KEYWORD: Guideline E

DIGEST: Hearing Judge found that Applicant falsified marijuana use and a related arrest on security clearance applications. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. New evidence regarding medical marijuana use provided at appeal was not considered and was without merit. Adverse decision affirmed.

CASENO: 16-00258.a1

DATE: 02/23/2018

DATE: February 23, 2018

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| Applicant for Security Clearance | ) | |
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## 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 October 30, 2016, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision – security concerns raised under Guideline E (Personal Conduct) of DoD Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). On December 29, 2016, the SOR was amended. Applicant requested a hearing. On November 14, 2017, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Mark Harvey 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 decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm the Judge's unfavorable decision.

In his analysis, the Judge summarized his pertinent findings as follows:

> Applicant frequently used marijuana from 1999 to 2003, and in May 2007, he used marijuana at a party. At the party, he drank four beers and two shots of vodka. The police stopped him after the party. He was charged with possession of drug paraphernalia, driving while impaired, and some other offenses. His breathalyzer was below the threshold for driving while intoxicated. He subsequently pleaded guilty to possession of drug paraphernalia and driving while impaired. On his March 15, 2004 SCA [security clearance application], he falsely denied EVER using marijuana in the past seven years. On his October 21, 2014 SCA, he falsely denied EVER using marijuana while holding a security clearance, and he falsely denied that he was EVER arrested for a drug-related offense. His assertion that he thought the questions on his 2014 SCA only sought information for the pervious seven years is not credible. He took the time to ask coworkers for their opinions about the question, showing he read the question carefully and considered whether he should lie. He intentionally and deliberately falsified his 2004 and 2014 SCAs.[1]

In his appeal brief, Applicant submitted letters of reference and other documents that he did not previously submit to the Judge for consideration. Those documents constitute new evidence that the Appeal Board cannot consider on appeal. Directive ¶ E3.1.29.

Applicant raises factual and legal concerns about his 2007 arrest. As the Judge correctly found, Applicant pled guilty to the charges of possession of drug paraphernalia and driving while impaired arising from that arrest. Tr. at 30. The record contains substantial evidence to support the Judge's material finding regarding the arrest and conviction. *See, e.g.*, ISCR Case No. 96-0897 at 2-3 (App. Bd. Dec. 9, 1997).

Applicant argues that he used marijuana in 2007 to deal with chronic pain arising from sports-related injuries.[2] He also argues that, even though he made a poor decision by not disclosing

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[1] Decision at 7.

[2] In his brief, Applicant stated:

> I realize marijuana continues to be my preferred medication and over the past two months I have taken the necessary steps to be registered and approved for use of medical marijuana from the [applicable state commission]. My Patient ID Number is . . . and I have enclosed my certificate with care provider to this appeal. [Appeal Brief at 2].

This explanation and the medical marijuana certificate also constitutes new evidence that the Appeal Board cannot consider. It merits noting, however, that, while several states have decriminalized marijuana or allowed its use for medical or recreational purposes, such use of marijuana remains subject to the applicable disqualifying conditions in the

his marijuana use in his 2004 SCA, he has proven his suitability for national security eligibility because he has held a security clearance for 13 years without incident. To the extent that he is arguing the Judge did not consider record evidence or mis-weighted the evidence, he failed to rebut the presumption that the Judge considered all of the evidence in the record and failed to establish the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 16-00844 at 2 (App. Bd. Jul. 25, 2017).

Applicant further contends that he did not falsify his 2004 SCA by failing to disclose a minor in possession of alcohol charge. In the amendment to the SOR, the allegation addressing Applicant's failure to disclose that charge was deleted. Additionally, Applicant asserts that denial of his security clearance will have an adverse impact on him. The Directive, however, do not permit us to consider the impact of an unfavorable decision. *See, e.g.*, ISCR Case No. 11-13180 at 3 (App. Bd. Aug. 21, 2013).

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 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."

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Directive. *See, e.g.,* Directive, Encl 2, App A ¶ 25(b), "any substance misuse. . . ." The use of medical marijuana was addressed in a memorandum issued by the Directive of National Intelligence, *Adherence to Federal Laws Prohibiting Marijuana Use*, dated October 25, 2014, which states in part:

> [N]o state can authorize violations of Federal law, including the Controlled Substance Act . . . which identifies marijuana as a Schedule I controlled drug. Moreover, [the Intelligence Reform and Terrorism Prevention Act, as amended, 50 U.S.C. § 3343 (2008)] specifically prohibits a federal agency from granting or renewing a clearance to an unlawful user of a controlled substance or an addict, and under federal law, use of marijuana remains unlawful.
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> Agencies continue to be prohibited from granting or renewing a security clearance to an unlawful user of a controlled substance, which includes marijuana.

## Order

The Decision is **AFFIRMED**.

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

Signed: Judge Charles C. Hale
Charles C. Hale
Administrative Judge
Member, Appeal Board

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