

KEYWORD: Guideline H

DIGEST: Applicant’s first use of marijuana occurred in 2007, while he held a clearance. The Judge concluded that under the circumstances of the case, Applicant’ drug use did not occur so long ago as to demonstrate an intent to refrain in the future. The Judge’s ultimate finding that Applicant had not mitigated the security concerns in his case is sustainable. Adverse decision affirmed.

CASE NO: 11-09172.a1

DATE: 03/19/2013

DATE: March 19, 2013

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In Re:)	
)	
-----)	ISCR Case No. 11-09172
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On August 15, 2012, DoD 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 January 11, 2013, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert E. Coacher 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 the Judge erred in his credibility determination and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant is an employee of a Defense contractor. He has held a security clearance since 2005.

Applicant used marijuana on five occasions between October 2007 and May 2010. He stated that the uses occurred in social settings. On the last occasion, he was attending a party at the home of a friend. Applicant ate some brownies, not realizing that they were laced with marijuana. Only after he felt the effects of the drug was he told that the brownies contained marijuana. In his April 2011 clearance interview, Applicant discussed his drug use. However, he did not mention unknowing ingestion during this interview. Applicant has not sought any kind of drug counseling.

The Judge's Analysis

Concluding that Applicant's circumstances raised concerns under Guideline H, the Judge noted aspects of the record that detracted from Applicant's effort to demonstrate mitigation. He noted that Applicant's apparent first use of marijuana occurred in 2007, while he held a clearance. The Judge concluded that, under the circumstances of the case, Applicant's drug use did not occur so long ago as to demonstrate an intent to refrain in the future. The Judge also stated that he did not find Applicant's testimony about unknowing ingestion to be credible. He stated that the first time Applicant mentioned this issue was at the hearing, although at the time of his 2011 interview his memory of the event should have been clearer. The Judge ultimately found that Applicant had not mitigated the security concerns in his case.

Discussion

Applicant challenges the Judge's conclusion that his testimony about unknowing ingestion lacked credibility. Applicant contends that he did not mention this subject in his 2011 interview because the interviewer did not seek details about the particular circumstances of each use of marijuana. We are required to give deference to a Judge's credibility determination. Directive ¶ E3.1.32.1. *See also* ISCR Case No. 10-08390 at 5 (App. Bd. Mar. 30, 2012). We have examined this assignment of error in light of the record as a whole. We note that Applicant addressed his drug use in his interview, in his answers to DOHA interrogatories, and in his Answer to the SOR. He did not discuss or even mention unknowing ingestion in any of these venues. In fact, in his Answer to the SOR, Applicant's admitted that his drug use from 2007 to 2010 "was a mistake and was a poor decision. . ." This is not consistent with his hearing testimony. A reasonable person could believe

that the testimony about unknowing ingestion was a recent fabrication. We find no reason to disturb the Judge's credibility determination.

Applicant takes issue with the Judge's adverse conclusions about mitigation. He contends that his drug use was not recent, contrary to the Judge's credibility determination. He contends that the Judge did not properly weigh his testimony that his 2010 use was unknowing, and he argues that his last instance of knowing use was actually in 2007, which was so long ago as to demonstrate that his behavior has changed. However, as stated above, the Judge's credibility determination was supportable, based on the record before him. Accordingly, he did not err in concluding that Applicant's last incidence of knowing use was in 2010. Moreover, there is no "bright-line" rule as to recency of drug use. In evaluating recency, as is the case with other issues in mitigation, the Judge must consider the evidence as a whole. *See, e.g.*, ISCR Case No. 05-03941 at 2-3 (App. Bd. Aug. 2, 2007). Given evidence that Applicant used marijuana on multiple occasions while holding a clearance, and given the Judge's adverse credibility determination, we find no error in the Judge's treatment of the pertinent mitigating conditions. A disagreement with the Judge's weighing of the evidence is not sufficient to demonstrate error. *See, e.g.*, ISCR Case No. 09-05854 at 3 (App. Bd. Nov. 8, 2010).

The Judge examined the relevant data and articulated a satisfactory explanation for the decision. The 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 Decision is **AFFIRMED**.

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