

KEYWORD: Guidline H; Guideline E

DIGEST: In an analyzing an applicant's *mens rea*, a Judge must consider the applicant's answers in light of the entire record. Adverse decision affirmed.

CASENO: 11-14265.a1

DATE: 08/28/2013

DATE: August 28, 2013

In Re:)	
)	
-----)	ISCR Case No. 11-14265
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Alan V. Edmunds, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On March 22, 2013, DoD 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 June 28, 2013, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Juan J. Rivera denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: 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

The Judge made the following pertinent findings of fact: Applicant works for a Government contractor. He served in the U.S. military from 1992 to 1998, receiving a General Discharge. He has an associate's degree.

Applicant submitted a security clearance application (SCA) in 2007. In response to a question about his prior use of drugs, he stated that he had used marijuana about five times between October 2001 and September 2002. He submitted another SCA in 2011. In response to a similar question, he stated that he had used marijuana about ten times between October 2001 and March 2011. During a clearance interview, he advised that he had used marijuana once a year while on vacation to relax, for a total of about ten times. He used during a vacation to a foreign country in 2005.

In his answer to the SOR and during the hearing, Applicant stated that he had used marijuana only four times. He confirmed that he had used marijuana after having been granted a security clearance. He stated that he was not aware that it was against policy to use marijuana while holding a clearance. Applicant claimed that the discrepancies in his answers about marijuana use were not due to an intent to deceive but to faulty memory. He states that he has matured and no longer associates with his drug-using friends. He is involved in community activities and has signed a statement of intent with automatic revocation of clearance for any further drug use. Applicant enjoys an excellent reputation for the quality of his work, his ethics, and his dedication. His job performance ratings have been exceptional.

The Judge's Analysis

Regarding Guideline H, the Judge stated that Applicant's contradictory statements undermined his credibility, thereby diminishing the impact of his testimony about changed behavior. Under Guideline E, the Judge found that Applicant's answers to the 2007 SCA were deliberately false. He found that none of the mitigating conditions applied, for reasons similar to those advanced under Guideline H. In the whole-person analysis, the Judge noted evidence that Applicant had received a General Discharge.¹ He also noted evidence of Applicant's family circumstances, his

¹“Q: And you got an other than honorable discharge? A: A general under honorable conditions. Q: Okay. And what was the reason for that? A: I was late for mission a few times.” Tr. at 30.

education, his good job performance, and his community involvement. He went on to conclude that the favorable evidence Applicant submitted was not sufficient to mitigate the concerns raised by his conduct.

Discussion

Applicant contends that the Judge erred in finding that he had deliberately falsified his SCA. He contends that the evidence supports his explanation that he was not certain about the number of times he had used marijuana. In analyzing an applicant's *mens rea*, a Judge must consider the applicant's answers in light of the entire record. *See, e.g.*, ISCR Case No. 10-07104 at 3 (App. Bd. Feb. 25, 2013). The Judge's finding about Applicant's intent was consistent with the record that was before him. Applicant has cited to another Hearing Office case which, he contends, supports his case for a clearance. We have given due consideration to this case. However, it has significant differences from Applicant's own. In any event, Hearing Office decisions are not binding on other Hearing Office Judges or on the Appeal Board. *See, e.g.*, ISCR Case No. 11-07666 at 3 (App. Bd. Jun. 7, 2013).

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: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, 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