DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
POST OFFICE BOX 3656
ARLINGTON, VIRGINIA 22203
(703) 696-4759

KEYWORD: Guideline H

DIGEST: Applicant used marijuana about five times between mid-2011 and mid-2019 while possessing security clearance eligibility. Adverse Decision is Affirmed.

CASE No: 20-03782.a1

DATE: 12/07/2021

Date: December 7, 2021

In the matter of:	)	
	)	
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	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Marc T. Napolitana, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On February 4, 2021, 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 September 27, 2021, after considering

the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge John Bayard Glendon denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant's appeal brief raises the following issues: whether he was denied due process, whether the Judge erred in the findings of fact and credibility determination, 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 in his thirties, is married, and has a child. He earned a master's degree about six years ago. For the past 11 years, he has been working for a defense contractor and has held a security clearance.

In a security clearance application, Applicant disclosed he used marijuana about five times between mid-2011 and mid-2019 while possessing security clearance eligibility. He admitted those facts again in his background interview and his response to the SOR. In his response to Department Counsel's File of Relevant Material (FORM), he stated he misspoke earlier about his last use of marijuana, indicating it occurred in mid-2018. He indicated that he has matured and promised never to use marijuana again.

Based on his repeated assertions, Applicant's latest use of marijuana more likely occurred in mid-2019. His marijuana use did not occur under unusual circumstances. He acknowledged his marijuana use was illegal under Federal law. "Regardless of whether his last use of marijuana was about two or three years ago, Applicant exercised extremely bad judgment using marijuana over a seven or eight-year period, even though infrequently, while he held a security clearance." Decision at 5. He has not mitigated the security concerns arising from his drug involvement.

Discussion

Background Investigator's Purported Statements

Applicant contends that the summary of his background interview (FORM Item 3) does not reflect statements the investigator made to him that he relied on to his detriment. His brief states:

> The summary of interview makes no mention to (sic) the assurances provided to the Applicant, which included statements to the effect of: "As long as you are open and honest and truthful, everything will be okay" at the outset of the interview. The investigator also told the Applicant that he "should not worry", and that "he [the investigator] has never seen a similar case of "smoking weed a few times" lead to an unfavorable decision" at the conclusion of the interview. Of course, this advice was highly improper. The Applicant relied on this evidence in making his elections throughout this process. He did not elect a personal appearance in front of an Administrative Judge simply because he was relying on this positive assurance.

> Additionally, he did not object to the summary of his interview because of these same assurances. Had the Applicant been aware of the potential consequences of his disclosure, he certainly would have elected alternative options and challenged the record on many more occasions. [Appeal Brief at 5.][1]

Applicant is raising this issue for the first time on appeal, and there is no evidence in the record of the purported statements of the investigator. Applicant frames this issue as an error by the Judge in making findings of fact. We fail to see how the Judge could err in making findings about the purported statements when there is no evidence about them in the record. Under this theory, the purported statements constitute new evidence on appeal that the Appeal Board is prohibited from considering. Directive ¶ E3.1.29. Raised in this manner, this issue fails for a lack of supporting record evidence to challenge any of the Judge's findings.

The Appeal Board has previously considered new evidence insofar as it bears upon the threshold questions of due process or jurisdiction. *See, e.g.*, ISCR Case No. 17-01472 at 2 (App. Bd. Aug. 6, 2018). Even if we construe this issue as a possible due process violation and consider the investigator's purported statements, we still conclude no relief is merited. In the SOR, Applicant was advised, "Because this office [the Consolidated Adjudications Facility of the Defense Counterintelligence and Security Agency] is unable to find that it is clearly consistent with national interest to grant you access to classified information, your case will be submitted to an Administrative Judge for a determination as to whether or not to grant, deny, or revoke your security clearance." The SOR was signed by a Division Lead in that office. In essence, the SOR informed Applicant that security clearance adjudicators could not make a favorable clearance decision due to his drug involvement while he held a security clearance. It is reasonable to conclude the SOR would have immediately dispelled any misconception that Applicant was laboring under based on the purported statements of the investigator. Put differently, despite whatever the investigator may have said to him, the SOR clearly placed Applicant on notice his security clearance was in jeopardy at the time he made his forum selection.

In the FORM, Department Counsel presented arguments why Applicant's security clearance should be denied or revoked. Specifically, Department Counsel stated, "Applicant's repeated use of marijuana after being granted access to classified information evidences a willful disregard for complying with laws, rules, and regulations, and his behavior casts doubt on his judgment, reliability, and trustworthiness." FORM at 2-3. Again, these arguments unquestionably placed Applicant on notice his security clearance was in jeopardy. The FORM also clearly advised Applicant that he could object to the summary of the interview and then "**the document may not be considered as evidence**." FORM at 2 (emphasis in original). Even after being apprised of the Government's arguments against the granting of his security clearance in the FORM, Applicant did not request to change his forum selection to a hearing or object to the Judge considering the summary of his background interview.

Applicant's arguments about the impact on him of the investigator's purported statements are not convincing. The record supports a conclusion that Applicant should have been well aware

[1] At the outset, it should be noted the Appeal Board is not convinced that the investigator's purported statements can be reasonably interpreted as "assurances" that Applicant would retain his security clearance.

of the potential consequences of his decisions regarding this adjudication before he made them. His arguments fail to establish he was denied any due process afforded him under the Directive.

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Findings of Fact

Applicant claims the Judge erred in finding he used marijuana with his wife while they were on trips. In support of this challenge, Applicant brief contains a signed declaration from his wife. As noted above, the Appeal Board cannot consider new evidence on appeal, which includes the wife's declaration. The summary of Applicant's background interview reflects that he purchased marijuana on four trips to two states where he did not reside. It further states, "On all four of these instances, Subject was traveling with his wife and he smoked marijuana utilizing a pipe. Afterwards, they would go and explore the city on foot, go out for dinner, and go back to the hotel." FORM Item 3 at 1. In the findings of fact, the Judge found, "The details of Applicant's admitted use of marijuana are that he and his wife traveled to two states in which marijuana could be legally purchased under the laws of those states and used marijuana a total of four times." Decision at 2-3. Applicant does not challenge that finding. Instead, he challenges the Judge's conclusion in the analysis section of the decision, that states, "[Applicant] used the drug with his wife while relaxing on a trip . . ." Decision at 5.

While there are significant differences between the review standards for findings of fact and conclusions (compare Directive ¶¶ E3.1.32.1 and E3.1.32.3), such distinctions are not critical to our analysis here. Based on our review of the record, Applicant cited no errors in the Judge's findings or conclusions that are likely to affect the outcome of the case. *See, e.g.*, ISCR Case No. 19-01220 at 3 (App. Bd. Jun. 1, 2020).

Hearing-Level Decisions

Applicant's brief relies on hearing-level decisions in unrelated Guideline H cases to argue the Judge erred in his analysis of this case. His reliance on those hearing-level decisions is misplaced. As the Board has previously stated, how particular fact scenarios in other cases were decided at the hearing level are generally not a relevant consideration in our review of a case. *See, e.g.*, ISCR Case No. 19-02593 at 3 (App. Bd. Oct. 18, 2021), setting forth a lengthier discussion of this issue. In short, Applicant's arguments based on favorable hearing-level decisions in cases involving different applicants and different facts do not establish that the Judge's conclusions and analysis in this case are arbitrary, capricious, or contrary to law.

Credibility Determination

Applicant contends the Judge erred in his credibility determination. In this regard, the Judge concluded that Applicant's change in the date of his last marijuana use was not credible. The Appeal Board is required to give deference to a Judge's credibility determinations. Directive ¶ E3.1.32.1. None of Applicant's arguments set forth any persuasive reason why we should not give deference to the Judge's credibility determination in this case.

Weighing of the Evidence

As noted above, Applicant contends the Judge improperly assessed and weighed the evidence. He argues, for example, that his drug involvement was infrequent and not recent, he self-reported his marijuana use, and he has acknowledged his mistake. His arguments are neither sufficient to rebut the presumption that the Judge considered all of the evidence in the record nor enough 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. 19-01400 at 2 (App. Bd. Jun. 3, 2020).

Conclusion

Applicant has failed to establish the Judge committed any harmful error. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The decision is sustainable on the record. "The general standard is that a clearance may be granted only when 'clearly consistent with 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 national security."

Order

The decision is **AFFIRMED**.

Signed: Michael Ra'anan
Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: Jennifer I. Goldstein
Jennifer I. Goldstein
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board