

DATE: July 23, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-12350

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Marc E. Curry, Esq., Department Counsel

FOR APPLICANT

Pro Se

Department Counsel has appealed the March 5, 2003 decision of Administrative Judge Joseph Testan, in which the Judge concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

This 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 issue: whether the Administrative Judge's favorable security clearance decision is arbitrary, capricious, or contrary to law. For the reasons that follow, the Board reverses the Administrative Judge's decision.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated February 26, 2002. The SOR was based on Guideline H (Drug Involvement). Applicant submitted an answer to the SOR, in which he requested that a decision be made in his case without a hearing. A File of Relevant Material (FORM) was prepared, and a copy of the FORM was given to Applicant. After Applicant submitted a response to the FORM, the case was assigned to the Administrative Judge for determination.

The Administrative Judge issued a written decision, dated March 5, 2003, in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Department Counsel's appeal from the Judge's favorable 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 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 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. *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 Issue

The Administrative Judge: (a) found Applicant used marijuana an average of twice a week from March 1993 to December 2000; (b) found Applicant used marijuana with full knowledge that he was breaking the law by doing so; and (c) concluded that Applicant's history of marijuana use reflected adversely on Applicant's judgment, reliability, and trustworthiness. However, the Judge concluded that Applicant had demonstrated sufficient evidence of reform and rehabilitation to warrant a favorable security clearance decision because: (i) Applicant truthfully disclosed his marijuana use on the security form he completed in March 2000; (ii) Applicant's marijuana use was not recent⁽¹⁾; and (iii) Applicant demonstrated a credible intent not to use illegal drugs in the future.⁽²⁾

On appeal, Department Counsel contends the Administrative Judge's favorable decision is arbitrary, capricious, or contrary to law. In support of this contention, Department Counsel argues: (1) the Judge erred by finding Applicant's marijuana use was not recent; and (2) the Judge erred by finding Applicant demonstrated a credible intent not to use marijuana in the future. The Board will address these arguments in turn.

(1) Department Counsel argues the Administrative Judge erred by finding Applicant's marijuana use was not recent because Applicant continued to use marijuana about twice a week for nine months after he completed the security form in March 2000. This argument is not persuasive because it is based on flawed reasoning.

Department Counsel's argument in this case relies only on the non-temporal aspects of an analysis of Applicant's behavior. Recency cannot be analyzed without consideration of the temporal aspects of Applicant's behavior. Therefore, Department Counsel's reliance on the Board's decision in ISCR Case No. 99-0018 (April 11, 2000) is misplaced.

(2) Department Counsel's challenge to the Administrative Judge's favorable credibility determination has merit. The deference owed to a Judge's credibility determination (Directive, Additional Procedural Guidance, Item E3.1.32.1) is predicated on the legal presumption that a Judge will form impressions about a witness's credibility by observing the witness's demeanor while they testify. When there is no hearing, the Judge has no opportunity to form impressions about a person's credibility based on demeanor. Accordingly, credibility determinations based on a written, nonhearing record are not entitled to the deference given to credibility determinations based on demeanor observations of a witness made during his or her testimony. Indeed, a credibility determination made by a Judge without the benefit of demeanor observations is indistinguishable from a Judge's fact-finding about purely documentary evidence.

In this case, Applicant waived a hearing and the case was submitted to the Administrative Judge for determination based on the FORM and Applicant's response to the FORM. Therefore, the only basis for the Judge to make a credibility determination concerning Applicant is the documentary evidence. Based on the documentary evidence, the Judge found: (a) Applicant truthfully disclosed his marijuana use on the security form he completed in March 2000; and (b) Applicant demonstrated a credible intent not to use illegal drugs in the future. Given the documentary evidence in this case, the Judge's favorable conclusions about Applicant's credibility are not sustainable.

The Administrative Judge's finding that Applicant truthfully disclosed his marijuana use when he completed the security form is not sustainable. The Judge found that Applicant used marijuana an average of twice a week from March 1993 to December 2000. That finding is supported by Applicant's March 1, 2001 written statement (FORM, Item 5). When Applicant completed the security form on March 10, 2000, he indicated that his last use of marijuana was on December

31, 1999 (FORM, Item 4). Since Applicant continued to use marijuana an average of twice a week until December 2000, it follows that Applicant's statement on the security form that he last used marijuana on December 31, 1999 was not a complete and accurate disclosure of his marijuana use. The Judge's finding that Applicant truthfully disclosed his marijuana use when he completed the security form runs contrary to the record evidence (Directive, Additional Procedural Guidance, Item E3.1.32.1) and reflects arbitrary and capricious reasoning because it is undercut by the Judge's own finding about Applicant's marijuana use after December 31, 1999. *Cf. Center for Auto Safety v. Federal Highway Administration*, 956 F.2d 309, 314 (D.C. Cir. 1992) ("An agency action is arbitrary and capricious if it rests upon a factual predicate that is unsupported by substantial evidence.").

The Administrative Judge's finding that Applicant demonstrated a credible intent not to use illegal drugs in the future also is not sustainable. Apart from Applicant's failure to fully disclose his marijuana use when he completed the security form in March 2000, he continued to use marijuana on a fairly regular basis (*i.e.*, an average of twice a week) until December 2000. Furthermore, in Applicant's March 1, 2001 written statement (FORM, Item 5), and in Applicant's answer to the SOR (FORM, Item 3), Applicant made statements minimizing the significance of his marijuana use, defended his marijuana use as "never to excess and never outside the privacy of my home," and asserted that his marijuana use "did not impair my social or occupational functioning" or his work performance. Applicant's defense of his marijuana use indicates no remorse on his part and shows no recognition or acknowledgment of its illegality. Since the Judge drew an adverse conclusion about Applicant using marijuana with full knowledge of its illegality, it was error for the Judge to ignore record evidence showing that Applicant did not exhibit any recognition or acknowledgment of the illegality of his marijuana use. Since the Judge concluded that Applicant's use of marijuana reflected adversely on his judgment, reliability, and trustworthiness, it was error for the Judge to ignore record evidence showing Applicant sought to defend his use of marijuana in terms indicating he felt it was reasonable, proper, and unobjectionable. Taken as a whole, Applicant's conduct and statements do not provide a rational basis for the Judge's conclusion that Applicant has demonstrated he is not likely to use marijuana in the future. *Compare* ISCR Case No. 01-21285 (September 12, 2002) at p. 4 (the totality of an applicant's conduct and statements about marijuana use must be considered in evaluating the applicant's stated intentions concerning future use).

An Administrative Judge's credibility determination may be set aside or reversed if: (a) it is unreasonable, contradicts other findings, or is based on an inadequate reason; (b) it is "patently without basis in the record"; or (c) it is "inherently improbable or discredited by undisputed fact." ISCR Case No. 97-0184 (December 8, 1998) at p. 5 (citing and quoting various federal cases). Considering the record as a whole, the Board concludes the Judge's favorable credibility determination in this case is undercut by his own factual findings, is based on inadequate reasons, and is inherently improbable in light of the record evidence as a whole.

Because the Administrative Judge's favorable credibility determination is not sustainable, the Judge's application of Drug Involvement Mitigating Condition 3 is not sustainable. Because the Judge's unsustainable favorable credibility determination is central to his favorable security clearance decision, the Judge's decision is fatally flawed. *See* ISCR Case No. 01-21285 (September 12, 2002) at pp. 4-5.

Conclusion

Department Counsel has met its burden on appeal of demonstrating error that warrants reversal. Pursuant to Item E3.1.33.3 of the Directive's Additional Procedural Guidance, the Board reverses 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 Administrative Judge applied Drug Involvement Mitigating Condition 1 (Directive, Enclosure 2, Item E2.A8.1.3.1) in connection with this finding.
2. The Administrative Judge applied Drug Involvement Mitigating Condition 3 (Directive, Enclosure 2, Item E2.A8.1.3.3) in connection with this finding.