

DATE: May 16, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-15891

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Applicant has appealed the February 12, 2003 decision of Administrative Judge Darlene Lokey Anderson, in which the Judge concluded it is not 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.

Applicant's appeal presents the following issues: (1) whether there were prejudicial errors in the hearing transcript; (2) whether the Administrative Judge erred by making certain findings of fact regarding Applicant's marijuana use and Applicant's alleged falsification; and (3) whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. For the reasons that follow, the Board affirms the Administrative Judge's adverse decision.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated June 7, 2002. The SOR was based on Guideline H (Drug Involvement), Guideline F (Financial Considerations), and Guideline E (Personal Conduct). A hearing was held on December 17, 2002. The Judge issued a written decision, dated February 12, 2003, 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 adverse 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 Issues⁽¹⁾

1. Whether there were prejudicial errors in the hearing transcript. Applicant contends there are 16 errors in the hearing transcript.⁽²⁾ He contends that since the record is used by the Judge in her final decision, the errors had a detrimental influence on the Judge's decision against him. He asserts that many of the errors are substantial in that they materially alter the meaning of his statements, take the force out of arguments expressed by Applicant, and in some cases reverse the meaning of what he said.

The Board reviews an Administrative Judge's security clearance decision to determine whether or not the Judge made any factual or legal error that was harmful to the appealing party. Directive, Additional Procedural Guidance, Item E3.1.32. To the extent that an appealing party raises claims of procedural error, the Board must consider whether: (a) the alleged procedural errors occurred, and (b) if procedural errors did occur, did they result in any prejudice to the appealing party.

When a hearing is conducted, the presiding Administrative Judge personally hears the words spoken by the parties and witnesses, and there is a rebuttable presumption that a Judge considers all the record evidence unless the Judge specifically states otherwise. Therefore, even if there are errors in a hearing transcript, an appealing party must demonstrate that such errors: (a) resulted in factual or legal error by the Judge, and (b) that such errors were harmful to the appealing party. Without such a showing, the mere presence of errors in a hearing transcript does not constitute error that warrants remand or reversal. ISCR Case No. 00-0489 (January 10, 2002) at p. 6.

Applicant's specific assignments of error regarding the hearing transcript fall into two categories. The first category involves assertions of error where Applicant has not indicated his assessment of the seriousness of the error. The second category involves assertions of error each of which Applicant characterizes as a "very significant misquote." The Board will address these categories in turn.

Within the first category of asserted transcript errors, four errors either do not indicate specifically what transcript language is incorrect (and consequently how a correct transcript would read) or the assertion of error is made in such a way that the Board cannot determine the specific transcript error being alleged.⁽³⁾ As the appealing party, Applicant must identify claims of error with specificity. *See, e.g.*, ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3. Because Applicant fails to clearly articulate, as a threshold matter, what the individual errors are, it is not possible for him to indicate how these alleged errors in the hearing transcript reflect any factual or legal error by the Administrative Judge or how these alleged errors specifically harmed or prejudiced Applicant. The four claims of error lack sufficient specificity to warrant further discussion by the Board.

Also within the first category, three errors occur in transcript passages where Applicant's finances are being discussed.⁽⁴⁾ The Administrative Judge ultimately found in Applicant's favor regarding the Guideline F issues in the case. This fact, coupled with Applicant's failure to specifically identify how the alleged transcript errors caused the Judge to err lead the Board to conclude that these three errors do not warrant further discussion.

Regarding the remaining four errors within the first category, two involve simple typographical errors.⁽⁵⁾ One of the errors involves unnecessary repetition of a phrase.⁽⁶⁾ The other involves the omission of a single letter from a word.⁽⁷⁾ The first error is obvious and has no effect whatever upon the substance of the text. The second error is easily overcome

by reference to the surrounding words and phrases. Concerning the second error, there is no indication in the decision that the Judge was confused or misled by it. The third alleged error involves Applicant's assertion that he testified he started an employment in 1980, not 1981 as reflected in the hearing transcript.⁽⁸⁾ A review of the record convinces the Board that the date on which Applicant commenced this particular employment was not germane to any important issue in the case. Even if the hearing transcript were in error as alleged by Applicant, this error is trivial. The decision does not reflect any factual or legal error by the Administrative Judge resulting from it.

Also in the first category is Applicant's reference to page 57 of the hearing transcript followed by an argument⁽⁹⁾ that the Board is unable to understand.

The second category of alleged transcript errors⁽¹⁰⁾ include two errors where a single word was omitted from a sentence,⁽¹¹⁾ two errors where the word "occasionally" appears in the transcript at a point where Applicant asserts he testified about a single "occasion,"⁽¹²⁾ and one alleged error where Applicant asserts he testified that he "realized" smoking marijuana was a foolish thing, as opposed to the transcript, which states he "didn't realize."⁽¹³⁾ Regarding the second category of alleged transcript errors, the Board has reviewed them and concludes the following: (a) with respect to two errors,⁽¹⁴⁾ a review of the decision below persuades the Board that there is no indication that the alleged errors confused or misled the Judge or resulted in any unwarranted finding or conclusion in the Judge's decision; and (b) with respect to the three other claims of transcript error,⁽¹⁵⁾ a review of the decision shows the Administrative Judge made factual findings consistent with Applicant's interpretation of the contents of the transcript. Therefore, any errors in the transcript did not confuse or mislead the Judge.

2. Whether the Administrative Judge erred by making certain findings and conclusions concerning Applicant's marijuana use and alleged falsification. On appeal Applicant argues that several of the Judge's findings and conclusions were in error. Specifically, he asserts: (a) the Judge erroneously found that Applicant used marijuana once every year or once every other year from 1981 to 1998; (b) the Judge erred by concluding that Applicant used marijuana while he held a security clearance; and (c) the Judge erred by finding that Applicant falsified a November 1999 security clearance questionnaire. For the reasons that follow, the Board concludes Applicant has failed to demonstrate error on the part of the Administrative Judge.

The Administrative Judge found that Applicant began using marijuana in 1974 and last used it in 1998. She found that he used it about once a year or one time every two years and that the use was intermittent. On appeal, Applicant argues that the Judge erroneously implies that he consistently used marijuana every year or every other year during the stated time frame. He claims on appeal that the marijuana use occurred only between 1995 and 1998 and was comprised of only two or three occasions. Applicant's assertions on appeal contrast with his answer to the SOR where he admits marijuana use on "some occasions" between 1974 and 1998 and record evidence which would allow the Judge to find that Applicant's use was broader than the 1995 to 1998 time frame. The Board need not agree with the Judge's findings to conclude they are sustainable. Likewise, her conclusion that Applicant used marijuana during a period where he held a security clearance (from 1981 to 1995) is sustainable.

In November 1999 Applicant was required to fill out a security clearance questionnaire. Question 28 asked, "Have you ever illegally used a controlled substance while employed as a law enforcement officer, prosecutor or courtroom official; while possessing a security clearance; or while in a position directly and immediately affecting public safety?" Applicant answered "no" to the question. The Administrative Judge found that Applicant intentionally concealed the fact that he had used marijuana while he had a security clearance. On appeal, Applicant claims he answered the question truthfully based on the fact that at the time his marijuana use occurred, he had no clearance. Applicant's argument fails to establish error on the part of the Administrative Judge. Her finding that Applicant intentionally falsified his answer is sustainable.

3. Whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. On appeal, Applicant asserts: (a) the Administrative Judge erred by not applying several mitigating factors to Applicant's marijuana use; (b) the Administrative Judge erred by dismissing as "irrelevant" his argument that he did not hold a security clearance at the time he used marijuana; and (c) the Administrative Judge ignored documents showing that Applicant did not hold a security clearance from 1995 to 1998. The Board construes these assertions of error as an

argument that the Administrative Judge's decision is arbitrary, capricious, or contrary to law.

Applicant asserts on appeal that his drug involvement was not recent, ⁽¹⁶⁾ that it was an isolated event, ⁽¹⁷⁾ and that he displayed a demonstrated intent not to use drugs in the future. ⁽¹⁸⁾ He cites as error the Judge's failure to list these mitigating factors as present in his case. Based on the record evidence of multiple uses of marijuana over a broad span of time, there is no basis for Applicant's argument that his conduct was isolated. Concerning the other two mitigating conditions, Applicant's ability to argue for their application does not establish error on the part of the Administrative Judge. It is merely a proffering of an alternative view of the evidence. Given the record evidence, the Judge's conclusion that the other mitigating factors were not applicable in this case was not arbitrary, capricious or contrary to law.

Applicant's statements during the proceedings below that he did not have a security clearance at the time he used marijuana was evidence the Administrative Judge was required to consider. Given this requirement, the Judge's characterization of Applicant's statements as an "irrelevant" argument was error. However, considering the record evidence as a whole, the Administrative Judge was not required to accept at face value the representations or explanations of Applicant concerning his security clearance status at the time he used marijuana. The record evidence provides a rational basis for the Judge's conclusion that Applicant used marijuana while in possession of a security clearance. Accordingly, the Judge's error is harmless.

Applicant claims on appeal that the Judge ignored evidence presented by him that established he had no security clearance between the years 1995 and 1998. There is a rebuttable presumption that the Administrative Judge considered all the record evidence unless that Judge specifically states otherwise. Moreover, contrary to the Applicant's appeal assertion, the Judge in her decision specifically acknowledges some of the evidence offered by Applicant on this point and the Judge specifically acknowledges that the evidence indicates Applicant's security clearance was terminated in 1995. Applicant's argument fails to establish error on the part of the Administrative Judge.

Conclusion

Applicant has failed to demonstrate error warranting 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

1. In his appeal brief the Applicant alleges errors in the Administrative Judge's findings concerning an SOR allegation

brought under Guideline F (Financial Considerations). Because the Judge ultimately resolved the Guideline F allegation in Applicant's favor, the Board need not consider these particular assignments of error.

2. In the appeal brief, Applicant did not number the list of specific errors he claims exist in the hearing transcript. For purposes of resolving this appeal, the Board will refer to those errors as alleged errors 1 through 16 by assigning them numbers in the order in which they are listed in the appeal brief.

3. Alleged errors 1, 3, 13, and 14.

4. Alleged errors 2, 4, and 11.

5. Alleged errors 15 and 16.

6. Alleged error 16.

7. Alleged error 15.

8. Alleged error 5.

9. Alleged error 9.

10. Alleged errors 6, 7, 8, 10, and 12.

11. Alleged errors 8 and 12.

12. Alleged errors 6 and 10.

13. Alleged error 7.

14. Alleged errors 8 and 12.

15. Alleged errors 6, 7, and 10.

16. Thus invoking Drug Involvement Mitigating Condition E2.A8.1.3.1.

17. Thus invoking Drug Involvement Mitigating Condition E2.A8.1.3.2.

18. Thus invoking Drug Involvement Mitigating Condition E2.A8.1.3.3.