

DATE: May 14, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-21292

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Pro Se

Applicant has appealed the January 21, 2003 decision of Administrative Judge Charles D. Ablard, 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 the Administrative Judge erred in stating in the synopsis that Applicant vowed not to use marijuana five years earlier; (2) whether the Administrative Judge erred by finding that Applicant admitted in a May 2001 statement that he had used marijuana over a period of eighteen years; and (3) whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. For the reasons that follow, the Board affirms the Administrative Judge's adverse security clearance decision.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated August 22, 2002. The SOR was based on Guideline H (Drug Involvement) and Guideline E (Personal Conduct). Applicant submitted an answer to the SOR, in which he requested an administrative determination in lieu of a hearing. A File of Relevant Material (FORM) was prepared. A copy of the FORM was given to Applicant. Applicant did not submit any information within the 30-day time period after receipt of his copy of the FORM. The case then was assigned to the Administrative Judge for disposition. The Judge issued a written decision, in which he 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 Administrative 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. 99-025 (October 19, 2000) at p. 2.

When a challenge to an Administrative Judge's ruling 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⁾

Applicant's appeal contains the factual assertion that he did not use marijuana from 1983 through 1999. This assertion goes beyond the record evidence that was before the Administrative Judge. Such an assertion constitutes new evidence, which the Board cannot consider. Directive, Additional Procedural Guidance, Item E3.1.29. Applicant had the opportunity to present evidence for consideration by the Judge during the proceedings below. Applicant cannot fairly challenge the Judge's decision based on new evidence. The Board will limit its consideration to those appeal arguments made by Applicant that do not rely on new evidence.

1. Whether the Administrative Judge erred in stating in the synopsis that Applicant vowed not to use marijuana five years earlier. The Administrative Judge stated in the synopsis of his decision that Applicant's admitted use of marijuana during the time he held a security clearance accompanied by his avowed intention to abstain from further marijuana use if it is necessary to retain a clearance was identical to his vow made five years earlier. On appeal, Applicant argues that he made such a statement on September 8, 1983, approximately 19 years earlier. Applicant's assertion is supported by the record evidence. However, the error in the synopsis of this case was harmless and not outcome-determinative. While the synopsis does state the Applicant had made an identical vow not to use marijuana if necessary to retain a security clearance five years earlier, instead of approximately 19 years earlier, as the Applicant correctly points out, a review of the Judge's decision reveals that this error had no impact on the findings of fact. To the contrary, the Administrative Judge correctly states in the findings of fact that "In an earlier statement in September 1983 he also admitted recreational use of marijuana and stated that, if such would jeopardize his security clearance, he would not use it in the future." Clearly the Judge was aware that the statement was made in 1983. Additionally, there is no indication that the Judge's conclusions about Applicant's vows not to use marijuana were in any way affected by the precise time frame in which the statements were made. Thus, the error in the synopsis of the case was harmless.

2. Whether the Administrative Judge erred by finding that Applicant admitted in a May 2001 statement that he had used marijuana over a period of eighteen years. The Administrative Judge found that Applicant made a sworn statement to an investigator in May 2001 and in that statement he admitted use of marijuana over a period of eighteen years. On appeal Applicant contends that in the May 2001 statement, he admitted only to using marijuana 8 times from 1999 until May 12, 2001. Applicant characterizes as "non-factual" the Judge's finding that he admitted use of marijuana over a period of eighteen years.

Applicant is correct in asserting that the Administrative Judge's finding regarding the content of the May 2001 statement is erroneous. In that statement Applicant admits only to marijuana use over a two-year period, 1999 to 2001. Likewise, contrary to the Judge's finding, the statement does not contain an admission that Applicant used marijuana for eighteen years. The Administrative Judge ultimately made a general finding that Applicant had used marijuana at various times from 1983 to May 2001. The Board construes Applicant's appeal as presenting an issue of whether the Judge's general finding concerning the duration of Applicant's marijuana use is sustainable, given the Judge's errors concerning the May 2001 statement.

Subparagraph 1.a. of the SOR alleges that Applicant used marijuana with varying frequency, from approximately 1983 to at least May 2001. In his answer, Applicant admits this allegation and while he characterized his marijuana use as

"very limited" and "infrequent," he did not specifically admit or deny the time span of use contained in the allegation. In the record below, Applicant admitted that he used marijuana between 1979 through 1983 and 8 times between August 1999 through September 2000, a time when he held a security clearance. Applicant also vowed in 1983 and again in 2001 to abstain from the use of marijuana. There is no record evidence that specifically indicates whether Applicant used marijuana between 1983 and 1999. To the extent the Judge's findings suggest Applicant used marijuana "over a period of eighteen years," they are erroneous.

3. Whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. Despite the errors made by the Administrative Judge in the findings of fact, the Judge's decision articulates a sufficient rational basis for his adverse decisions about Applicant's judgment, reliability, and trustworthiness under Guidelines H and E. The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. Given the Administrative Judge's sustainable findings that the Applicant used marijuana in 1983 and during the time he held a security clearance in 2001, and that his stated intention not to use drugs in the future was, at best, conditional, the Judge had a rational basis for his adverse conclusions about Applicant's judgment, reliability and trustworthiness under Guidelines H and E.

Conclusion

Applicant has failed to demonstrate harmful error below. Accordingly, the Board affirms the Administrative Judge's adverse security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

1. Department Counsel's reply brief contains remarks concerning Guideline F (Financial Considerations). Because Guideline F was not alleged in the SOR and was not relied on by the Administrative Judge in making his adverse decision, Department Counsel's remarks concerning Guideline F are not relevant to this appeal.