KEYWORD: Guideline H

DIGEST: Applicant contends the Judge's finding that his marijuana use while holding a security clearance was done "in ignorance" is not representative of the statement he provided. This contention does not merit any relief. In responding to the FORM, Applicant stated, "I would like to clarify, that while the use did occur while in possession of a security clearance, the added offense described in Guideline H, paragraph 25(f) was committed in ignorance." Adverse decision is affirmed.

CASE NO: 19-01539.a1

DATE: 01/09/2020

DATE: January 9, 2020

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 June 7, 2018, 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 decision on the written record. On October 4, 2019, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert Robinson Gales 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 findings of fact and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The SOR alleged that Applicant used marijuana with varying frequency from about late 2010 to mid-2016 and that he used that substance from about early 2011 to mid-2016 while holding a security clearance. Applicant admitted both allegations with comments.

The Judge's Findings of Fact

Applicant, who is in his mid-30s, has been working for a defense contractor since early 2011. He is married with two children. He received an honorable discharge after serving in the military for about six years. In 2008, he was granted a security clearance that has remained active.

In late 2010, Applicant "commenced what he called a 'minor level of participation' as well as 'limited and infrequent' use of marijuana[.]" Decision at 2. This use occurred during a vacation or at social gatherings. He claimed that he never purchased marijuana, carried it anywhere, or used it while performing his professional responsibilities. He never failed a drug screening test. He voluntarily reported his marijuana use when he completed a security clearance application in 2017. At some point, he decided that he neither had the time nor desire to continue using marijuana.

"Applicant denied knowing the significance of using any illegal drug while granted access to classified information, and he contends that his marijuana use while holding his security clearance was done 'in ignorance.'" Decision at 3, quoting from Applicant's File of Relevant Material (FORM) Response. He is now aware of its significance. He submitted a letter of intent to refrain from all drug involvement and acknowledged that future use would result in an automatic revocation of his security clearance. He claims he has ended his relationships with drug-using friends and relatives. No evidence of drug counseling or treatment was provided.

The Judge's Analysis

Applicant's professed level of marijuana use constitutes drug involvement. Vacations or social events are not a valid excuse to use illegal drugs. His claim that he was ignorant of the significance of using marijuana while holding a security clearance cannot be given much weight.

Use of marijuana while holding a security clearance is highly significant. No documentation, including character statements, support his claim that he has ended relationships with drug-using friends or relative.

"With a cavalier attitude towards laws, rules, and regulations spanning over five years, Applicant periodically used marijuana while holding a security clearance. Despite knowing that such use was prohibited by both the Government and his employer, he claimed ignorance of the significance of doing so while holding a security clearance." Decision at 6. Applicant's actions, despite a period of abstinence of a little over three years, continue to cast doubt on his current reliability, trustworthiness, and good judgement.

Discussion

Applicant contends the Judge erred in his findings of fact. When a Judge's findings are challenged, we examine them to see if they are supported by substantial evidence, *i.e.*, "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. *See, e.g.,* ISCR Case No. 16-04094 at 2 (App. Bd. Apr. 20, 2018). Applicant argues that he did not make the statement that his marijuana use was a "minor level of participation" but rather asserts that statement came from investigators who interviewed him.

In the FORM, Department Counsel advised Applicant that he could comment on whether his summarized background interview accurately reflected the information he provided to the investigators and that he could make any corrections, additions, deletions and updates necessary to make the summary accurate. In submitting his response to the FORM, Applicant did not indicate that the "minor level of participation" statement was inaccurate or make any correction to it. From our review of the record, the Judge's challenged finding was based on substantial evidence or constitutes a reasonable inference that could be drawn from the evidence. *See, e.g.*, ISCR Case No. 17-02225 at 2-3 (App. Bd. Jun. 25, 2019).

Applicant next contends the Judge's finding that his marijuana use while holding a security clearance was done "in ignorance" is not representative of the statement he provided. This contention does not merit any relief. In responding to the FORM, Applicant stated, "I would like to clarify, that while the use did occur while in possession of a security clearance, the added offense described in Guideline H, paragraph 25(f) was committed in ignorance." In his appeal brief, he asserts that he knew his actions were unlawful but was not aware that use while holding a security clearance was more egregious than mere drug abuse. He argues the Judge misrepresented his statement by suggesting that he lacked the ability to discern right from wrong. We do not interpret the Judge's finding in the manner that Applicant contends. Applicant has failed to establish that the Judge committed any harmful error in making this finding.

Applicant also contends the Judge mis-characterized his character. For example, he takes exception to the Judge's conclusion that he possesses a cavalier attitude towards the law as well as, in his view, the Judge's implication that he was using vacations and social events as an excuse to use illegal drugs. Applicant further argues that he has proven his honesty, reliability, and trustworthiness through his military and defense contractor services; that he is remorseful for his transgressions; and that he is committed to abstinence. His arguments fail to establish that the Judge either drew conclusions or weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3.

Noting the Judge's comment about the lack of character references, Applicant states that he chose not to present character references because he believed that his previously provided character references would be questioned. He is most likely referring to the character references he listed in his security clearance application. His belief that Judge would question those character references was incorrect. The FORM advised Applicant that, if he did not file objections or submit additional matters in response to that document, his case would be assigned to a Judge "for a determination based **solely** on this FORM." [Emphasis added.] FORM at 3. If Applicant wanted the Judge to consider character references, it was his obligation to provide that information to him. We also note that a DOHA Judge has no authority to interview individuals or serve as an investigator in a case, which would be inconsistent with his or her duty of impartiality. *See, e.g.*, ISCR Case No. 16-03709 at 2 (App. Bd. Jul. 2, 2018).

Additionally, Applicant states that he "incorrectly assumed that [he] would be afforded the opportunity to provide additional evidence, in the event that [his] initial responses to the SOR and FORM were insufficient or inconclusive." Applicant neither asserts nor does the record evidence establish that he was misled in any way in making his forum choice or led to believe he would be provided an additional opportunity beyond his FORM response to submit evidence. As noted above, he was informed that the Judge's decision would be based solely on the FORM and his response to it. Applicant has not established that a due process violation occurred in the processing of his case.

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."

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