

DATE: January 6, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-08613

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated September 15, 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), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct). Administrative Judge Kathryn Moen Braeman issued an unfavorable security clearance decision, dated September 28, 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 issue has been raised on appeal: whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law because Applicant's marijuana use occurred only during off-duty hours. 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 Issue

Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law because Applicant's marijuana use occurred only during off-duty hours. Applicant does not challenge the Administrative Judge's findings of fact about: (a) his history of marijuana use during the periods 1971-1976 and 1994-October 2003 (including marijuana use after he was granted a security clearance in 1997); and (b) his falsification of security clearance questionnaires in May 1996 and January 1997. However, Applicant: (i) makes arguments about alcohol abuse, the harmful effects of tobacco, other health problems in America, and why marijuana should be legalized; and (ii) asserts that his marijuana use occurred only during off-duty hours, and did not cause him to have any drug-related problems.

The purpose of DOHA proceedings is to make security clearance determinations for individual applicants. DOHA proceedings are not a proper forum to debate the pros and cons of whether marijuana should be legalized, or the merits of DoD policy concerning drug abuse. *Cf.* ISCR Case No. 01-05340 (December 20, 2002) at p. 3 (DOHA proceedings are not a proper forum for challenging the validity of federal tax laws); ISCR Case No. 99-0519 (February 23, 2001) at p. 6 n.3 (DOHA proceedings are not a proper forum to debate or adjudicate the formulation of DoD policy concerning foreign passports); ISCR Case No. 99-0457 (January 3, 2001) at p. 6 (appeal process is not proper forum to challenge the wisdom or legality of provisions of the Directive).

The Board construes Applicant's remaining assertion as raising the issue of whether the Judge failed to give proper weight to the off-duty nature of Applicant's marijuana use. Security clearance decisions are not limited to consideration of an applicant's job performance or conduct during duty hours. Indeed, security concerns can be raised by an applicant's conduct and circumstances during off-duty hours. *See, e.g.*, ISCR Case No. 01-01642 (June 14, 2002) at p. 6. Accordingly, the off-duty nature of Applicant's marijuana use did not preclude the Judge from considering it under Guideline H (Drug Involvement). Drug abuse raises security concerns. *See, e.g.*, *AFGE Local 1533 v. Cheney*, 944 F.2d 503, 506 n. 6 (9th Cir. 1991)(discussing several ways that drug abuse can pose security risks). Given the record

evidence of Applicant's history of marijuana use, the Judge properly concluded it raised security concerns under Guideline H.

Applicant does not challenge the Administrative Judge's findings about his falsification of security clearance questionnaires in May 1996 and January 1997. Nor does Applicant challenge the Judge's finding that Applicant's falsifications on those occasions constituted violations of 18 U.S.C. §1001. Those unchallenged findings provide a rational basis for the Judge's adverse conclusions under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct), as well as a rational basis for her unfavorable security clearance decision independent of her findings and conclusions under Guideline H.

Conclusion

Applicant has failed to demonstrate error below. The Board affirms the Administrative Judge's 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