KEYWORD: Guideline H; Guideline J

DIGEST: We have previously recognized that the precedential value of our decisions may be affected by changes to the Directive or the Guidelines. We also are aware that an arrest must be based on probable cause that a criminal offense has been or is being committed. Having said that, all record evidence pertaining to an arrest should be analyzed in determining whether AG ¶ 31(b) is established.

CASE NO: 19-01992.a1

DATE: 05/13/2020

DATE: May 13, 2020

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| In Re: | ) | |
| ---------- | ) | ISCR Case No. 19-01992 |
| 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 July 26, 2019, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline H (Drug Involvement and Substance Misuse) and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On January 31, 2020, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Braden M. Murphy denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

The Judge summarized the case as follows:

> Applicant has a 20-year history of marijuana use, and he used marijuana after submitting his security clearance application. Security concerns under Guideline H, drug involvement and substance misuse, are not mitigated. Applicant's 2007 arrest for marijuana possession is dated, but mitigation of the security concern under Guideline J, criminal conduct, is not established, due to his subsequent marijuana use. Applicant's eligibility for access to classified information is denied. [Decision at 1.]

In his appeal brief, Applicant claims that, before the hearing, Department Counsel stated he attempted to have the case dismissed because the security concerns appeared to have been mitigated. Based on that purported communication, Applicant argues that he believes another Judge would have reached a favorable decision. In his reply brief, Department Counsel argues this purported communication constitutes new evidence and does not raise any due process issues. More specifically, Department Counsel states, "[Applicant] does not allege or raise a concern that he was denied any opportunity to present his case or was otherwise harmed." Reply Brief at 2. We agree with Department Counsel. Neither party discussed or raised the purported communication at the hearing. Nothing in that communication would likely have misled a reasonable person in any manner or would have caused him to take any action or make any decision that would have inured to his detriment. Under Directive ¶ E3.1.29, we are prohibited from considering this purported communication on appeal because it is new evidence. This claim is not reviewable.

In his appeal brief, Applicant cites to the Adjudicative Desk Reference (ADR) in support of his arguments that his alleged conduct has been mitigated. His reliance upon the ADR is misplaced. DOHA Judges are required to decide cases by using the Adjudicative Guidelines, not the ADR. The ADR itself contains language indicating that it is not U.S. Government policy and may not be cited as authority for denial or revocation of access to classified information. *See* ADR at 2, Approving Authority Paragraph. *See also* ISCR Case No. 07-02253 at 3 (App. Bd. Mar. 28, 2008).

Applicant disputes the allegation asserting that he was arrested for possession of marijuana in 2007. He argues there is no evidence he committed that offense and cites to the written statement of an eyewitness that corroborates his claim that he did not possess marijuana on that occasion. In

his security clearance application (SCA) submitted in 2016, Applicant disclosed that he was arrested for being near some people smoking marijuana in 2007, and the misdemeanor "possession?" charge was dropped. Government Exhibit (GE) 1 at 68 and 69. He also disclosed that he used marijuana on occasion from 1997 to 2016, including "recreational use, daily use from 1997 until 2000, now monthly or less, used ~2000 times[.]" *Id*. at 70. In his background interview, he told an investigator that he was in the back of a van when fellow band members in its front were smoking marijuana. When a police officer arrested him, he told the officer that he was not involved in smoking marijuana. He was held in jail overnight. The next day he met with a court-appointed attorney who advised him, if he pled "no contest" to the charge, he would not need to return to court. He pled no contest to the charge and was placed on one year of unsupervised probation.[1] He was told that, after his probation was completed, the charge would be dismissed. GE 2 at 5. The only evidence of the arrest in the record are the statements of Applicant and the eyewitness. *See also* Tr. 33-37 and 73-76.

In his analysis, the Judge notes that Applicant disputed the arrest allegation, pled no contest to the charge, and chose not to contest the charge which would have required him to return to a city far from his home. The Judge concluded that "the fact of the arrest is sufficient to apply AG ¶ 31(b)."[2] Decision at 8. It merits noting that a Judge is tasked to resolve apparent conflicts in the evidence. *See, e.g.*, ISCR Case No. 14-00281 at 4 (App. Bd. Dec. 30, 2014). A Judge's decision also must be written in a manner that allows the parties and the Board to discern what conclusions the Judge is reaching. *See, e.g.*, ISCR Case No. 16-02536 at 5 (App. Bd. Aug. 23, 2018). Here, the Judge did not specifically conclude that Applicant committed the criminal conduct at issue or that Applicant's denial of engaging in that conduct was not credible. We are unable to determine, as the decision is written, whether the Judge concluded Applicant possessed marijuana when he was arrested in 2007.

In the past, we have stated, "[t]he fact that an applicant has been arrested or otherwise charged with a criminal offense, standing alone, does not constitute proof that the applicant engaged in criminal conduct." *See, e.g.*, ISCR Case No. 99-0119 at 2 (App. Bd. Sep. 13, 1999). When that decision was issued, the Guideline J disqualifying conditions were different than they are today. At the time of that prior decision, the pertinent Guideline J disqualifying conditions read:

> E2.A10.1.2.1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged;
>
> E2.A10.2.2. A single serious crime or multiple lesser offenses.

The applicable disqualifying condition now reads:

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[1] *See* ISCR Case No. 04-05712 (App. Bd. Oct. 31, 2006)(addressing a Judge's erroneous application of the doctrine of collateral estoppel to a misdemeanor conviction).

[2] AG ¶ 31(b) states, "evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted[.]" Directive, Encl. 2, App. A ¶ 31(b).

> 31(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted[.]

We have previously recognized that the precedential value of our decisions may be affected by changes to the Directive or the Guidelines. *See, e.g.*, ISCR Case No. 17-01807 at 2-3 (App. Bd. Mar. 7, 2018). We also are aware that an arrest must be based on probable cause that a criminal offense has been or is being committed.[3] Having said that, all record evidence pertaining to an arrest should be analyzed in determining whether AG ¶ 31(b) is established.

As noted above, the Judge did not specifically address whether Applicant's denial of possessing marijuana at the time of his arrest was credible. Given Applicant's apparent comprehensive disclosure of his other drug involvement and the statement of the eyewitness, his credibility was a relevant factor that should have been addressed. Although such an omission may have been an error, it was harmless because 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). The unmitigated security concerns under Guideline H are sufficient support the Judge's ultimate decision.

Applicant also argues that the Judge erred in his whole-person assessment and challenges his conclusion that Applicant needed to establish a longer track record of abstinence from illegal drug use. A party's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.,* ISCR Case No. 15-00650 at 2 (App. Bd. Jun. 27, 2016). Applicant has failed to show that the Judge erred in his whole-person assessment.

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, 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."

[3] *See Devenpeck v. Alford*, 543 U.S. 146, 152-156 (2004), citing other U.S. Supreme Court cases standing for that proposition.

## 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