KEYWORD: Guideline H

DIGEST: Applicant points out that the Judge made errors in the listing of his children. We find such errors were harmless because they likely had no affect on the Judge's ultimate decision. Adverse decision affirmed.

CASENO: 16-02402.a1

DATE: 08/16/2017

DATE: August 16, 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 September 14, 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 hearing. On May 25, 2017, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Roger C. Wesley 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 the findings of

fact; whether the Judge erred in his application of the mitigating conditions; 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, who is 55 years old, has worked for a defense contractor for more than 32 years. In 1993, he received a security clearance and has held one for most of his professional career. Between 1977 and 1984, he used marijuana sometimes weekly and other times monthly. In 1999, he was cited for possession of marijuana and was later fined and ordered to attended a substance abuse awareness program. In 2012, he ceased using marijuana at home and "shifted to using it on a spotty basis with his brother-in-law, mostly on weekends." Decision at 3. He acknowledged his employer has a zero tolerance drug policy. He has not used marijuana or any illegal drug since July 2014. He is held in high regard by his managers who vouched for his integrity, honesty, and ability to execute his responsibilities faithfully.

The Judge's Analysis

Applicant's use of marijuana is longstanding. Most of his drug use occurred while he held a security clearance. There are no bright lines for determining whether drug use is recent. Considering all the circumstances surrounding his marijuana use, mitigating conditions 26(a) and 26(b) have minimal application.[1] While Applicant's contributions to his employer are impressive from a whole-person perspective, they are not enough to overcome the security concerns arising from his recurrent marijuana use over a 37-year period.

Discussion

Applicant points out that the Judge made errors in the listing of his children. We find such errors were harmless because they likely had no affect on the Judge's ultimate decision. *See, e.g.*, ISCR Case No. 12-03420 at 3 (App. Bd. Jul. 25, 2014).

Applicant is also challenging that the Judge's finding that Applicant used marijuana "on a spotty basis" from 2012 to 2014. Applicant contends that he only used marijuana once per year (on the 4th of July) during those years. We examine a Judge's findings to see if they are supported by "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. At the hearing, Applicant testified, "I admitted to the sporadic use of marijuana between 1977 and July of 2014

[1] In the decision, the Judge misidentified the pertinent mitigating conditions as ¶¶ 24(a) and 24(b), instead of ¶¶ 26(a) and 26(b). Under Guideline H, ¶ 24 is "*The Concern*," while ¶ 26 lists the mitigating conditions. *See*. Directive, Encl. 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;" and ¶ 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[.]" We note the adjudicative guidelines were revised on June 8, 2017. Under the revision, mitigating condition ¶ 26(a) remains unchanged, while ¶ 26(b) imposed greater requirements on an applicant to show mitigation.

outside of the work environment." Tr. at 19. He also testified:

> I would say that for the last several years leading up to 2014, I was not a user. Periodically, we would attend a 4th of July party at my sister's house. And my brother-in-law is a user of marijuana and he would -- I'd say offer, pressure me into the use of marijuana during the weekend and I'll have to say [I] went with the peer pressure and used the marijuana.[2]

Applicant's testimony was not clear that he only used marijuana once per year between 2012 and 2014 on the 4th of July. From our review of the record, we conclude that the Judge's findings about Applicant's marijuana use are based on substantial evidence, or constitute reasonable characterizations or inferences that could be drawn from the record. *See, e.g.*, ISCR Case No. 12-03420 at 3, *supra*.

Applicant further contends that the Judge erred in the application of the mitigating conditions. He argues, for example, that his most recent marijuana use was infrequent, that his last marijuana use occurred nearly three years ago, and that he does not intend to ever use marijuana again. His argument amounts to a disagreement with the Judge's weighing of the evidence. The presence of some mitigating evidence does not compel the Judge to make a favorable security clearance decision. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. 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. 15-01652 at 2 (App. Bd. Jul. 7, 2017).

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, 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." The decision is sustainable on this record.

[2] Tr. at 35.

Order

The Decision is **AFFIRMED**.

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

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board

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