

KEYWORD: Guideline H

DIGEST: The Appeal Board evaluates a Judge’s language in light of the entirety of the Decision. The Judge’s characterization of Applicant’s conduct as “drug abuse” was not error. The Judge’s finding about Applicant’s having received training regarding the inconsistency between drug abuse and holding a clearance was a reasonable inference. The Board cannot consider new evidence on appeal. Adverse decision affirmed.

CASE NO: 15-00207.a1

DATE: 03/28/2016

DATE: March 28, 2016

)	
In Re:)	
-----)	ISCR Case No. 15-00207
)	
Applicant for Security Clearance)	
)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Sean M. Bigley, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On July 6, 2015, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline H (Drug Involvement) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested that the case be decided on the written record. On January 28, 2016, after the close of the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert E. Coacher denied Applicant’s request for a security clearance. Applicant appealed, pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issue on appeal: whether the Judge’s adverse decision is arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge made the following findings: Applicant is 38 years old and has held a security clearance since 2006. He admitted using marijuana approximately three times between August 2013 and February 2014. Applicant obtained it from a friend. He explained that his marijuana use during that time frame was related to an emotional and stressful period in his life when he was going through a divorce. The divorce took place in August 2013. He stated his uses of marijuana during that time were “in celebration of my divorce, a life changing event that has restored my peace of mind and happiness. . . .” He further stated that he discontinued his use when he realized it no longer contributed to his peace of mind and happiness. He did not report his use of marijuana to his security manager at the time he used it. He reported it when he completed his security clearance reinvestigation application in June 2014. He claims that he “didn’t think about it [using marijuana] as being an illegal act and he did not realize it was in conflict with his security clearance.” He received annual training from his company on the prohibition of using illegal drugs and the reporting requirements for someone who engages in such use. Applicant provided a written statement of intent not to smoke marijuana in the future. He has received contribution awards and awards for excellence from his company.

The Judge concluded: Applicant’s drug use at his age, education level, and security background is troubling and a cause for concern. His claim of ignorance of the impact of using marijuana on his security clearance is not persuasive, nor is his stated lack of realization that using marijuana was illegal. Using the drug to celebrate his divorce was demonstrative of poor judgment. He has participated in annual training, which explains the consequences of illegal drug use and reporting requirements. His actions cast doubt on his current reliability, trustworthiness, and his judgment. Applicant receives partial credit in mitigation for completing a statement of intent not to smoke marijuana in the future, but there is no evidence that he terminated his friendship with his neighbor who supplied him with the marijuana. He did not mitigate the concerns under Guideline H.

Applicant asserts that the Judge erred because he made a key factual misstatement and took other information out of context. He notes that the Judge accurately quoted Applicant when Applicant stated he used marijuana “in celebration” of his divorce, but that the Judge ignored a qualifying statement that made his “celebration” comment, and his conduct, less flippant.¹ Applicant asserts that as the Judge presents the quote, it appears that Applicant remains flippant over his conduct and is lacking in remorse. After reviewing the Judge’s decision and the record evidence, the Board concludes that the Judge did not err.

There is no requirement that a judge discuss each and every piece of evidence in his or her decision. *See, e.g.*, ISCR Case No. 05-03250 at 4 (App. Bd. Apr. 6, 2007). There is nothing intrinsically significant about the omitted quote that required its inclusion in the Judge’s decision.

¹The statement reads, “I mistook the elation of finally being done with a personal disaster with a reason for celebration with drug use.”

Moreover, the Board will not evaluate language in a Judge's decision in isolation, but rather will consider the decision in its entirety to discern what the Judge found and concluded. *See, e.g.*, ISCR Case No. 01-22311 at 4 (App. Bd. Apr. 4, 2003). A review of the Judge's decision does not indicate that the Judge viewed Applicant's behavior as flippant or lacking in remorse. The Judge cites to Applicant's assertion that his marijuana use was related to an emotional and stressful period in his life when he was going through his divorce. The Judge accepts without comment Applicant's assertion that his marijuana use stemmed from something serious. In his analysis section, the Judge's only comment about Applicant using marijuana to celebrate his divorce was his conclusion that such use was demonstrative of poor judgment. Applicant concedes the accuracy of this assessment on appeal.

Similarly, Applicant takes issue with the Judge's finding that Applicant discontinued his use when he realized that it "no longer" contributed to his peace of mind and happiness.² He asserts that such wording by the Judge implies a concession by Applicant that, at some time, he did find marijuana use a contributing factor to his peace of mind and happiness, and this outlook shifts Applicant's casual *use* to some form of drug *abuse* or dependence. Applicant's argument lacks merit. While the Judge did not get the quote from Applicant precisely right, the Board detects no harmful error. Contrary to Applicant's appeal argument, nothing in the Judge's decision suggests that he based his ultimate conclusion on a perception that Applicant was at any time dependent upon the drug for a general state of well being. Rather, he based his conclusions in part by applying a portion of Guideline H that defines "drug abuse" as "the illegal *use* of a drug or *use* of a legal drug in a manner that deviates from approved medical direction (emphasis added)."³ Thus, it was not necessary for the Judge to find that Applicant had a psychological dependency on marijuana to conclude that he had engaged in drug *abuse*, as defined by the Directive. The Board notes that the Judge also based his conclusions on a Guideline H disqualifying condition that references any illegal drug *use* (emphasis added) after being granted a security clearance.⁴

Applicant argues that there is no basis in the record for the Judge's finding that he received annual training from his company on the prohibition of using illegal drugs and the reporting requirements for someone who engages in such use. Applicant's argument lacks merit. It is true that while the Government's evidence references annual refresher training, it does not establish that the training specifically dealt with drug use and the reporting requirements relating to it. However, Applicant's Exhibit C contains a statement by Applicant where he indicates, "Although I took the annual refresher training, I had never used illegal drugs before, and never planned to use them, so when I took the training, I honestly did not take note on what to do in the event I did use them." Given such a statement, which strongly suggests that the topic of illegal drug use was included in

²The actual wording of Applicant's comment, taken from his answer to the SOR, was, "I . . . discontinued the marijuana use after I discovered that the drug use did NOT (emphasis in original) contribute to my peace of mind and happiness."

³Directive, Enclosure 2 ¶ 24(b). Thus, Applicant's apparent argument that there is no basis for the Judge's application of the disqualifying condition at ¶ 25(a) is without merit.

⁴Directive, Enclosure 2 ¶ 25(g).

the training, the Judge, under the substantial evidence standard, could reasonably infer that Applicant had received such training. In any event, Applicant's prior completion of a security clearance application should have placed him on notice that drug use was incompatible with holding a clearance. *See, e.g.*, ISCR Case No. 14-03450 at 3 (App. Bd. Sep. 11, 2015).

Applicant asserts that the Judge failed to apply appropriate weight to his unusual life circumstances at the time as well as the passage of time since his marijuana use when evaluating the case for mitigation. The Board finds no reason to believe that the Judge did not properly weigh the evidence or that he failed to consider all the evidence of record. *See, e.g.*, ISCR Case No. 11-06622 at 4 (App. Bd. Jul. 2, 2012). We have considered the totality of Applicant's arguments on appeal and find no error in the Judge's ultimate conclusions regarding mitigation. The gravamen of the Judge's decision was the troubling nature of Applicant's marijuana use, notwithstanding the fact that he used it only about three times. This included consideration of Applicant's age, education level, and status as the holder of a security clearance. Additionally, the Judge did not find persuasive Applicant's claims of ignorance regarding the legal status of marijuana use and its effect on his clearance. Given this record, notwithstanding some evidence of mitigation, the Judge's ultimate conclusion that Applicant had not overcome the Government's security concerns was sustainable.

Applicant's brief is accompanied by a volume of material that is not part of the record below and therefore constitutes new evidence. The Board cannot consider such evidence. Directive ¶ E3. 1.29. Applicant's stated reason for considering the evidence notwithstanding the prohibition is not persuasive.

The Board does not review a case *de novo*. The favorable evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-11172 at 3 (App. Bd. Sep. 4, 2007). After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for the decision. "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). Therefore, the Judge's ultimate unfavorable security clearance decision is sustainable.

Order

The decision of the Judge is AFFIRMED.

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

Signed: Jeffrey D. Billett
Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board