

KEYWORD: Guideline B; Guideline C; Guideline E

DIGEST: We agree the Judge erred in failing to analyze Applicant's contention that he did not understand the question when he submitted his SCA and, on the same day, disclosed his marijuana use during his counterintelligence screening. However, this error was harmless because, given Applicant's other questionable conduct, it did not likely affect the outcome of the case. Adverse decision affirmed.

CASENO: 17-03978.a1

DATE: 03/06/2019

DATE: March 6, 2019

In Re: _____)
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Applicant for Security Clearance)

ISCR Case No. 17-03978

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Ryan C. Nerney, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On February 15, 2018, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct), Guideline B (Foreign Influence), and Guideline C (Foreign Preference) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. Prior to the hearing, Department Counsel withdrew the Guideline B and C allegations. On November 30, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Jennifer I. Goldstein 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

Applicant is a 30-year-old employee of a defense contractor. He has earned a bachelor's degree and is enrolled in a master's degree program. A professor and master's program director praised Applicant's performance as a student.

Applicant admitted he received multiple traffic citations for speeding, uninspected vehicle, and failing to comply with traffic signals from 2004 to 2016. He attributed his receipt of the citations to working as a driver, although many were received before that employment. He also admitted to receiving two additional traffic citations in 2018.

Applicant admitted he used marijuana in 2015. He testified that he used marijuana six to eight times at parties and claimed he had not used it since 2015. Two drug tests he took in 2018 were negative. He signed a statement of intent in which he pledged to abstain from further use of illegal substances.

Applicant admitted he was arrested for felony embezzlement in 2007. He was found guilty of a reduced charge, given a suspended sentence, and was required to pay restitution and perform community service. While working as a store clerk, he scanned store merchandise as if he was returning previously purchased goods and issued himself a refund that was deposited directly in his bank account. He indicated he did not understand his action were illegal. He was terminated from that employment.

Applicant admitted he was arrested for forging public records in 2007. He admitting forging a date on a court document related to the above arrest to account for his absence from high school. This charge was dismissed.

Applicant admitted that he falsified his 2017 security clearance application (SCA) when he denied drug use in the past seven years. During a background interview, he claimed he did not list his marijuana use on that document because he did not think experimental use had to be disclosed.

He testified that he omitted that information because he did not understand the question and wanted to know more about it.

The Judge's Analysis

Applicant deliberately omitted his marijuana use from his SCA. He has an extended history of questionable conduct. “He incurred numerous traffic citations; used marijuana in violation of federal criminal laws; lied about that marijuana use on his [SCA]; embezzled from his employer; and forged court documents submitted to his school.” Decision at 5. None of the mitigating conditions fully apply. His two traffic citations in 2018 demonstrate he had not yet learned to comply with traffic rules. He has not demonstrated sufficient rehabilitation to show similar behavior is unlikely to recur.

Discussion

Applicant contends that he answered the SCA incorrectly because he did not fully understand the drug-use question and subsequently corrected himself in the follow-up interview after obtaining clarification of the question. He argues that the Judge erred in disregarding “the fact he did not fully understand the question and without a full understanding, [an] individual cannot deliberately act.” Appeal Brief at 9. In his SOR Response, Applicant’s answered the falsification allegation (SOR ¶ 1.e) stating:

I admit. I falsified the answer because I was not sure if the question applied to me. Also, I was waiting to be screened and discussed the question with my screener. I answered correctly after I got clarification from the screener on the spot.

On July 24, 2017, Applicant submitted his SCA in which he answered “No” to the question that asked whether he illegally used any drugs or controlled substance in the past seven years. Government Exhibit (GE) 1. On the same day that he submitted his SCA, he also underwent a counterintelligence screening. GE 5. The report of that screening reflects the following:

43. Describe your current and past drug usage. Amount/frequency.

CANDIDATE Response: “I experimented with marijuana a couple of times. The last time was in 2015.”

Interviewer Note: CANDIDATE stated HE “puffed” on a joint of marijuana “10 times” in the course of two months in 2015.

This information was not in HIS SF86. HE stated HE did not think experimental use had to be input in the SF86. CANDIDATE later stated that HE wanted to talk and [sic] about it during the interview and see if the experimenting needed to be added.¹

We agree the Judge erred in failing to analyze Applicant's contention that he did not understand the question when he submitted his SCA and, on the same day, disclosed his marijuana use during his counterintelligence screening. However, this error was harmless because, given Applicant's other questionable conduct, it did not likely affect the outcome of the case. *See, e.g.*, ISCR Case No. 11-15184 at 3 (App. Bd. Jul. 25, 2013).

Applicant also contends that the Judge did not consider or properly weigh all relevant evidence. For example, he argues he has learned from his past mistakes and claims the Judge did not consider the passage of time that has occurred since his marijuana use or his "severe criminal conduct." Appeal Brief at 10. His arguments, however, are neither enough to rebut the presumption that the Judge considered all of the record evidence nor sufficient to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 17-02488 at 3 (App. Bd. Aug. 30, 2018). We give due consideration to the Hearing Office cases that Applicant's Counsel has cited, but they are neither binding precedent on the Appeal Board nor sufficient to undermine the Judge's decision. *Id.* at 3-4. We further conclude the Judge considered the totality of the evidence in compliance with the whole-person analysis requirements. *See* Directive, Encl. 2, App. A ¶ 2(d).

The Judge examined the relevant evidence 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, Encl. 2, App. A ¶ 2(b): "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

¹ GE 5 at 13-14.

Order

The Decision is **AFFIRMED**.

Signed: Michael Ra'anan

Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy

James F. Duffy
Administrative Judge
Member, Appeal Board