

KEYWORD: Guideline H; Guideline E

DIGEST: Under Guideline H, the SOR alleged that, while granted access to classified information, Applicant used marijuana with varying frequency from about 1975 to 1982 and from about late 2016 to late 2019. Applicant falsified his responses to illegal drug-activity questions in a 2017 security clearance application. Adverse Decision Affirmed.

CASE NO: 19-03376.a1

DATE: 02/08/2021

DATE: February 8, 2021

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In Re:)	
-----)	ISCR Case No. 19-03376
)	
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 April 10, 2020, 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 E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On October 8, 2020, after considering the record, 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 issue on appeal: whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

Under Guideline H, the SOR alleged that, while granted access to classified information, Applicant used marijuana with varying frequency from about 1975 to 1982 and from about late 2016 to late 2019. Under Guideline E, the SOR alleged that Applicant falsified his responses to illegal drug-activity questions in a 2017 security clearance application. In responding to the SOR, Applicant admitted each allegation with explanations. The Judge found against Applicant on all of the SOR allegations.

Applicant’s appeal brief contains information from outside the record. The Appeal Board is prohibited from considering new evidence on appeal. Directive ¶ E3.1.29.

In the appeal brief, Applicant contends the Judge based his decision on errors in Department Counsel’s File of Relevant Material (FORM). Specifically, he challenges Department Counsel’s statements that “Applicant has a Substantial [sic] history of illegal drug abuse” and “Applicant has Consistently [sic] used marijuana while he held a security clearance.” Appeal Brief at 1. This contention lacks merit. The Appeal Board’s scope of review is limited to determining whether the Judge committed harmful error. Directive ¶ E3.1.32. An error in a FORM, as opposed to one in a Judge’s decision, is not an appealable issue. *See, e.g.*, ISCR Case No. 15-00535 at 2 (App. Bd. Mar. 13, 2017).

Applicant also contends that the Judge penalized him for choosing to have his decision based on the written record instead of on a hearing. He is apparently basing this contention on the Judge’s finding of fact that states, “I was unable to evaluate his credibility, demeanor, or character in person since he elected to have his case decided without a hearing.” Decision at 3. In this regard, the Appeal Board has long held that when an applicant waives a hearing and chooses to have his or her case decided by the Judge based on the written record, the Judge has no ability to make a credibility determination based on observation of the applicant’s demeanor. *See, e.g.*, ISCR Case No. 19-02819 at 4 (App. Bd. Dec. 21, 2020). Moreover, an applicant, even if *pro se*, is generally responsible for the consequences of his or her decisions. *Id.* In this case, Applicant has failed to establish the Judge committed any error by merely noting a consequence of his forum choice.

Applicant points out the Judge found that he did not submit any evidence of the quality of his job performance or other evidence tending to establish his good judgment, trustworthiness, and

reliability. Applicant argues that he has worked as a Government employee or a contractor for many years, did not understand that he should have submitted job performance records or other character evidence, and contends the initial instructions to him were not clear. To the extent that he is arguing that he was denied due process or was not provided adequate notice of his responsibilities, we do not find that argument persuasive. Applicant was provided a copy of the Directive when he received the SOR. Directive ¶ E3.1.15 provides “[t]he applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” In the FORM and its forwarding letter, Applicant was informed that, unless he presented additional information, the Judge would base his decision solely upon the information contained in the FORM. Neither Department Counsel nor the Judge had a duty to obtain or present mitigating evidence. *See* ISCR Case No 19-02819 at 3. If Applicant wanted the Judge to consider any form of character evidence, it was his responsibility to provide it to him. Applicant has failed to establish that he was denied the due process afforded him under the Directive.

Applicant contends that the Judge failed to properly apply the whole-person concept. For example, he argues that his use of marijuana never negatively impacted his professional conduct, that his prior long period of abstinence from marijuana demonstrates his ability to refrain from it; that his more recent use of marijuana was due to medical issues and stress and occurred during a period of diminished mental health, that he has worked with a doctor to make permanent behavioral changes, and that he could never be pressured into compromising national security. These arguments amount to a disagreement with the Judge’s weighing of the evidence and are not enough to show the Judge reached conclusions that are arbitrary, capricious, or contrary to law. *Id.* at 5. Furthermore, we note that Applicant has not challenged the Judge’s findings or conclusions that he falsified his security clearance application, which is a sufficient independent basis to deny his request for a security clearance.

Applicant failed to establish that the Judge committed any harmful error. 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