KEYWORD: Guideline H

DIGEST: An error in a File of Relevant Material is not an appealable issue. The error in the Judge's findings of fact was harmless. A party's disagreement with a Judge's weighing of the evidence is not sufficient to show that the Judge mis-weighed the evidence. The Appeal Board cannot consider new evidence on appeal. Statement in interview summary that Applicant cannot be blackmailed represents Applicant's answers to questions, not the in interviewer's opinion as to Applicant's eligibility for a clearance. Adverse decision affirmed.

CASE NO: 15-00535.a1

DATE: 03/13/2017

DATE: March 13, 2017

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 January 27, 2016, 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 a decision on the written record. On January 4, 2017, after considering 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 Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge erred in the findings of fact; whether the Judge erred in his application of the mitigating conditions and whole-person analysis; 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

Applicant is a 36-year-old employee of a defense contractor. He earned a bachelor's degree in 2002. He has held a security clearance since at least February 2005. In responding to the SOR, he admitted using marijuana, with varying frequency, from March 2009 to June 2011; using cocaine once in February 2006; and using marijuana and cocaine while holding a security clearance.[1] During college, he used marijuana about once a week. From 2002-2007 and 2008-2009, he used marijuana about once every week or two. He also used it "a few times" while staying with friends. Decision at 2. His last admitted use was in June 2011 while attending a wedding. In his security clearance application, he claimed that he did not intend to use controlled substances in the future. He noted that marijuana use caused him headaches and impaired his thinking. He now intends to live a heathier lifestyle, which includes extensive cycling. He did not present any information about his work performance or other facts that could be used to assess the applicability of whole-person factors.

The Judge's Analysis

The Judge concluded that disqualifying conditions 25(a) "any drug abuse" and 25(g) "any illegal drug use after being granted a security clearance" applied. Many of Applicant's marijuana uses and his onetime use of cocaine occurred while he held a security clearance. Although such drug use occurred a number of years ago, insufficient evidence exists to determine he will change his behavior. The Judge was not persuaded by Applicant's claimed intention to not use marijuana again because it caused him headaches. Applicant did not provide a signed statement of intent with automatic revocation of security clearance for any future violations. Given his age, education, and security clearance status, his extensive drug use calls into question his reliability, trustworthiness, and good judgment.

Discussion

[1] In responding to the SOR, Applicant actually admitted he used marijuana from March 1999 (instead of 2009) to June 2011.

Applicant contends a mathematical error was made in computing the period of his marijuana use. Specifically, he points to the following sentence, "Applicant continued to use illegal drugs, admittedly intermittently, for nine years after graduating from college in 2002." Appeal Brief at 2. Excluding periods of abstinence, he argues the period of his marijuana usage was seven years. However, the sentence that Applicant quotes does not appear in the Judge's decision. The quoted sentence is from Department Counsel's File of Relevant Material (FORM).[2] An error in a FORM is not an appealable issue. The Appeal Board's scope of review is limited to determining whether the Judge committed harmful error. Directive E3.1.32.

Applicant also contends that the Judge erred in summarizing the periods of his marijuana use listed in his security clearance application (SCA), in which he stated:

> While a student at [name of college] before 2002, I used marijuana about once every month and didn't notice any effect. While a student in 2002, I first noticed an effect and used marijuana about once a week. In 2004 and 2005 I used marijuana on some weekends spent visiting friends who were students at [name of college]. While living in [an overseas location] (2006-2007 and 2008-2009) I used marijuana about once every week or two. During my most recent stay in [the overseas location], some friends offered me marijuana a few times during Nov 2010 and I used it. At a wedding in June 2011 marijuana was passed to me several times, I used it once and declined the rest.

With one exception, the Judge's findings about the periods of Applicant's marijuana use comport with his SCA disclosure. The exception involves the Judge's finding that Applicant used marijuana from 2002-2007. In his SCA disclosure, Applicant admitted using marijuana in 2002 and 2004-2007, but makes no mention of 2003. While the Judge may have erred in finding Applicant used marijuana in 2003, we find it was a harmless error because it likely had no affect on the Judge's decision. *See, e.g.*, ISCR Case No. 12-03420 at 3 (App. Bd. Jul. 25, 2014).

Applicant argues that the Judge erred in concluding that mitigating conditions 26(a)[3] and 26(b)[4] did not apply. In doing so, he notes the Judge's decision omitted a statement he made during

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[2] FORM at 2. Of note, Applicant was provided an opportunity to file objections and submit additional information within 30 days after receipt of the FORM, but he did not comment on the purported mathematical error. He submitted no response to the FORM.

[3] Directive, Enclosure 2 ¶ 26(a): "the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment[.]"

[4] Directive, Enclosure 2 ¶ 26(b): "a demonstrated intent not to abuse drugs in the future, such as: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation[.]"

his background interview about his transition to a heathy lifestyle. He failed, however, to rebut the presumption that the Judge considered all the evidence in the record. *See, e.g.*, ISCR Case No. 12-05959 at 2 (App. Bd. Apr. 6, 2016). In arguing for application of those mitigating conditions, Applicant also points to, among other matters, the period that has elapsed since his last marijuana use, the extent of his marijuana use, and his transition to a healthy lifestyle. Such arguments amount to a disagreement with the Judge's weighing of the evidence. A party's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 14-06440 at 4 (App. Bd. Jan. 8, 2016).

Applicant further contends that he believed his "initial submission" (which we interpret as his SOR response) was "a signed statement of intent." Appeal Brief at 3. In his SOR response, he stated, "I haven't used drugs since the last time reported above (June 2011) and do not wish to resume. I value my career and the trust placed in me and will not jeopardize it again." His SOR response, however, falls short of the statement envisioned in mitigating condition 26(b)(4) because it does not contain language that his security clearance could be automatically revoked for any future drug violation. Although he included a conforming "signed statement of intent" in his Appeal Brief, it constitutes new evidence that the Board may not receive or consider. Directive E3.1.29.[5]

In support of his arguments, Applicant points to the statement in the summary of his background interview that "[t]here is nothing in the subject's background that could be used to blackmail or coerce him to include his security violation, providing financial support to foreign nationals, contact with foreign nationals, drug and alcohol use." Appeal Brief at 4. As the Appeal Board has previously stated, such statements in the summary of a clearance interview represent an applicant's answers to the interviewer's questions, not the interviewer's opinion as to an applicant's worthiness for a clearance. *See, e.g.*, ISCR Case No. 14-03069 at 3 (App. Bd. Jul. 30, 2015). In any event, even if an investigator provided such an opinion it would not bind the DoD in its evaluation of an applicant's case.

The Judge's whole-person analysis is supportable because Applicant's security-significant conduct was evaluated in light of the entirety of the record evidence. *See, e.g.*, ISCR Case No. 14-02806 at 4 (App. Bd. Sep. 9, 2015). Applicant has not identified any harmful error likely to change the outcome of the case. The Judge examined the relevant evidence 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). *See also* Directive, Enclosure 2 ¶ 2(b): "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." The decision is sustainable on this record.

[5] In the Appeal Brief, Applicant also provided assertions about his periods of marijuana abstinence, his disassociation with drug-using friends, and his cycling regime that were not previously presented to the Judge. Those assertions also constitute new evidence that the Appeal Board may not consider. Directive E3.1.29.

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