

DATE: December 5, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-03767

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Tobe M. Lev, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued the Applicant a Statement of Reasons (SOR), dated January 17, 2003, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guidelines H (Drug Involvement), E (Personal Conduct), and J (Criminal Conduct). Administrative Judge Robert Robinson Gales issued an unfavorable security clearance decision, dated August 25, 2003.

Applicant appealed the Administrative Judge's unfavorable decision. The 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 erred by concluding that the security concerns raised by Applicant's drug involvement had not been mitigated, and (2) whether the Administrative Judge erred by concluding that the security concerns raised by Applicant's multiple falsifications throughout the security clearance process had not been mitigated. For the reasons that follow, the Board affirms the Administrative Judge's decision.

Scope of Review

On appeal, the Board does not review a case *de novo*. Rather, the Board addresses the material issues raised by the parties to determine whether there is factual or legal error. There is no presumption of error below, and the appealing party must raise claims of error with specificity and identify how the Administrative Judge committed factual or legal error. Directive, Additional Procedural Guidance, Item E3.1.32. *See also* ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (discussing reasons why party must raise claims of error with specificity).

When the rulings or conclusions of an Administrative Judge are challenged, the Board must consider whether they are: (1) arbitrary or capricious; or (2) contrary to law. Directive, Additional Procedural Guidance, Item E3.1.32.3. In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an

explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See, e.g.*, ISCR Case No. 97-0435 (July 14, 1998) at p. 3 (citing Supreme Court decision). In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. Compliance with state or local law is not required because security clearance adjudications are conducted by the Department of Defense pursuant to federal law. *See* U.S. Constitution, Article VI, clause 2 (Supremacy Clause). *See, e.g.*, ISCR Case No. 00-0423 (June 8, 2001) at p. 3 (citing Supreme Court decisions).

When an Administrative Judge's factual findings are challenged, the Board must determine whether "[t]he Administrative Judge's findings of fact 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. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge." Directive, Additional Procedural Guidance, Item E3.1.32.1. The Board must consider not only whether there is record evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings, and whether the Judge's findings reflect a reasonable interpretation of the record evidence as a whole. Although a Judge's credibility determination is not immune from review, the party challenging a Judge's credibility determination has a heavy burden on appeal.

When an appeal issue raises a question of law, the Board's scope of review is plenary. *See* DISCR Case No. 87-2107 (September 29, 1992) at pp. 4-5 (citing federal cases).

If an appealing party demonstrates factual or legal error, then the Board must consider the following questions:

Is the error harmful or harmless? *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine);

Has the nonappealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds? *See, e.g.*, ISCR Case No. 99-0454 (October 17, 2000) at p. 6 (citing federal cases); and

If the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded? (Directive, Additional Procedural Guidance, Items E3.1.33.2 and E3.1.33.3)

Appeal Issues

1. Whether the Administrative Judge erred by concluding that the security concerns raised by Applicant's drug involvement had not been mitigated. On appeal, Applicant does not dispute the Administrative Judge's findings of fact with respect to the Applicant's long history of improper or illegal drug use. Rather, Applicant contends the Judge should have concluded that the security concerns raised by his prior drug use had been mitigated because he had abstained from such drug use for the last five years, his job performance of many years had been good, and he had stated that he would not use drugs in the future. For the reasons set forth below, we affirm the Judge's decision.

The application of Adjudicative Guidelines disqualifying and mitigating conditions does not turn simply on a finding that one or more of them applies to the particular facts of a case. Rather, the application of disqualifying and mitigating conditions requires the exercise of sound discretion in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 01-14740 (January 15, 2003) at p. 7. Thus, the presence of some mitigating evidence does not alone 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*. An applicant's disagreement with the Judge's weighing of the record evidence is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law.

In this case, the Applicant had a lengthy and serious history of improper and illegal marijuana use. That history included marijuana use--sometimes as often as twice a week--over a period of approximately 28 years. It also included the purchase of marijuana and marijuana use during adulthood, while an active duty member of the armed forces, and while holding a security clearance. On multiple occasions throughout the security clearance process, the Applicant provided false, misleading, or incomplete information about that marijuana use to the Government. In light of the foregoing, the

Judge had a rational basis to conclude that Applicant's overall history of improper and illegal drug use raised serious security concerns under Guideline H, and that the evidence which the Applicant had presented in mitigation was insufficient to overcome those security concerns. Therefore, we conclude that the Judge's adverse conclusions about Applicant's drug abuse are not arbitrary, capricious, or contrary to law.

2. Whether the Administrative Judge erred by concluding that the security concerns raised by Applicant's multiple falsifications throughout the security clearance process had not been mitigated. On appeal, Applicant does not dispute Administrative Judge's finding that he provided false, misleading, or incomplete information on multiple occasions throughout the security clearance process. Rather, Applicant contends that the Judge should have concluded that the security concerns raised by those falsifications were mitigated because he has now "come clean," has "nothing left to hide," and therefore, "[t]here is no reason to suspect that [he] would ever lie about his past marijuana use, or anything else, in the future." For the reasons set forth below, we conclude Applicant has failed to demonstrate the Judge erred.

In this case, the Judge found that Applicant provided false, misleading, or incomplete information on his security clearance application, in a signed, sworn statement, in an interview with an agent of the Defense Security Service, and at the hearing. Given those findings, the Judge had a rational basis for concluding that the serious security concerns raised by the Applicant's multiple falsifications under Guidelines E and J were not mitigated by his assertions that he has now "come clean," that he has "nothing left to hide," and that he has no reasons to lie about his past drug use in the future. Therefore, we conclude that the Judge's adverse conclusions about Applicant's falsifications are not arbitrary, capricious, or contrary to law.

Conclusion

Applicant has failed to demonstrate error below. Therefore, the Board affirms the Administrative Judge's adverse security clearance decision.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

Separate opinion of Chairman Emilio Jaksetic,

concurring in part and dissenting in part:

Given the record evidence in this case, and giving due deference to the Administrative Judge's opportunity to assess Applicant's demeanor during his hearing testimony, the Judge's adverse conclusions about Applicant's credibility are reasonable and easily sustainable. The Judge's unchallenged findings about Applicant's history of multiple falsifications, and the Judge's negative assessment of Applicant's credibility provide a rational basis for the Judge's doubts about Applicant's veracity. However, the Judge's adverse conclusions about Applicant's veracity are not a sufficient basis for the Judge's adverse conclusions under Guideline H (Drug Involvement).

An unfavorable credibility determination provides an Administrative Judge with a basis for deciding to disbelieve an applicant's testimony. However, mere disbelief of an applicant's testimony, standing alone, is not a sufficient basis for a

Judge to conclude that the applicant did something (*e.g.*, engaged in drug abuse after a given date) for which there is no independent evidence, however slight. *See, e.g.*, ISCR Case No. 01-26893 (October 16, 2002) at p. 7; ISCR Case No. 97-0356 (April 21, 1998) at p. 3.

An applicant does not have the burden of disproving a controverted fact; rather, the burden of proving controverted facts falls on Department Counsel. Directive, Additional Procedural Guidance, Item E3.1.14. If an applicant has not admitted to engaging in specific acts of misconduct, and if there is no record evidence that an applicant has engaged in specific acts of misconduct, then what rational basis is there for an Administrative Judge to find that misconduct occurred? An Administrative Judge's disbelief of the applicant's denials cannot relieve Department Counsel of its burden of proof, nor can it impose a burden of disproof on the applicant. It is understandable if a Judge faced with a lying applicant is highly suspicious and doubtful about that applicant's prior statements and current testimony. But, however warranted such suspicion and doubt may be, they do not warrant the Judge in making findings or reaching conclusions that disregard the burdens of proof set by the Directive.

In this case, the Administrative Judge did not find that Applicant used illegal drugs after 1998. However, the Judge refers to Applicant's "purported period of abstinence" (Decision at p. 10). Absent evidence of drug use after 1998, the Judge's reference to "purported period of abstinence" indicates the Judge is implicitly finding Applicant has not been abstinent since 1998. Given the record evidence in this case, the Judge's negative credibility determination is not sufficient to warrant Judge's implicit finding that Applicant has not really been abstinent since 1998. Without that implicit finding, the Judge's adverse conclusions under Guideline H are difficult to sustain.

For the foregoing reasons, I conclude that: (a) Applicant has demonstrated the Administrative Judge erred with respect to his adverse conclusions under Guideline H; (b) Applicant has failed to demonstrate the Judge erred in any way with respect to his findings and conclusions about Applicant's multiple acts of falsification; and (c) the Judge's findings and conclusions about Applicant's falsifications provide a rational basis for the Judge's adverse security clearance decision. Because the Judge's findings and conclusions about Applicant's falsifications provide a rational basis for his adverse conclusions about Applicant's security eligibility, I concur with the majority's conclusion that the Judge's decision should be affirmed.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board