every 4-5 months" during college and that he "socially smoked at college parties every now and then." Decision at 4.

Applicant has a good reputation for the quality of his job performance, dependability, and character.

Applicant contends that he did not deliberately falsify his 2004 SCA. He challenges the Judge's conclusions to the effect that he had attempted to mislead the Government concerning the extent of his drug use. In formulating her findings and conclusions, the Judge relied in part on the Clearance Decision Statement from the other Government agency, included in Government Exhibit 2, Answers to Interrogatories. This document explained to Applicant the reasons that the agency denied him a clearance. Among other things, this document described Applicant's statements to the security clearance interviewer in August 2004. The Judge stated that she considered this document

to be an official record compiled in the regular course of business. Decision at 2, note 1. See Directive ¶ E3.1.20. See also ISCR Case No. 08-06997 at 3 (App. Bd. Mar. 1, 2011). This Clearance Decision Statement, along with the other evidence in the record, supports the Judge's conclusions that Applicant had deliberately understated the extent of his drug use, in an attempt to mislead the Government.

Applicant challenges certain of the Judge's findings of fact, for example that he had told the other agency that he had feared not being hired if he had admitted the true extent of his illegal drug use. He also challenges the Judge's finding that, at the time he completed his 2004 SCA, he was aware that the other agency did not want an applicant who had used illegal drugs within two years. On this latter point, the evidence, which consists of Applicant's hearing testimony, is somewhat ambiguous.¹ However, the Judge's finding is a reasonable interpretation of the evidence and is sustainable. Even if we were to conclude that the Judge erred in this finding, the error would be harmless. The Judge's material findings of security concern are based upon substantial record evidence. 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.")

The record supports a conclusion 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 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). See also Directive, Enclosure 2 ¶ 2(b): "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security."

Order

The Judge's adverse security clearance decision is AFFIRMED.

¹"[W]hen I filled out that information I had no idea about, my security officer told me there was a two-year buffer zone for the agency. You know, they didn't want you to be involved in drugs for two years between when you applied and when you last did drugs. Now, you know, I didn't know that information, but it wasn't—there was no benefit in my eyes for me to say 2003 versus '98 versus '85 versus this morning, in my eyes." Tr. at 53-54.

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