

DATE: November 25, 2002

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-08717

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Henry Lazzaro, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

Administrative Judge Roger C. Wesley issued a decision, dated June 24, 2002, in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Department Counsel appealed.

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

Department Counsel's appeal presents the following issues: 1. Did the Administrative Judge err in admitting two of Applicant's exhibits; 2. Did the Administrative Judge err in his factual findings relating to Applicant's 1998 positive drug test; and 3. Is the Administrative Judge's decision arbitrary, capricious, or contrary to law. For the reasons that follow, the Board affirms the Judge's favorable security clearance decision.

### **Procedural History**

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons dated October 16, 2001 based on Guidelines F (Financial Considerations), H (Drug Involvement), and E (Personal Conduct). Applicant requested a hearing which was held on May 14, 2002. Subsequently, the Administrative Judge issued a favorable decision. The case is before the Board on Department Counsel's appeal of that 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. *See* Directive, Additional Procedural Guidance, Item E3.1.32. *See, e.g.*, ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (discussing reasons why party must raise claims of error with specificity).

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 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. *See, e.g.,* ISCR Case No. 99-0205 (October 19, 2000) at p. 2.

When a challenge to an Administrative Judge's rulings or conclusions 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).

### **Appeal Issues**

The Administrative Judge's findings and conclusions under Guideline F are not at issue on appeal. Therefore, to decide this appeal, the Board need not address the Judge's findings and conclusions about Applicant's financial situation.

1. Did the Administrative Judge err in admitting two of Applicant's exhibits? Department Counsel argues that the Administrative Judge erred in admitting and then considering two of Applicant's exhibits (Applicant Exhibits A and B).

Applicant Exhibit A is a one-page document which appears to be the product of an internet search conducted outside the current proceedings on March 1, 1999. The heading is "Excerpts from 'Marijuana effects and urinalysis after passive inhalation and oral ingestion.' " Department Counsel objected to Applicant Exhibit A on the grounds it was incomplete and unscientific and contained unfounded assertions without any underlying basis.

Applicant Exhibit B appears to be a reprint of an entire article entitled "Passive inhalation of marijuana smoke and urinary excretion of cannabinoids." Department Counsel objected below to admission and consideration of the exhibit on the grounds a court of the United States would have to make a preliminary assessment of whether the reasoning or methodology underlying the reported experiment is scientifically valid and whether such reasoning or methodology is applicable to Applicant's case. Department Counsel further argued below that the methods were invalid because the experiment's sample was small and the conditions were unrealistic. Department Counsel also argued below that the conditions of Applicant's alleged second-hand exposure to marijuana were sufficiently different from those reported in Applicant Exhibit B as to make the exhibit inapplicable to Applicant's case.

The Administrative Judge overruled Department Counsel's objections to Applicant Exhibits A and B on the ground they provided "enough plausible corroboration of Applicant's passive inhalation claims to merit introduction . . . for the weight they deserve . . . under the Directive's more relaxed admission standards."

On appeal, Department Counsel repeats its objections from the proceedings below. Department Counsel's objections to Applicant Exhibit A are well taken. On its face the document is incomplete (quoting only two sentences from the introduction and four sentences from the conclusion of a chapter of a monograph, which chapter is cited as nine pages in length), and impossible to interpret without reference to the entire document being excerpted. Such a small portion of a document, excerpted outside the proceedings by an unidentified individual using unknown criteria is more likely to produce unfair prejudice than to produce probative information. Even with relaxed rules of evidence, the Administrative Judge could not reasonably admit and rely on Applicant Exhibit A.

Although Department Counsel's objections are not frivolous, the Board concludes that the Department Counsel has not demonstrated error in the Judge's admission and consideration of Applicant Exhibit B. DOHA proceedings apply relaxed rules of evidence. Given that the article was provided by a *pro se* applicant who specified that he could not afford an expert witness, Department Counsel has not shown that it was an error for the Judge to allow the Applicant to tender a complete published article that tended to support his position. However, admissibility does not mean that an exhibit is entitled to much weight. Department Counsel correctly points out that the article itself leaves many important questions unanswered. Department Counsel is correct in pointing out the differences between a controlled study and the limited record evidence of Applicant's alleged second-hand exposure to marijuana over the course of a weekend of moving furniture. Department Counsel also is correct in noting that while the Administrative Judge does not expressly rely on either of the two contested exhibits, a fair reading of his decision suggests that he was accepting the proposition that passive inhalation of marijuana can produce positive drug tests. The only record evidence to support such a proposition is the contested exhibits. The Judge erred by relying on the two exhibits (one of which was inadmissible and the other was entitled to only minimal weight). However, this error is harmless for the reasons stated later in this

decision.

2. Did the Administrative Judge err in his factual findings relating to Applicant's 1998 positive drug test? Department Counsel argues that several of the Administrative Judge's findings of fact are unsupported by the record evidence. The Judge's challenged findings are: 1) that Applicant's THC level was measured at only 15 ng/mL in his confirmatory drug test; 2) that a Defense Security Service (DSS) special agent expressed no doubts regarding Applicant's claims of passive inhalation as an explanation for his positive drug test; 3) that Applicant is not associating with drug users anymore; and 4) that Applicant's claim as to not having used drug since 1982 was uncontroverted.

Department Counsel's first claim is valid. The drug tests results in this case do not give a precise reading but only listed cutoffs. The best reading of the exhibit is that two tests were done on Applicant's sample one was looking for at least 100ng/mL and the other for 15 ng/mL. Both tests were positive. The Administrative Judge had no basis to conclude what Applicant's specific level was.

Department Counsel's second claim is that the Administrative Judge erred by finding that a DSS special agent expressed no doubts regarding Applicant's claim of passive inhalation and used that finding to bolster his findings in support of Applicant's claim. Department Counsel argues that the DSS special agent was never asked whether or not she believed Applicant or had doubts about his claim and that it was impermissible for the Judge to draw conclusions about her views of the Applicant's claim without evidence. The Board agrees. Factual findings must be based on evidence and reasonable inferences from evidence. There was no basis in the record evidence for the Judge's finding that the DSS special agent had no doubts about Applicant's claim because there was no evidence on the issue and no foundation for the Judge's inference.

Department Counsel's third claim is not persuasive. Applicant testified that he does not associate with drug users anymore. It was within the Judge's discretion to believe or not believe that testimony. Department Counsel's appeal arguments fail to persuade the Board that the Judge could not accept Applicant's testimony on this point.

Department Counsel's fourth claim is based on a misreading of the Judge's decision. The Judge's decision does not say that Applicant's claim not to have used drugs since 1982 is uncontroverted. It says the Applicant's claim not to have used drugs between 1982 and 1998 is uncontroverted. The Judge clearly recognized that the government was challenging Applicant's claim not to have used drugs in 1998.

Department Counsel also challenges the Judge's application of the Adjudicative Guidelines based on their other challenges. Specifically, Department Counsel claims the Judge erred by applying Personal Conduct Mitigating Condition 1 [\(1\)](#)

and Personal Conduct Mitigating Condition 7 [\(2\)](#)

because Applicant's explanation for the positive urinalysis results in 1998 raises serious questions about his credibility and because there is no evidence supporting Applicant's claim that he has dissociated himself from drug abusers.

As discussed earlier in this decision, Department Counsel has failed to demonstrate that the Administrative Judge could not accept Applicant's testimony that he no longer associates with drug users. Therefore, this part of Department Counsel's argument fails to demonstrate the Judge erred by applying Personal Conduct Mitigating Conditions 1 and 7.

Department Counsel's other appeal arguments demonstrate the Administrative Judge erred by accepting Applicant's "passive inhalation" explanation for the positive urinalysis test results in 1998. However, that does not demonstrate the Judge erred by applying Personal Conduct Mitigating Condition 7. Even if the Board were to conclude the Judge should have found that Applicant used marijuana in 1998, based on the positive urinalysis test results, such a finding would not have precluded the Judge from applying Personal Conduct Mitigating Condition 7, based on his acceptance of Applicant's testimony. As to Personal Conduct Mitigating Condition 1, use of marijuana in 1998 would be pertinent to a determination of Applicant's security eligibility, thereby precluding application of Personal Conduct Mitigating Condition 1. However, the inapplicability of Personal Conduct Mitigating Condition 1 would not preclude the Judge from concluding that marijuana use that occurred more than three and a half years before the hearing did not mandate an

adverse security clearance decision. Therefore, the Judge's erroneous application of Personal Conduct Mitigating Condition 1 was harmless error.

Department Counsel also challenges the Administrative Judge's application of Drug Involvement Mitigating Condition 1, [\(3\)](#)

Drug Involvement Mitigating Condition 2, [\(4\)](#)

and Drug Involvement Mitigating Condition 3. [\(5\)](#)

Even if the Board were to conclude the Judge should have found that Applicant used marijuana in 1998, such a finding would not have precluded the Judge from applying Drug Involvement Mitigating Condition 1 or Drug Involvement Mitigating Condition 3, given the record evidence in this case. The Judge erred by applying Drug Involvement Mitigating Condition 2 because Applicant had a history of using marijuana over a period of years. However, the Judge's application of Drug Involvement Mitigating Condition 2 was harmless error under the particular facts of this case.

### Conclusion

Department Counsel has failed to demonstrate the Administrative Judge committed harmful error. Accordingly, the Board affirms the Administrative Judge's favorable 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

1. "The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability."
2. "Association with persons involved in criminal activities has ceased."
3. "The drug involvement was not recent."
4. "The drug involvement was an isolated or aberrational event."
5. "A demonstrated intent not to abuse any drugs in the future."