

DATE: December 29, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-09389

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated April 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), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct). Administrative Judge Claude R. Heiny issued a favorable security clearance decision, dated August 30, 2004.

Department Counsel appealed the Administrative Judge's favorable 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 the Administrative Judge erred by finding that Applicant used marijuana five to ten times during the period from 1982 through 1996; (2) whether the Administrative Judge erred by concluding Applicant's marijuana use was mitigated under Drug Involvement Mitigating Condition 1; and (3) whether the Administrative Judge erred by concluding Applicant's falsification of a security clearance application in 1996 was mitigated under Personal Conduct Mitigating Condition 2. 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 Issues

1. Whether the Administrative Judge erred by finding that Applicant used marijuana five to ten times during the period from 1982 through 1996. Department Counsel challenges the Administrative Judge's finding that Applicant used marijuana five to ten times during the period from 1982 through 1996. This claim of error is not persuasive.

Department Counsel's disagreement with the Administrative Judge's finding of fact is not sufficient to satisfy its burden of persuasion on appeal. *See, e.g.*, ISCR Case No. 02-09892 (July 15, 2004) at p. 5. For all practical purposes, Department Counsel's brief is asking the Board to review the record evidence *de novo* and make its own findings of fact about Applicant's history of marijuana use. Under the Directive, the Board is not authorized to make its own findings of fact. Rather, the Board reviews a Judge's challenged findings of fact under the terms of Directive, Additional Procedural Guidance, Item E3.1.32.1. The Board does not have to agree with the Judge's challenged finding of fact about Applicant's history of marijuana use to conclude it is sustainable under Directive, Additional Procedural Guidance, Item E3.1.32.1.

2. Whether the Administrative Judge erred by concluding Applicant's marijuana use was mitigated under Drug Involvement Mitigating Condition 1. Department Counsel contends the Administrative Judge erred by applying Drug Involvement Mitigating Condition 1, [\(1\)](#) arguing that: (a) the record evidence shows Applicant used marijuana more than five to ten times during the period from 1982 through 1996; (b) a 1999 incident shows Applicant did not stop using marijuana in 1996; and (c) insufficient time has passed since Applicant's last use of marijuana to warrant application of Drug Involvement Mitigating Condition 1.

As discussed earlier in this decision, the Administrative Judge's finding that Applicant used marijuana five to ten times during the period from 1982 through 1996 is sustainable. Moreover, Department Counsel has not shown that it was arbitrary or capricious for the Administrative Judge to conclude that the 1999 incident was dated and not recent. *Cf.* ISCR Case No. 02-19479 (June 22, 2004) at p. 6 (noting the Board has declined to adopt a "bright-line" rule concerning what constitute "recent" under the Directive). Department Counsel's disagreement with the Judge is not sufficient to demonstrate the Judge acted in a manner that is arbitrary or capricious when he concluded the 1999 incident was not recent. Accordingly, the Board concludes that the Judge had a sufficient basis to decide that application of Drug Involvement Mitigating Condition 1 was warranted in light of the record evidence in this case.

3. Whether the Administrative Judge erred by concluding Applicant's falsification of a security clearance application in 1996 was mitigated under Personal Conduct Mitigating Condition 2. Department Counsel contends that the Administrative Judge erred by applying Personal Conduct Mitigating Condition 2 ⁽²⁾ in this case, arguing: (a) the Judge's application of that mitigating condition runs contrary to the reasoning of prior Board decisions; and (b) the Judge's application of that mitigating condition is not warranted because of record evidence that Applicant has engaged in falsifications beyond his falsification of the security clearance application. Department Counsel's appeal arguments have mixed merit.

Department Counsel correctly notes the Judge's application of Personal Conduct Mitigating Condition 2 runs contrary to prior Board decisions concerning that mitigating condition. *See, e.g.* ISCR Case No. 99-0557 (July 10, 2000) at p. 4 (discussing difference between Personal Conduct Mitigating Conditions 2 and 3).

However, it is untenable for Department Counsel to challenge the Administrative Judge's application of this mitigating condition by trying to raise -- for the first time on appeal -- allegations of falsification not covered by the SOR. If Department Counsel believed that the record evidence supported multiple allegations of falsification, then it could have moved to amend the SOR during the proceedings below to include allegations of falsification beyond the one made by SOR paragraph 2.a. *See, e.g.*, ISCR Case No. 02-22163 (March 12, 2004) at p. 4 n.3 (noting earlier Board decision that held motions to amend SOR can be made in cases adjudicated by File of Relevant Material).

Furthermore, Department Counsel's claim of error is based on the premise -- repeatedly rejected by the Board -- that an Administrative Judge cannot render a favorable decision in the absence of an Adjudicative Guidelines mitigating condition. Department Counsel's argument ignores the Judge's obligation to also evaluate Applicant's case under the general factors of Directive, Section 6.3 and Adjudicative Guidelines, Item E2.2.1. *See, e.g.*, ISCR Case No. 02-11810 (June 5, 2003) at p. 5.

In view of the foregoing, the Board concludes Department Counsel has not shown that the Administrative Judge's error concerning Personal Conduct Mitigating Condition 2 is harmful in this case.

Conclusion

The Board affirms the Administrative Judge's decision because Department Counsel has failed to demonstrate harmful error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. "The drug involvement was not recent" (Directive, Adjudicative Guidelines, Item E2.A8.1.3.1).
2. "The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily" (Directive, Adjudicative Guidelines, Item E2.A5.1.3.2).