

DATE: December 3, 2002

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 01-23671

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

*Pro Se*

Administrative Judge Joseph Testan issued a decision, dated October 3, 2002, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant 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.

Applicant's appeal presents the following issue: 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 decision.

### **Procedural History**

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated January 7, 2002. The SOR was based on Guideline H (Drug Involvement).

Applicant submitted an answer to the SOR in which he stated "I wish to have a decision without a hearing." A File of Relevant Material (FORM) was prepared. A copy of the FORM was given to Applicant. No response to the FORM was received from Applicant. The case was then assigned to an Administrative Judge for determination.

The Administrative Judge issued a written decision, dated October 3, 2002, 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 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, 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 Issue

The Administrative Judge made the following findings: (1) Applicant used marijuana, on average, twice a month from September 1977 to at least November 1997; (2) Applicant purchased marijuana during the time he was using it; (3) some of Applicant's marijuana use occurred while he held a DoD security clearance; and (4) Applicant is unwilling or unable to demonstrate an unequivocal, unconditional intent not to use marijuana in the future. The Judge concluded the following: (a) Applicant's history of marijuana use reflects adversely on his judgment, reliability and trustworthiness, and strongly suggests he cannot be relied on to safeguard classified information; and (b) Applicant's inability or unwillingness to demonstrate an unequivocal, unconditional intent not to use marijuana in the future precludes application of Drug Involvement Mitigating Condition 3<sup>(1)</sup> and precludes a finding that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

On appeal, Applicant does not challenge the Administrative Judge's findings concerning his history of marijuana use. However, Applicant does contend: (i) the Judge erred by concluding Applicant's conduct had reflected adversely on his judgment, reliability, and trustworthiness; (ii) the Judge erred by concluding Applicant is unwilling or unable to demonstrate an unequivocal, unconditional intent not to use marijuana in the future; and (iii) an adverse security clearance decision would not be "a just and proper conclusion." The Board construes these contentions as raising the issue of whether the Judge's adverse decision is arbitrary, capricious, or contrary to law. The Board will address each contention in turn.

(i) Applicant points out that in the past he has disclosed to the government his marijuana use on several occasions and states "I could have chosen to be dishonest on any of these occasions, but instead chose to be truthful. I feel that this demonstrates my reliability and trustworthiness, contrary to what the Administrative Judge has stated in his decision." This argument fails to demonstrate the Administrative Judge erred.

Applicant's candor with the government about his marijuana use does not preclude the government from considering the security implications of his overall history of marijuana use. *See, e.g.*, ISCR Case No. 00-0621 (January 30, 2002) at p. 6 ("The security implications of an applicant's conduct and circumstances are not reduced or diminished by the fact that the applicant candidly admits his or her conduct and circumstances to the government."). Involvement with illegal drugs raises several potential security concerns. *See, e.g.*, *AFGE Local 1533 v. Cheney*, 944 F.2d 503, 506 n.6 (9th Cir. 1991). Furthermore, involvement with illegal drugs also demonstrates a person's willingness to engage in criminal conduct, which also raises questions about the person's judgment, reliability, and trustworthiness. Given the record evidence of Applicant's overall history of marijuana use, it was not arbitrary or capricious for the Judge to conclude Applicant's drug-related conduct reflected adversely on his judgment, reliability, and trustworthiness.

(ii) Applicant makes three, interrelated arguments in support of his second contention. First, Applicant argues that his statement if he did not receive a special clearance applied for in 1997 or receive a continuation of his then-existing security clearance then he would continue using marijuana (FORM, Government Exhibit 4) was "merely an attempt at the time to have the freedom to choose my future behavior, while at the same [time] being forthright with the investigating agencies." Second, Applicant argues "I was under the impression that since I had openly divulged my previous activities and was still issued a clearance at the outset, there was a probability that doing so again would not result in a subsequent clearance denial." Third, after realizing that continuing marijuana use could result in an adverse security clearance decision, he "reiterated on multiple occasions . . . that I would discontinue any marijuana use (which I

have done), and was prepared to do so indefinitely in order to maintain my existing security clearance."

As discussed earlier in this decision, Applicant's candor with the government does not preclude the government from considering the security implications of his overall history of marijuana use. In addition, Applicant's statement that he had a desire "to have the freedom to choose" illegal drug use does not reflect favorably on him. An applicant who expresses a desire to have the freedom to engage in criminal conduct does not inspire confidence in his judgment, reliability, or trustworthiness. Moreover, it was not arbitrary or capricious for the Administrative Judge to consider Applicant's statement (Decision at p. 2) in making his findings of fact and in deciding whether Applicant had demonstrated an intent to not use marijuana in the future.

Any previous decision to grant Applicant a security clearance did not give him a vested interest or right in continuing to have a security clearance. *See, e.g.*, ISCR Case No. 99-0519 (February 23, 2001) at p. 15. Furthermore, even if the government granted or continued a security clearance for Applicant after he made disclosures about his marijuana use, such governmental action would not equitably estop the government from denying or revoking his access to classified information now based on his overall history of marijuana use. *See, e.g.*, ISCR Case No. 00-0519 (February 23, 2001) at p. 15.

Applicant's statements about his willingness to forego marijuana use in the future in order to be granted access to classified information are record evidence that the Administrative Judge had to consider. However, those statements were not binding on the Judge. *See, e.g.*, ISCR Case No. 00-0620 (October 19, 2001) at pp. 3-4 (Administrative Judge is not bound to accept a witness's statements; rather the Judge must consider a witness's statements in light of the record evidence as a whole). It was not arbitrary or capricious for the Judge to consider Applicant's statements in light of the record evidence as a whole and draw reasonable inferences and conclusions concerning Applicant's future intentions about marijuana use. Given the record evidence in this case, the Judge articulated a rational basis for his expressed doubts about Applicant's willingness or ability to refrain from marijuana use in the future. None of Applicant's arguments, individually or collectively, demonstrate the Judge erred on this aspect of the case.

The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). Security requirements include consideration of a person's honesty, judgment, sobriety, and sense of one's obligations. *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961). It was not arbitrary or capricious for the Administrative Judge to conclude Applicant's long history of marijuana use raises questions about Applicant's judgment, reliability, and trustworthiness. Considering the record as a whole, the Judge's decision sets forth findings and conclusions that reflect a reasonable interpretation of the record evidence and provide a rational basis for his adverse conclusions about Applicant's security eligibility.

### **Conclusion**

Applicant has failed to demonstrate 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: 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. "A demonstrated intent not to abuse any drugs in the future."