KEYWORD: Guideline H; Guideline E

DIGEST: Record does not sustain Judge's conclusion that the two years that had elapsed since Applicant's last reported use of marijuana were sufficient to demonstrate rehabilitation. The Judge failed to analyze significant inconsistent statements by Applicant. Applicant's claim that he used marijuana only for analgesic purposes not supported by the record as a whole. Even if this explanation were true, one would have to consider Applicant's prior inconsistent explanations in evaluating his security worthiness. Favorable decision reversed.

CASE NO: 11-00193.a1

DATE: 01/24/2013

DATE: January 24, 2013

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

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Jeff A. Nagel, Esq., Department Counsel

FOR APPLICANT
Silvia J. Esparza, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On March 14, 2012, 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 September 28, 2012, after the hearing, Administrative Judge Richard A. Cefola granted Applicant's request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Judge erred in his application of the mitigating conditions and whether the Judge's application of the whole-person factors was erroneous. Consistent with the following, we reverse the decision of the Judge.

Facts

The Judge made the following pertinent findings of fact: In 1989, at age 18, Applicant began using marijuana "infrequently and on a recreational basis," until the early to mid-1990s. Decision at 2. In 2000, he signed a statement to the effect that he had no intention of using marijuana again, because of its effect on his security clearance and because marijuana use is illegal. His clearance was granted in 2001. In 2003, Applicant used marijuana, in order to alleviate pain from a fractured toe, as verified by a psychiatrist witness.

In 2008 through 2010, Applicant used marijuana, again in order to alleviate pain from a medical condition, as verified by the psychiatrist. Previously Applicant had stated that his use of marijuana had been recreational rather than medicinal. Applicant explained that he had been embarrassed to share his medical conditions with others.

In the Analysis, the Judge concluded that Applicant's conduct raised security concerns under Guideline H, specifically Disqualifying Conditions (DC) 25(a)[1] and 25(g).[2] He also concluded that Applicant had mitigated these concerns, citing to Mitigating Conditions (MC) 26(a)[3] and 26(b)(4).[4] The Judge stated that Applicant's last marijuana use was two years in the past and that he had signed a declaration eschewing future drug involvement. The Judge stated, "The fact that twelve years ago he said that he would not smoke marijuana, does not vitiate his current Declaration." *Id*. at 4. Under Guideline E, the Judge concluded that DC 16(c)[5] applied but that the concern had been mitigated

[1]Directive, Enclosure 2 ¶ 25(a): "any drug abuse . . ."

[2]Directive, Enclosure 2 ¶ 25(g): "any illegal drug use after being granted a security clearance[.]"

[3]Directive, Enclosure 2 ¶ 26(a): "the 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]Directive, Enclosure 2 ¶ 26(b): "a demonstrated intent not to abuse any drugs in the future, such as . . . (4) a signed statement of intent with automatic revocation of clearance for any violation[.]"

[5]Directive, Enclosure 2 ¶ 16(c): "credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information[.]"

under MC 17(c).[6] The Judge acknowledged Applicant's inconsistent statements concerning his marijuana use, but he concluded that the inconsistencies were minor.

Discussion

A Judge is required to "examine the relevant data and articulate 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 U.S. 518, 528 (1988). "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b). The Appeal Board may reverse the Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶¶ E3.1.32.3 and E3.1.33.3.

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. *See* Directive ¶ E3.1.15. "The application of disqualifying and mitigating conditions and whole person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole." *See, e.g.*, ISCR Case No. 05-03635 at 3 (App. Bd. Dec. 20, 2006).

In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Department Counsel argues that the Judge's treatment of the Guideline H mitigating conditions was not supported by the totality of the record evidence. We find this argument to be

[6]Directive, Enclosure 2 ¶ 17(c): "the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment[.]"

persuasive. Although the record contains no evidence of any marijuana use by Applicant after 2010, which was two years prior to the hearing, Department Counsel contends that Applicant's drug involvement had been extensive. The record demonstrates that Applicant had used marijuana over a 21 year period, which included a period of several years abstinence following his 2000 promise not to use the drug again. His resumed use undercuts the Judge's conclusion that Applicant's two recent years of abstinence are sufficient to demonstrate that his conduct was remote in time or that he had clearly reformed his conduct. Department Counsel persuasively argues that the second clause of MC 26(a) has not been satisfied because Applicant's multiple instances of marijuana use while holding a clearance and after having promised to refrain cast doubt on his current reliability. Moreover, evidence of Applicant's prior broken promise significantly undermines the applicability of 26(b)(4), in that it could lead a reasonable person to question Applicant's resolve to abide by his current declaration of intent. *See, e.g.*, ISCR Case No. 10-06480 at 2 (App. Bd. Aug. 19, 2011), in which an applicant's use of marijuana after having stated that he would not do so undermined the applicant's case for mitigation. In the case currently before us, the Judge's statement that this evidence does not vitiate Applicant's current declaration is not accompanied by any analysis or explanation and provides no reasonable basis to distinguish Applicant's circumstances from those in ISCR Case No. 10-06480.

Department Counsel also cites to evidence of Applicant's inconsistent statements concerning the reasons for his drug use. In his security clearance application (SCA), his clearance interview, and his answers to DOHA interrogatories, Applicant stated that his use of marijuana had been recreational.[7] However, at the hearing, Applicant's psychiatrist testified that Applicant had used marijuana in order to combat pain and that he had previously described the use as recreational to avoid the embarrassment of having to advise strangers about his medical conditions.[8] Applicant also testified to this effect. Applicant's presentation at the hearing is inconsistent with his prior statements, which significantly undercuts his credibility. These inconsistent statements could persuade a reasonable person to believe that Applicant's presentation at the hearing was a recent

[7]The SCA inquired if Applicant had used illegal drugs during the previous seven years. Applicant responded that he had engaged in occasional recreational use of marijuana from 2003 until the present. Government Exhibit (GE) 1 at 37. Later, during his security clearance interview, conducted in October 2010, he stated that he had used marijuana twice a month between August 2003 until the present. The interview summary was accompanied by Applicant's certification that the interview report was accurate. GE 2, Interrogatories, at 127. In addition, one of the interrogatory questions inquired whether Applicant had ever used drugs, to include cannabis, except as prescribed by a doctor. Applicant replied that he had used marijuana in 2003 and again from 2008 until 2010, once in a while at social events. *Id*. at 120. Another question inquired about changes in Applicant's circumstances that might demonstrate a "change of lifestyle away from your past drug usage." In response to this question, Applicant listed his professional success, his concern for the environment and for the improvement of political and social conditions, and his 2009 marriage. *Id*. at 125. The pagination of GE 2 begins at page 119. There are no other page markings consistently utilized throughout the document.

[8]On cross examination, the psychiatrist admitted that he had relied only on Applicant's statements to him during the examination conducted in anticipation of the hearing. "Q: Did you see any medical reports on any of those? A: No. Q: So, you had to take him at his face value? A: Yes. So, if it turns out that he didn't use it for medical reasons . . . he could have been lying to you. A: Yes. And that could throw things off. Is that correct? A: Yes." Tr. at 54. This cross examination undermines the Judge's finding that the psychiatrist had verified that Applicant had used drugs to alleviate pain, to the extent that verification would imply consideration of corroborating evidence.

fabrication. The Judge's conclusory statement that the inconsistencies are minor is not reasonable on its face and is not accompanied by analysis or explanation. This paucity of analysis lends force to Department Counsel's argument that the Judge appears to have substituted a favorable impression of Applicant's demeanor for record evidence. *See, e.g.*, ISCR Case No. 07-18324 at 7 (App. Bd. Mar. 11, 2011).

For reasons set forth above, the record does not support the Judge's favorable application of Guideline E MC 17(c). Evidence that Applicant had used marijuana over a period of many years is not consistent with the Judge's conclusion that the circumstances of Applicant's drug use were unusual. As the evidence in note 7, *supra*, illustrates, the temptation to use drugs appears to be an ongoing feature of Applicant's social life. Even if one accepts as true Applicant's evidence that his drug use during the past seven years was for analgesic purposes, painful injuries or illnesses are not unusual, but rather a real possibility for anyone. More significantly, if, for the sake of argument, one accepts this evidence as true one must conclude that Applicant has repeatedly lied during the investigation of his clearance, undercutting his claims of rehabilitation. The Judge's treatment of MC 17(c) is not sustainable on this record. Moreover, the Judge's whole-person analysis merely cites to Applicant's evidence of performance awards from his job, but it does not otherwise provide additional analysis supporting the favorable decision.

To sum up, the record contains evidence that Applicant used marijuana with varying degrees of frequency from 1989 to 2010. Some of this use occurred after Applicant had promised to avoid subsequent drug misconduct and while he held a security clearance. Moreover, the record contains evidence of inconsistent statements by Applicant that undermine his credibility. The record as a whole does not support the Judge's favorable decision, in light of the *Egan* standard.

Order

The Judge's decision is **REVERSED**.

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: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board