

DATE: September 29, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-20314

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

David E. McGehee, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated August 9, 2002 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline H (Drug Involvement) and Guideline E (Personal Conduct). Administrative Judge John G. Metz, Jr. issued an unfavorable security clearance decision dated April 7, 2003.

Applicant appealed the Administrative Judge's unfavorable decision. The Board has jurisdiction under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

The following issues have been raised on appeal: (1) whether the Administrative Judge's findings of fact are supported by substantial record evidence; (2) whether the Administrative Judge's conclusions are arbitrary, capricious, or contrary to law; and (3) whether the Administrative Judge erred by concluding 10 U.S.C. §986 applies to Applicant's history of marijuana use. 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's findings of fact are supported by substantial record evidence. Applicant contends that certain factual findings by the Administrative Judge are erroneous. Specifically, Applicant argues the record evidence does not support the following findings by the Judge: (a) Applicant used marijuana for more than 30 years; (b) Applicant decided to use marijuana without regard for its illegality; and (c) Applicant used marijuana until at least March or April 2001. For the reasons that follow, the Board concludes Applicant's arguments fail to demonstrate harmful error.

(a) Given the Administrative Judge's finding that Applicant did not use marijuana between 1985 and 1994, <sup>(1)</sup> the Judge erred by characterizing Applicant's marijuana use as covering a period of "more than 30 years." A nine-year hiatus in marijuana use is not a trivial period of time. However, this error is harmless under the particular facts of this case.

(b) Applicant challenges the Administrative Judge's statement (contained in the Synopsis section of the decision below) that Applicant used marijuana "without regard for its illegality or its prohibition by both company and government policy," as well as the Judge's statement (contained in the decision itself) that the illegality of marijuana use "played little in Applicant's decision to use [it]." Applicant's argument is not persuasive.

First, the Board is not inclined to view the synopsis of an Administrative Judge's decision as critical, or more important than the body of the Judge's decision itself. Absent unusual circumstances, any flaw or failing with a synopsis is not likely to demonstrate harmful error. Second, given the record evidence in this case, the Administrative Judge's challenged finding reflects a plausible interpretation of the record evidence. Applicant's strong disagreement with the Judge's finding is little more than a difference of opinion that fails to demonstrate the Judge erred.

(c) Applicant's challenge to the Administrative Judge's finding that Applicant used marijuana until at least March or April 2001 is not persuasive. There is no rule of law that compels a Judge to accept a witness's testimony at face value

without regard to the record evidence as a whole or the Judge's assessment of the witness's demeanor and credibility. The Judge was not bound to accept at face value Applicant's testimony about what he meant in his March 20, 2001 written statement (Government Exhibit 2). Giving due deference to the Judge's opportunity to personally observe Applicant's demeanor during his testimony, the Board concludes the Judge was not compelled, as a matter of law, to accept Applicant's testimony (or the testimony of Applicant's wife) that he had stopped using marijuana in 2000. The Judge could have accepted that testimony, or he could have found it not credible. It was not unreasonable for the Judge to interpret Applicant's March 20, 2001 written statement as indicating that Applicant had been using marijuana up to and including the time he gave that statement. Applicant's argument in support of an alternate reading of the March 20, 2001 written statement fails to demonstrate the Judge erred.

2. Whether the Administrative Judge's conclusions are arbitrary, capricious, or contrary to law. Applicant contends that various conclusions reached by the Administrative Judge are arbitrary, capricious, or contrary to law. Specifically, Applicant argues it is arbitrary and capricious for the Judge to conclude that: (a) the entire period of Applicant's marijuana use should be evaluated as a whole; (b) Applicant has not demonstrated an intent to refrain from marijuana use; and (c) Applicant has demonstrated a pattern of being willing to bend rules to his own purposes. For the reasons that follow, the Board concludes Applicant's arguments fail to demonstrate harmful error.

(a) Under the whole person concept, an Administrative Judge must consider the record evidence as a whole and evaluate the totality of an applicant's conduct and circumstances. *See* Directive, Section 6.3 and Enclosure 2, Item E2.2.1. However, the whole person concept still requires a Judge to draw reasonable, common sense conclusions from the totality of the record evidence. As noted earlier in this decision, the Judge erred by characterizing Applicant's marijuana use as covering a period of "more than 30 years." Although the Judge acted properly by considering the totality of Applicant's history of marijuana use, the Judge acted in an arbitrary and capricious manner when he failed to give due weight to a nine-year hiatus in Applicant's marijuana use.

(b) Given the record evidence of Applicant's overall history of marijuana use, Applicant had the burden of demonstrating reform, rehabilitation, and changed circumstances sufficient to warrant a favorable security clearance decision. *See* Directive, Additional Procedural Guidance, Item E3.1.15. The Administrative Judge articulated a sustainable basis for why he had doubts about whether Applicant had truly demonstrated an intent to refrain from marijuana use.

(c) Given the record evidence in this case, it was not arbitrary or capricious for the Administrative Judge to conclude that Applicant had demonstrated a pattern of conduct indicative of a willingness to bend rules. That conclusion reflects a plausible interpretation of the record evidence.

3. Whether the Administrative Judge erred by concluding 10 U.S.C. §986 applies to Applicant's history of marijuana use. The Administrative Judge concluded that Applicant's "extensive history of marijuana abuse and its recency" make him a "user of illegal drugs" for purposes of 10 U.S.C. §986(c)(2).<sup>(2)</sup> Applicant contends the Judge's conclusion is erroneous and unsustainable because his marijuana use ended in either 2000 (as Applicant claims) or in March 2001 (as the Judge found).

Given the Administrative Judge's finding that Applicant last used marijuana approximately two years before the hearing, the Judge failed to articulate a rational basis for applying 10 U.S.C. §986(c)(2) to the particular facts and circumstances of Applicant's history of marijuana use. However, this error is harmless because the Judge's adverse security clearance decision can be affirmed based on his other adverse findings and conclusions.

### **Conclusion**

Applicant has failed to demonstrate error below that warrants remand or reversal. Therefore, 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: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

1. On appeal, Applicant argues he did not use marijuana between 1971 and 1994. However, there is record evidence that supports the Administrative Judge's finding that Applicant occasionally used marijuana after 1971, up to 1985.
2. Under 10 U.S.C. §986, the Department of Defense may not grant or renew a security clearance for a defense contractor official or employee that falls under any of four statutory categories [10 U.S.C. §986(c)(1) through (c)(4)]. Section (c)(2) reads: "The person is an unlawful user of, or is addicted to, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S. 802))."