

DATE: September 12, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-21285

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Jonathan A. Beyer, Esq., Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge John G. Metz, Jr., issued a decision, dated May 7, 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.

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 issues: (1) whether the Administrative Judge misapplied Drug Involvement Mitigating Conditions 1 and 3; and (2) whether the Board should reverse the Administrative Judge's favorable security clearance decision. 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 11, 2002. The SOR was based on Guideline H (Drug Involvement). A hearing was held on April 25, 2002. The Administrative Judge issued a written decision, dated May 7, 2002, 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 of the Administrative Judge's favorable security clearance 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 following facts, summarized from the Administrative Judge's decision, are not in dispute on appeal: Applicant first used marijuana in 1986 or 1987, when he was in high school. Between then and September 1988, Applicant used marijuana about once a month at parties. Applicant did not use marijuana when he was in the military from October 1988 to October 1994. After leaving the military, Applicant again used marijuana, about 26 times, from October 1994 to arch 2001. Applicant used marijuana as "a demonstration of independence on my part after having so many restrictions placed on me during my time in the military." After completing a security questionnaire in December 2000, Applicant used marijuana once in January 2001 and three times in March 2001.

1. Whether the Administrative Judge misapplied Drug Involvement Mitigating Conditions 1 and 3. The Administrative Judge cited Involvement Mitigating Condition 1 ("The drug involvement was not recent") but did not explain why he did so. The Administrative Judge also applied Drug Involvement Mitigating Condition 3 ("A demonstrated intent not to abuse any drugs in the future"). The Judge explained his application of Drug Involvement Mitigating Condition 3 as follows:

"Applicant has stated an unequivocal intent to refrain from drug abuse in the future, without regard to his clearance status, and recognizes that the risks to his future and his family's future far outweigh any imagined benefit of resumed drug use. Department Counsel's argument to the contrary, while not unreasonable, does require some speculation about what Applicant might do in the future while not in a cleared status. I conclude it is unlikely that Applicant will return to marijuana use in the future. That this motivation is more rooted in Applicant's unwillingness to put himself and his family through the clearance process ordeal he has been through than a fear of criminal consequences does not render the motivation invalid or insufficient to support the mitigating factor." (Decision at pp. 5-6)

Drug Involvement Mitigating Condition 1. Department Counsel challenges the Administrative Judge's application of Drug Involvement Mitigating Condition 1. In support of its contention that the Judge erred, Department Counsel argues: (a) Applicant used marijuana over a period of 16 years; (b) Applicant's marijuana use was not isolated or aberrational; and (c) Applicant last used marijuana after he completed the security questionnaire. Applicant argues: (i) the Judge correctly applied Drug Involvement Mitigating Condition 1; and (ii) in any event, the Judge's citation of Drug Involvement Mitigating Condition 1 "was not outcome determinative" because the Judge did not refer to it in the Conclusions section of his decision.

In addressing the arguments of Department Counsel and Applicant, the Board is faced with the fact that the Administrative Judge cited Drug Involvement Mitigating Condition 1 but did not explain why he did so, and did not refer to it in the Conclusions section of his decision. Under the circumstances, the Board must construe the Judge's decision. Reading the Judge's decision in its entirety, the Board concludes the Judge gave little weight to Drug Involvement Mitigating Condition 1. We reach this conclusion because the Judge based his analysis of Applicant's case in terms of Drug Involvement Mitigating Condition 3 and did not discuss or refer to Drug Involvement Mitigating Condition 1 or its content.

Department Counsel's specific arguments concerning Drug Involvement Mitigating Condition 1 fail to articulate any persuasive reason for concluding the Administrative Judge could not apply that mitigating condition in this case. However, even if the Board were to conclude Department Counsel's arguments demonstrated the Judge erred with respect to Drug Involvement Mitigating Condition 1, Applicant persuasively notes such an error would not be outcome determinative.

Drug Involvement Mitigating Condition 3. Department Counsel also challenges the Administrative Judge's application of Drug Involvement Mitigating Condition 3, arguing the record evidence does not support application of that mitigating condition. Applicant argues the record evidence supports the Judge's application of Drug Involvement Mitigating Condition 3.

The Administrative Judge's rationale for applying Drug Involvement Mitigating Condition 3 was noted earlier in this decision. When reviewing an Administrative Judge's application of Drug Involvement Mitigating Condition 3 that has been challenged, the Board will consider whether there is record evidence that reasonably detracts from the Judge's conclusion that the mitigating condition is applicable. *See, e.g.*, ISCR Case No. 98-0611 (June 3, 1999) at pp. 3-4.

In this case, the Administrative Judge's application of Drug Involvement Mitigating Condition 3 is not sustainable on the record evidence in this case. The Judge's application of that mitigating condition is seriously undercut by the record evidence that shows: (a) Applicant used marijuana without any concern about its illegality; (b) Applicant used marijuana as "a demonstration of independence on my part after having so many restrictions placed on me during my time in the military"; (c) Applicant used marijuana even after he knew his position with a defense contractor required him to have a security clearance and he completed a security clearance questionnaire; and (d) Applicant's explanation for his stated intention to not use marijuana again is based on solely on concern for his personal interests and lacks any acknowledgment or acceptance of the illegality of marijuana use or the negative security implications of such drug use. Applicant's indifference to the illegality of his marijuana use demonstrates an indifference to his legal obligations. Applicant's use of marijuana as a "demonstration of independence" from the U.S. military was a deliberate repudiation of rules and regulations associated with military order and discipline and the values associated with military service. By doing so, Applicant showed he is willing to deliberately use marijuana to show his contempt for rules and regulations. Such a cavalier use of marijuana raises serious doubts about Applicant's commitment to refrain from using it again. Applicant's use of marijuana after he knew that his position with a defense contractor required him to have a security clearance demonstrates a reckless indifference about, or defiance toward, the industrial security program. Finally, Applicant's stated reason for not using marijuana again reflects a purely personal concern that shows an indifference to his legal obligations and provides no meaningful assurance that Applicant will not return to marijuana use if he later deems it desirable for his personal reasons. Taken as a whole, Applicant's conduct and explanations for his conduct do not provide a rational basis for the Judge's conclusion that Applicant has demonstrated he is not likely to use marijuana again. *See, e.g.*, ISCR Case No. 99-0019 (November 22, 1999) at p. 4 (Board holding that application of Drug Involvement Mitigating Condition 3 was not warranted where the applicant was indifferent to the illegality of his marijuana use, the applicant failed to acknowledge wrongfulness of his marijuana use, and the applicant's stated reason for refraining from marijuana use reflected no concern for the illegality or security implications of marijuana use and was based on a purely personal concern that could fade or disappear with the passage of time or a change in the applicant's personal life).

2. Whether the Administrative Judge's favorable security clearance decision should be reversed. Department Counsel contends the Administrative Judge's errors warrant reversal. As discussed earlier in this decision, Department Counsel has failed to articulate a persuasive argument against the Judge's application of Drug Involvement Mitigating Condition 1. However, the Board is persuaded by Department Counsel's contention that the record evidence does not support the Judge's application of Drug Involvement Mitigating Condition 3.

The Administrative Judge correctly noted that Department Counsel had established its case against Applicant under Guideline H. Given that conclusion, the Administrative Judge could not render a favorable security clearance decision without articulating a rational basis for why it would be clearly consistent with the national interest to grant Applicant access to classified information despite his overall history of marijuana use. *See* Executive Order 10865, Section 2 (security clearance may be granted "only upon a finding that it is clearly consistent with the national interest to do so"); Directive, Section 4.2 (noting it is DoD policy that "A clearance decision reflects the basis for an ultimate finding as to whether it is clearly consistent with the national interest to grant or continue a security clearance for an applicant"). Furthermore, in light of Applicant's undisputed history of marijuana use, Applicant had the burden of demonstrating reform, rehabilitation or changed circumstances sufficient to warrant a favorable security clearance decision. *See* Directive, Additional Procedural Guidance, Item E3.1.15 ("The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable security clearance decision."). Given the

"clearly consistent with the national interest" standard, Applicant had a heavy burden of persuasion. *See, e.g.*, ISCR Case No. 99-0601 (January 30, 2001) at p. 7.

Reading the decision below in its entirety, the Board concludes the Administrative Judge's favorable decision is predicated on his application of Drug Involvement Mitigating Condition 3. Because the Judge's application of that mitigating condition is not sustainable, the rationale of the Judge's favorable conclusions cannot be sustained. As noted earlier in this decision, the Board concludes the Judge gave Drug Involvement Mitigating Condition 1 little weight in his analysis. Furthermore, given the reasons why the Judge's application of Drug Involvement Mitigating Condition 3 is not sustainable, application of Drug Involvement Mitigating Condition 1 is insufficient to justify a favorable security clearance decision. Therefore, no useful purpose would be served by remanding the case. Accordingly, reversal of the Judge's decision is warranted.

Conclusion

Department Counsel has met its burden of demonstrating error that warrants reversal. Pursuant to Item E3.1.33.3 of the Directive's Additional Procedural Guidance, the Board hereby 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