

DATE: August 29, 2001

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-05912

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Administrative Judge Robert R. Gales issued a decision, dated June 8, 2001, in which he 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 issue of whether the Administrative Judge's adverse security clearance decision is arbitrary or capricious.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated March 2, 2001 to Applicant. The SOR was based on Guideline H (Drug Involvement).

Applicant submitted an answer to the SOR in which he indicated he wanted a decision made in his case without a hearing. A File of Relevant Material (FORM) was prepared. A copy of the FORM was given to Appellant, who submitted a response to it. The case was then assigned to an Administrative Judge for consideration.

The Administrative Judge issued a written decision, dated June 8, 2001, in which he 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 that decision.

Administrative Judge's Findings and Conclusions

Applicant used marijuana on three occasions during the period January 1994-Easter 1997, when he was in his late 30s. In May 2000 and April 2001, Applicant expressed a willingness to use marijuana in social occasions with friends in the future if he were given the opportunity. In May 2001, when responding to the FORM, Applicant admitted his marijuana use was a mistake and vowed to abstain from any future marijuana use because it might place his job in jeopardy.

Applicant's past use of marijuana was not isolated or aberrational in nature. Applicant's past use of marijuana demonstrated questionable judgment, irresponsibility and immaturity because he was in his 30's at the time. Applicant's statements about his willingness to use marijuana in the future, made in May 2000 and April 2001, raise serious concerns. Applicant's change of his position in May 2001 concerning the future use of marijuana is not convincing.

It is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Appeal Issue

On appeal, Applicant: (a) insists that he will not use any illegal drugs as long as he has a security clearance; (b) states he did not understand, in the past, how serious the Department of Defense views marijuana use; (c) he does not view marijuana as posing more of a security risk than drinking; (d) he has been honest and truthful with the Department of Defense despite advice from friends to the contrary, and he believes that applicants should not have to be afraid to tell the truth to the Department of Defense; (e) he now understands how serious the Department of Defense views any marijuana use, and he will not use it in the future; (f) he has never used marijuana while holding a security clearance; (g) he is subject to random drug tests; (h) since he has not used marijuana for a few years, it does not make sense to say that he needs drug rehabilitation; and (i) he needs a security clearance to do his job.

Applicant's brief contains many factual statements that go beyond the record evidence and constitute new evidence. The Board may not consider new evidence on appeal. Directive, Additional Procedural Guidance, Item E3.1.29. Applicant had the opportunity to present such information for consideration by the Administrative Judge when he responded to the FORM. Applicant cannot fairly contend the Judge erred based on information that Applicant did not present for the Judge's consideration during the proceedings below.

The following appeal arguments do not rely on new evidence: (1) he will not use illegal drugs in the future; (2) since he has not used marijuana for a few years, it does not make sense to say that he needs drug rehabilitation; and (3) he needs a security clearance to do his job. The Board construes these arguments as raising the issue of whether the Administrative Judge's adverse decision is arbitrary or capricious.

(1) The Administrative Judge specifically considered Applicant's various statements about his intentions concerning future use of marijuana. The Judge weighed those statements and gave an explanation for not giving full weight to Applicant's May 2001 statement that he would not use marijuana in the future. The Judge's explanation is not arbitrary or capricious. Applicant's disagreement with the Judge's conclusion is not sufficient to demonstrate the Judge erred.

(2) In deciding this case, the Administrative Judge made statements about the desirability of a requirement that an applicant demonstrate successful completion of a drug treatment and rehabilitation program, although the Judge acknowledged there was no such requirement. The statements reflected arbitrary and capricious action by the Judge.

An applicant is entitled to have his or her case adjudicated based on the application of pertinent provisions of the Directive (including the Adjudicative Guidelines), as opposed to an Administrative Judge's opinion as to what the applicant is required to do to overcome the government's case. *See* ISCR Case No. 98-0066 (August 28, 1998) at p. 2 (Administrative Judge erred by imposing on applicant a standard the Judge prefers to the provisions of the Adjudicative Guidelines); ISCR Case No. 96-0869 (September 11, 1997) at p. 4 (Administrative Judge erred by imposing a standard based on a defunct provision of the Adjudication Policy that the Judge prefers to the existing provision). *Cf.* ISCR Case No. 99-0511 (December 19, 2000) at p. 13 (an Administrative Judge's personal opinion of U.S. Government policy would be irrelevant to a security clearance adjudication). However, the Board reviews a Judge's decision in its entirety rather than focusing on isolated sentences in it. *See, e.g.*, ISCR Case No. 00-0104 (March 21, 2001) at p. 3. Viewed in the context of the Judge's decision as a whole, the Judge's statements about the desirability of a drug treatment and rehabilitation program are not dispositive of this case. Accordingly, the Judge's statements reflect harmless error under the particular facts of this case. *See, e.g.*, ISCR Case No. 98-0657 (November 16, 1999) at p. 3 (error is harmless when, upon consideration of the whole record, there is not a significant chance that, but for the error, the Judge would have reached a different result).

(3) Whether Applicant needs a security clearance for his job is not relevant to evaluating his security eligibility. The security significance of Applicant's past use of marijuana and his statements about future use of marijuana is

independent of, and does not depend on, whether Applicant needs a security clearance for his job. Furthermore, the negative effects that an adverse security clearance decision might have on Applicant's career do not render the Judge's decision arbitrary or capricious. 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. 00-0593 (May 14, 2001) at p. 4. Applicant's past use of marijuana and his statements concerning future use of marijuana provide a rational basis for the Judge's adverse security clearance decision.

Conclusion

Applicant has failed to demonstrate error below that warrants remand or reversal. Accordingly, the Board affirms the Administrative Judge's adverse security clearance 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