KEYWORD: Guideline H

DIGEST: Applicant's appeal includes matters not contained in the record, including an attachment that post-dates the Judge's decision. We are not permitted to consider new evidence on appeal. Applicant argues that the Judge overstated the extent of his marijuana use. He cites to his testimony and his SOR Answer that he had used the drug only about once a year on average rather than two to five times, as the Judge found. However, the challenged finding is based on Applicant's disclosures contained in his 2016 SCA and in his clearance interview. After considering the record as a whole, we conclude that the finding is based upon "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." Adverse decision affirmed.

CASE NO: 19-00540.a1

DATE: 12/13/2019

DATE: December 13, 2019

In Re:	)	
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	)	
	)	
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 March 18, 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) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On September 25, 2019, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Wilford H. Ross 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 regarding the extent of Applicant's marijuana use 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 and Analysis

Applicant is employed by a Defense Contractor. He has held a security clearance since 2006. He used marijuana about two to five times a year from 2000 until 2018, including during those years in which he had access to classified information. He acknowledged that having done so was a poor decision and that such conduct was illegal under Federal law as well as state law during most of his period of use. When interviewed after submitting his security clearance application (SCA), Applicant stated that he intended to use marijuana in the future. Subsequently he signed a document retracting this statement and promising not to use illegal drugs in the future. Applicant's employer has a drug-free workplace policy, and he has attended briefings about what steps to take if a subordinate is believed to be using drugs on the job.

Although Applicant has not used marijuana for over a year, the Judge cited to what he termed consistent ingestion of marijuana over several years. The Judge noted that use of marijuana was illegal and that Applicant did so while holding a clearance and in contravention of his employer's drug-free workplace policy. The Judge stated that there is little evidence to suggest that Applicant will not return to drug use in the future, characterizing his statements to the contrary as self-serving.

Discussion

Applicant's appeal includes matters not contained in the record, including an attachment that post-dates the Judge's decision. We are not permitted to consider new evidence on appeal. Directive ¶ E3.1.29. Applicant argues that the Judge overstated the extent of his marijuana use. He cites to his testimony and his SOR Answer that he had used the drug only about once a year on average rather than two to five times, as the Judge found. However, the challenged finding is based on Applicant's disclosures contained in his 2016 SCA and in his clearance interview. After considering the record as a whole, we conclude that the finding is based upon "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." Directive ¶ E3.1.32.1. Even if the Judge had found that Applicant had used marijuana an average of once a year, it is not likely that he would have arrived

at a different overall decision. Therefore, even if he erred, such error was harmless. *See, e.g.*, ISCR Case No.18-02302 at 3 (App. Bd. Jun. 26, 2019).

Applicant contends that his marijuana use was legal in his state of residence and that he did not understand the conflict with Federal law and the implications of drug misuse on one's eligibility for a clearance. In the first place, it has long been established that ignorance or mistake of law is generally not an excuse for failing to abide by legal obligations. *See, e.g.*, *Rhode Island v. Massachusetts*, 45 U.S. 591, 613 (1846). In any event, we are not persuaded by Applicant's claim of ignorance. He testified that after completing an SCA in 2006 he was aware of the Federal Government's position on drug use by clearance holders. Tr. at 26-27. An applicant's use of illegal drugs after having completed a security clearance application or after otherwise having been placed on notice of the incompatibility of drug abuse and clearance eligibility raises questions about his or her judgment, reliability, and willingness to comply with laws, rules, and regulations. *See, e.g.*, ISCR Case No. 17-04198 at 2 (App. Bd. Jan. 15, 2019). We resolve this assignment of error adversely to Applicant.

Applicant cites to various pieces of record evidence that he believes support his effort to obtain a favorable decision. Among other things, he notes his good work performance, his having voluntarily disclosed his security-significant conduct, what he asserted was the relative infrequency of his marijuana use, and his efforts to relieve stress through legally permissible means. These were things that the Judge was bound to consider, along with all of the other evidence in the record. Applicant also states that he has held a clearance for many years with "zero security related issues." Appeal Brief at 2. However, while there is no evidence that he has committed any security infractions, Applicant's drug use over several years while holding a clearance fairly qualifies as a security concern, as the Judge stated in his analysis. Applicant's arguments in their entirety are not enough to rebut the presumption that the Judge considered all of the evidence, nor are they enough to demonstrate that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 18-01482 at 2 (App. Bd. Sep. 6, 2019). Despite Applicant's arguments to the contrary, we conclude that the Judge's whole person analysis complies with the requirements of Directive ¶ 6.3, in that he considered the totality of the evidence in reaching his decision. *See, e.g.,* ISCR Case No. 15-03592 at 2 (App. Bd. Jun. 14, 2017).

The record supports a conclusion that the Judge examined the relevant data and articulated 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 Judge's adverse 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."

Order

The Decision is **AFFIRMED**.

Signed: Michael Y. Ra'anan
Michael Y. 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