

DATE: May 14, 2004

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-08032

**APPEAL BOARD DECISION AND REVERSAL ORDER**

**APPEARANCES**

**FOR GOVERNMENT**

Nygina T. Mills, Esq., Department Counsel

**FOR APPLICANT**

David T. Fulmer, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated July 21, 2003 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 Michael H. Leonard issued an unfavorable security clearance decision dated January 12, 2004.

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 Applicant was denied due process because Department Counsel did not submit evidence of Applicant's work history for the Administrative Judge's consideration, and Applicant was under the mistaken belief that his work history was part of the record before the Judge; (2) Whether the Administrative Judge was biased; (3) Whether the Administrative Judge erred by finding Applicant's use of marijuana was "regular"; (4) Whether the Administrative Judge erred by referring to illegal drugs other than marijuana in his decision; (5) Whether the Administrative Judge erred by finding that Applicant pleaded guilty or admitted sufficient facts to support a finding of guilt to a criminal offense; (6) Whether the Administrative Judge erred by drawing an adverse inference about Applicant's credibility based on his August 2000 statement about the extent of his marijuana use; and (7) Whether the Administrative Judge erred by relying on the absence of record evidence that Applicant has taken affirmative steps to show he will not use marijuana in the future. For the reasons that follow, the Board reverses 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 <sup>(1)</sup>

1. Whether Applicant was denied due process because Department Counsel did not submit evidence of Applicant's work history for the Administrative Judge's consideration, and Applicant was under the mistaken belief that his work history was part of the record before the Administrative Judge. On appeal, Applicant contends he was denied due process. In support of this contention, Applicant argues: (a) Department Counsel did not submit his employment history for the Administrative Judge to consider in this case; and (b) Applicant did not submit such evidence himself because he had the mistaken belief it would be part of the record before the Judge.

Applicant's due process claim lacks merit. A review of the record below persuades the Board that Applicant was on reasonable notice of what was in the File of Relevant Material (FORM), and his obligation to offer whatever other evidence he wanted the Administrative Judge to consider in his case. Given the language of the Directive, Additional Procedural Guidance, Items E3.1.7 and E3.1.15, as well as the September 25, 2003 cover letter that accompanied the FORM, Applicant was on fair notice of: (i) the contents of the FORM; (ii) his right to object to the FORM; (iii) his right to submit a response to the FORM; (iv) his right to present whatever additional evidence he wanted the Judge to consider in his case; and (v) his obligation to present evidence to rebut, explain, extenuate or mitigate facts admitted by him or proven by Department Counsel. Considering the procedural history of this case, it is untenable for Applicant to

claim he believed that information in addition to the FORM was being presented to the Judge by Department Counsel.

Applicant chose to represent himself during the proceedings below. Applicant's *pro se* status did not relieve him of the obligation to take timely, reasonable steps to protect his rights under Executive Order 10865 and the Directive.<sup>(2)</sup> Having decided to represent himself during the proceedings below, Applicant cannot fairly complain about the quality of his self-representation or seek to be relieved of the consequences of his decision to represent himself.<sup>(3)</sup> Furthermore, Applicant's failure to take advantage of procedural opportunities available to him during the proceedings below does not constitute a violation of due process.<sup>(4)</sup>

(2) Whether the Administrative Judge was biased. Applicant also asserts: (a) the Administrative Judge's decision "is suggestive of . . . bias against marijuana smokers, irrespective of how isolated the use may be or may have been"; (b) the Judge's findings have the "net effect [of] overt prejudice and bias"; and (c) the Judge's assessment of Applicant's marijuana use "is clouded by his own prejudice" and "is overtly prejudicial." Applicant's claims of bias are not well founded.

There is a rebuttable presumption an Administrative Judge is impartial and unbiased, and a party seeking to rebut that presumption has a heavy burden of persuasion on appeal.<sup>(5)</sup> The issue is not whether Applicant personally believes that the Judge was biased or prejudiced against Applicant. Rather, the issue is whether the record of the proceedings below contains any indication that the Judge acted in a manner that would lead a reasonable person to question the fairness and impartiality of the Judge.<sup>(6)</sup> Bias is not demonstrated merely because the Judge made adverse findings or reached unfavorable conclusions in a case.<sup>(7)</sup> Moreover, even if an appealing party demonstrates error by the Judge, proof of such error standing alone does not demonstrate the Judge was biased.<sup>(8)</sup>

Nothing in the record below or the Administrative Judge's decision supports Applicant's claims of bias. Applicant's strong disagreement with the Judge's findings and conclusions is not proof of bias. As will be discussed later in this decision, Applicant has persuasively demonstrated harmful error by the Judge. But proof of such error is not proof of bias. Applicant fails to identify anything in the record below that indicates or suggests a basis for a reasonable person to question the fairness or impartiality of the Judge in this case.

3. Whether the Administrative Judge erred by finding Applicant's use of marijuana was "regular". Applicant contends the Administrative Judge erred by finding his past use of marijuana was regular use. The Judge's characterization of Applicant's past marijuana use as regular in nature is a reasonable, legally permissible interpretation of record evidence as a whole.

4. Whether the Administrative Judge erred by referring to illegal drugs other than marijuana in his decision. Applicant also takes exception with the Administrative Judge's reference to illegal drugs other than marijuana (Decision at p. 3), arguing that there is no record evidence that Applicant was involved with any illegal drug other than marijuana. Applicant is correct that there is no record evidence that he used any illegal drug other than marijuana. However, the Judge's reference to other drug use tracks language in Applicant's written statement (FORM, Item 5 at p. 2). Applicant cannot fairly complain that the Judge erred by making a finding that tracks language from his own written statement.

5. Whether the Administrative Judge erred by finding that Applicant pleaded guilty or admitted sufficient facts to support a finding of guilt to a criminal offense. With respect to SOR paragraph 1.b, the Administrative Judge found that in connection with a drug-related criminal complaint, "Applicant pled guilty or admitted sufficient facts to support a finding of guilty" (Decision at p. 3). Applicant challenges that finding, claiming that the record evidence shows the criminal case was continued without a finding and the criminal charge subsequently dismissed.

Applicant's claim of error has mixed merit. On the one hand, Applicant's answer to the SOR indicates he pleaded guilty to the criminal charge. Furthermore, in FORM Item 6 (4th page), under Disposition Method, there is an X in the box for "Guilty Plea or Admission to Sufficient Facts accepted after colloquy & 278 §29D warning." On the other hand, on the same page of FORM Item 6, under Sentence or Other Disposition, there is an X in the box for "Sufficient facts found but continued without guilty finding until" followed with handwriting that indicates "probation 10-14-98" and under Final Disposition, there is an X in the box for "Dismissed on recommendation of Probation Dept."

The Board need not decide whether the Administrative Judge's characterization of the record evidence or Applicant's characterization of the record evidence is the better one with respect to the disposition of the criminal charge. The SOR did not allege the criminal matter under Guideline J (Criminal Conduct), but rather under Guideline H (Drug Involvement) and Guideline E (Personal Conduct). Since the Judge entered formal findings in favor of Applicant with respect to Guideline E, the Judge's challenged finding is moot for purposes of that Guideline. And, since Applicant did not dispute that he used marijuana up to December 1997, the Judge's challenged finding did not prejudice Applicant in any meaningful way. Even if the Board were to assume, solely for purposes of deciding this appeal, that Applicant's claim of error has merit, it fails to demonstrate harmful error by the Judge.

6. Whether the Administrative Judge erred by drawing an adverse inference about Applicant's credibility based on his August 2000 statement about the extent of his marijuana use. The Administrative Judge found that Applicant did not fully disclose the full extent of his marijuana use when he was asked about it in August 2000, and that Applicant's failure to do so undercuts his credibility. Applicant challenges that finding on appeal, arguing the Judge misinterpreted the record evidence on this matter.

To decide this appeal, the Board need not decide whether Applicant's challenge to the Administrative Judge's credibility determination is persuasive. Even if the Board were to sustain the Judge's negative credibility determination, as discussed later in this decision, such a negative credibility determination would not be a substitute for record evidence that Applicant used marijuana after 1997.

7. Whether the Administrative Judge erred by relying on the absence of record evidence that Applicant has taken affirmative steps to show he will not use marijuana in the future. The Administrative Judge concluded that Applicant failed to meet his burden of persuasion because of the long period of Applicant's marijuana use (1969-December 1997) and because he did not present evidence that he had taken affirmative steps to show he will not use marijuana in the future (Decision at p. 5). Applicant contends the Judge's reasoning is erroneous because: (a) the Judge's statements show he is prejudiced against Applicant; (b) there is no evidence suggesting that Applicant will use marijuana in the future; (c) the record evidence is "overwhelming[ly] . . . mitigating or extenuating"; and (d) the Judge failed to give due weight to the record evidence that Applicant has been drug-free since 1997.

As discussed earlier in this decision, Applicant's claims of bias lack merit. Applicant's remaining arguments, viewed together, demonstrate the Administrative Judge erred.

Although the Administrative Judge reached an unfavorable credibility determination concerning Applicant, such a negative credibility determination is not a substitute for record evidence that Applicant used marijuana after December 1997. A Judge cannot find an applicant has engaged in misconduct based on suspicion predicated on a negative credibility determination.<sup>(9)</sup> The SOR did not allege that Applicant used marijuana after 1997. Department Counsel did not present evidence that Applicant used marijuana after 1997. And, Applicant did not make any admissions that he used marijuana after 1997. Furthermore, the Judge did not identify any record evidence -- direct or circumstantial -- that would provide a rational basis for the Judge to infer that Applicant engaged in marijuana use after 1997.<sup>(10)</sup>

The Directive is silent on what constitutes a sufficient period of reform and rehabilitation. However, such silence does not mean an Administrative Judge has unfettered discretion in deciding what period of time is sufficient to demonstrate reform and rehabilitation.<sup>(11)</sup> The sufficiency or insufficiency of an applicant's period of conduct without recurrence of past misconduct does not turn on any bright-line rules concerning the length of time needed to demonstrate reform and rehabilitation, but rather a reasoned analysis of the facts and circumstances of an applicant's case based on a careful evaluation of the totality of the evidence record within the parameters set by the Directive.<sup>(12)</sup> If the record evidence shows that a significant period of time has passed without evidence of misconduct by an applicant, then the Judge must articulate a rational basis for concluding why that significant period of time does not demonstrate changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.<sup>(13)</sup> Given the passage of more than six years since the last time Applicant used marijuana, the Judge properly concluded that Applicant's marijuana use was not recent within the meaning of Drug Involvement Mitigating Condition 1. Given the passage of time since 1997 without any record evidence -- direct or circumstantial -- of subsequent marijuana use and the fact that the Judge had applied Drug Involvement Mitigating Condition 1 in Applicant's favor, the Judge failed to articulate a rational basis for

deciding that an insufficient period of time had passed to conclude Applicant had demonstrated his marijuana use was a thing of the past. This is not a case where there is evidence that Applicant had years of marijuana use mixed with intermittent, significant periods of abstinence, followed by renewed marijuana use -- circumstances that could provide a rational basis for doubts about whether the most recent period of abstinence was sufficient to conclude Applicant had put marijuana use behind him.

### Conclusion

Many of Applicant's claims of error lack merit. However, Applicant has met his burden of demonstrating harmful error that warrants reversal. Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.3, the Board reverses the Administrative Judge's unfavorable 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: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge entered formal findings in favor of Applicant with respect to the Guideline E (Personal Conduct) allegations. Those favorable formal findings are not at issue on appeal.

2. *See, e.g.*, ISCR Case No. 00-0250 (February 13, 2001) at p. 3.

3. *See, e.g.*, ISCR Case No. 00-0086 (December 13, 2000) at pp. 2-3.

4. *See Dusanek v. Hannon*, 677 F.2d 538, 542-543 (7th Cir. 1982)("The availability of recourse to a constitutionally sufficient administrative process satisfies due process requirements if the complainant merely declines or fails to take advantage of the administrative process."), *cert. denied*, 459 U.S. 1017 (1982).

5. *See, e.g.*, ISCR Case No. 99-0710 (March 19, 2001) at p. 5.

6. *See, e.g.*, ISCR Case No. 01-04713 (March 27, 2003) at p. 3.

7. *See, e.g.*, ISCR Case No. 94-0954 (October 16, 1995) at p. 4.

8. *See, e.g.*, ISCR Case No. 98-0515 (March 23, 1999) at p. 5.

9. *See, e.g.*, ISCR Case No. 01-26893 (October 16, 2002) at p. 7; ISCR Case No. 97-0356 (April 21, 1998) at p. 3;

DISCR Case No. 91-1344 (April 6, 1993) at p. 5 n.3; DISCR Case No. 87-1983 (August 29, 1989) at p. 3. *But see* ISCR Case No. 96-0461 (December 31, 1997) at p. 4 (noting that a negative credibility determination, combined with probative record evidence, could be jointly sufficient to support an Administrative Judge's finding of fact).

10. The Administrative Judge stated Applicant had not dispelled "*all* doubt" that he would remain drug free (Decision at p. 5)(italics added). Although the clearly consistent with the national interest standard means that a Judge should resolve doubts about an applicant's security eligibility in favor of the national security, the Judge must have a rational basis for having such doubts. *See, e.g.*, ISCR Case No. 01-00677 (May 21, 2002) at p. 7 ("If a Judge is faced with unresolved security concerns or doubts *that have a rational basis in the record evidence*, the Judge acts properly by resolving them in favor of the national security.")(italics added); ISCR Case No. 99-0519 (February 23, 2001) at p. 12 (Board upheld Judge's decision to resolve in favor of the national security his doubts that applicant's evidence was sufficient to adequately address security concerns in the case; Board's consideration of the record as a whole showed that the Judge's expressed doubts had a rational basis).

11. The silence of the Directive with respect to specific time periods (in the general factors of Directive, Section 6.3 and Enclosure 2, Item E2.2.1, and in the Adjudicative Guidelines) does not relieve an Administrative Judge of the obligation to construe and apply pertinent provisions of the Directive in a reasonable, common sense way. *See, e.g.*, ISCR Case No. 02-11810 (June 5, 2003) at p. 4; ISCR Case No. 98-0394 (June 10, 1999) at pp. 2-3. *Cf.* ISCR Case No. 98-0611 (November 1, 1999) at pp. 2-3 (Administrative Judge must consider the record evidence as a whole in assessing the significance to be accorded to the passage of time since the applicant's last act of misconduct).

12. *See, e.g.*, ISCR Case No. 02-05110 (March 22, 2004) at pp. 4-6 (discussing reasons why security clearance adjudications are not reduced to mechanical, formula adjudication, nor left to the unfettered discretion of security clearance adjudicators).

13. *Compare* ISCR Case No. 98-0394 (June 10, 1999) at p. 4 (although the passage of three years since the applicant's last act of misconduct did not, standing alone, compel the Administrative Judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) *with* ISCR Case No. 01-02860 (May 7, 2002) at p. 3 ("The Administrative Judge articulated a rational basis for why she had doubts about the sufficiency of Applicant's efforts at alcohol rehabilitation.").