

DATE: May 14, 2001

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 00-0593

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

Andrew Aloisi, Esq.

Administrative Judge Elizabeth M. Matchinski issued a decision, dated February 28, 2001, in which she concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed. For the reasons set forth below, the Board affirms the Administrative Judge's decision.

This Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant's appeal presents the following issues: (1) whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law; and (2) whether the Board should remand the case to the Administrative Judge for a new hearing.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated October 25, 2000 to Applicant. The SOR was based on Guideline H (Drug Involvement). A hearing was held on January 11, 2001.

The Administrative Judge issued a decision, dated February 28, 2001, in which she concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Applicant's appeal from the Judge's decision.

Appeal Issues

1. Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. Applicant does not challenge the Administrative Judge's findings about his use of marijuana on a monthly basis from 1992 to June 2000 while he held a security clearance. Rather, Applicant challenges the adverse conclusions the Judge draws from her findings of fact and argues that the Judge failed to consider certain mitigating circumstances. Specifically, Applicant argues: (a) the Judge erred by focusing on his marijuana use over an eight-year period and failed to consider Applicant's marijuana use in context of its sporadic, *de minimis* nature; (b) the Judge failed to consider that Applicant's level of marijuana use was not indicative of drug abuse or drug dependence; (c) the Judge failed to give due weight to the fact that there is no evidence that Applicant's marijuana use adversely affected him physically, emotionally, occupationally, or financially; (d) the Judge failed to give due weight to the fact that Applicant has no criminal record and has never been charged with

any criminal offense; (e) the Judge gave undue weight to the evidence that Applicant associates with friends who use marijuana; (f) the Judge erred by failing to give due weight to the evidence that Applicant has been candid and forthcoming with the government about his marijuana use, recognizes he made a mistake, has expressed remorse for it, and has demonstrated he does not intend to use marijuana in the future; and (g) the Judge's adverse decision improperly punishes Applicant for being honest about his marijuana use and stopping his use of marijuana of his own volition. For the reasons that follow, the Board concludes Applicant's arguments fail to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law.

On appeal, the Board reviews an Administrative Judge's conclusions to determine whether they are arbitrary, capricious, or contrary to law. *See Directive, Additional Procedural Guidance, Item E3.1.32.3.* Even if a Judge's findings of fact are supported by the record evidence or are unchallenged on appeal, the Board may still need to determine whether the inferences and conclusions the Judge drew from those findings are reasonable if those inferences and conclusions are challenged on appeal. *See, e.g., ISCR Case No. 99-0019 (November 22, 1999) at p. 3. See also ISCR Case No. 99-0511 (December 19, 2000) at pp. 13-14* ["An Administrative Judge's responsibility to weigh the record evidence does not mean that the Judge is at liberty to draw whatever inferences or conclusions the Judge wants to. Rather, a Judge must: (a) draw reasonable inferences and reach reasonable conclusions that take into account the totality of the record evidence; (b) evaluate the facts and circumstances of an applicant's case in a manner consistent with the 'whole person' analysis required by the Directive; and (c) consider the totality of an applicant's conduct and circumstances under the 'clearly consistent with the national interest' standard."](citations and footnotes omitted)

Applicant's history of marijuana use clearly falls under Guideline H. *See Directive, E2.A8.1.1.2.1* (listing marijuana as an example of a mood or behavior-altering substance). Furthermore, possession and use of marijuana are illegal, whereas possession and use of alcohol by an adult are not illegal. Accordingly, the Board is not persuaded by Applicant's comparison of his marijuana use to social drinking to suggest it was not that serious a problem.

There is no dispute that Applicant used marijuana, about twice a month, from 1992 to June 2000. That equates to marijuana use approximately 24 times a year for approximately eight years. Given that frequency of marijuana use, it is untenable for Applicant to argue the Administrative Judge should have concluded his marijuana was sporadic or *de minimis* in nature. Furthermore, there is no requirement in the Directive that drug abuse must rise to the level of drug dependence before it can be considered as raising security concerns. Accordingly, the absence of evidence that Applicant was dependent on marijuana did not preclude the Judge from considering the negative security significance of Applicant's overall history of marijuana use.

Applicant's argument that there is no evidence that his marijuana use adversely affected him physically, emotionally, occupationally, or financially does not demonstrate the Administrative Judge erred. Drug abuse can pose a security risk in a variety of ways. *See, e.g., AFGE Local 1533 v. Cheney, 944 F.2d 503, 506 n.6 (9th Cir. 1991).* The government is not required to demonstrate a specific, quantifiable level of risk that a given applicant may mishandle classified information when under the influence of illegal drugs such as marijuana. *See ISCR Case No. 99-0456 (January 21, 2000) at p. 3.* Furthermore, the government is not required to wait until an applicant actually mishandles or fails to properly safeguard classified information before it can make an adverse security clearance decision. *Adams v. Laird, 420 F.2d 230, 238-39 (D.C. Cir. 1969), cert. denied, 397 U.S. 1039 (1970).* Moreover, Applicant's argument ignores the negative security significance of the fact that he voluntarily engaged in marijuana use over a period of approximately eight years despite his awareness that such drug use was illegal and of security concern to the federal government. By doing so, Applicant raised serious questions whether he feels at liberty to disregard security policies, practices, or procedures whenever he disagrees with them. An applicant who demonstrates he or she is unwilling to comply with security policies, practices, or procedures is not a good candidate for a security clearance.

Applicant's absence of a criminal record fails to demonstrate the Administrative Judge erred. "Even if an applicant has not engaged in other conduct that has more serious negative security significance, the Judge still has the obligation to evaluate the security significance of the conduct the applicant did engage in." *ISCR Case No. 99-0254 (February 16, 2000) at p. 3.* Applicant's lack of a criminal record does not negate or diminish the negative security significance of his history of marijuana use.

The Administrative Judge did not act in an arbitrary and capricious manner by considering the record evidence that

Applicant associates with friends who use marijuana. Applicant correctly notes that he presented evidence that could warrant application of Drug Involvement Mitigating Condition 3 ("A demonstrated intent not to abuse any drugs in the future."). Indeed, the Judge specifically noted the applicability of the mitigating condition, but explained why she has doubts about the likelihood that Applicant would continue to refrain from marijuana use. The Judge acted in a reasonable manner. The Judge had to consider the record evidence as a whole to assess Applicant's claim of reform and to consider whether he would continue to refrain from marijuana use. *See* Directive, Section 6.3.5. (adjudicator should consider "[a]bsence or presence of rehabilitation"); Section 6.3.6 (adjudicator should consider "[p]robability that the circumstances or conduct will continue or recur in the future"); Item E2.2.1.6 (adjudicator should consider "[t]he presence or absence of rehabilitation and other pertinent behavioral changes") and Item E2.2.1.9 (adjudicator should consider "[t]he likelihood of continuation or recurrence"). It was reasonable for the Judge to consider Applicant's continued association with people who use marijuana in evaluating whether Applicant is likely to continue to refrain from marijuana use. This is particularly so because the Judge did not consider the evidence of Applicant's continued association with friends who use marijuana in isolation, but rather viewed it specifically as one facet of the circumstances of Applicant's case. The Judge's analysis of this aspect of the case was reasonable and consistent with pertinent provisions of the Directive.

Applicant's disclosures to the federal government about his marijuana use did not preclude the Administrative Judge from considering the security significance of Applicant's history of marijuana use over a period of eight years while he had a security clearance and was aware that marijuana use was illegal and of security concern to the federal government. Furthermore, the adverse effect that an unfavorable security clearance decision might have on Applicant's employment is not relevant. An applicant is not made more or less suitable for a security clearance based on how a security clearance decision might affect the applicant. *See, e.g.*, ISCR Case No. 99-0480 (February 14, 2001) at p. 2.

2. Whether the Board should remand the case to the Administrative Judge for a new hearing. Applicant argues, in the alternative, that the Board should to remand the case for a new hearing to enable him to present evidence that he is drug-free, that he was never drug dependent, and that he did not abuse drugs and was not a threat to security. For the reasons that follow, Applicant has failed to demonstrate he is entitled to a remand for a new hearing.

As discussed in the previous section of this decision, Applicant has failed to demonstrate the Administrative Judge's inferences and conclusions are arbitrary, capricious, or contrary to law. Absent a showing of harmful error that affects a party's right to present evidence in the proceedings below, a party does not have any right to have a second chance at presenting its case before an Administrative Judge. The right to present evidence for consideration by a Judge does not mean that a party has multiple chances to present evidence regardless of the provisions of the Directive concerning the orderly handling of these cases. *See, e.g.*, ISCR Case No. 00-0250 (February 13, 2001) at p. 3.

The Board is not persuaded by Applicant's argument that as "a lay person" he was not aware of his option to present certain kinds of evidence to address the government's security concerns. Applicant represented himself during the proceedings below. Applicant's *pro se* status did not relieve him of the obligation to take timely, reasonable steps to protect his rights under Executive Order 10865 and the Directive. *See, e.g.*, ISCR Case No. 00-0250 (February 13, 2001) at p. 3. A review of the record shows that Applicant received a copy of the Directive and was placed on reasonable notice of his obligation to prepare for the hearing and to present evidence on his behalf for the Administrative Judge's consideration. Having decided to represent himself during the proceedings below, Applicant cannot fairly complain about the quality of his self-representation or seek to be relieved of the consequences of his decision to represent himself. *See, e.g.*, ISCR Case No. 00-0086 (December 13, 2000) at pp. 2-3.

Conclusion

Applicant has failed to meet his burden of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's February 28, 2001 decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board