

DATE: August 5, 2003

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 02-09571

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

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

**FOR APPLICANT**

*Pro Se*

Applicant has appealed the May 12, 2003 decision of Administrative Judge Philip S. Howe, 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 by finding Applicant used marijuana on more than one occasion; (2) whether the Administrative Judge erred by finding that Applicant falsified a security clearance application by denying any drug use; and (3) whether the Administrative Judge's adverse security clearance 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 October 22, 2002. The SOR was based on Guideline H (Drug Involvement), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct).

Applicant submitted an answer to the SOR, in which she stated she did not wish to have 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 the Administrative Judge for determination.

The Administrative Judge issued a written decision, dated May 12, 2003, 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 security clearance 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. 99-0205 (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 Issues**

Applicant's appeal brief contains factual assertions that go beyond the record evidence in this case. The Board cannot consider new evidence on appeal. *See Directive, Additional Procedural Guidance, Item E3.1.29.* Furthermore, Applicant had the opportunity to respond to the FORM and provide information for consideration by the Administrative Judge in her case. Applicant did not take advantage of that opportunity. Applicant cannot fairly challenge the Judge's decision based on a proffer of information that she did not submit for the Judge's consideration.

1. Whether the Administrative Judge erred by finding Applicant used marijuana on more than one occasion. The Administrative Judge found that Applicant used marijuana on two occasions before she completed a security clearance application in July 1999. On appeal, Applicant challenges that finding, arguing that she used marijuana only once. There is conflicting record evidence as to whether Applicant used marijuana once or twice. The Judge is responsible for considering the record evidence as a whole and making findings of fact. *See Directive, Additional Procedural Guidance, Item E3.1.25.* The Board will not disturb a Judge's findings of fact if they reflect a reasonable interpretation of the evidence as a whole. Given the record evidence in this case, the Judge's finding that Applicant used marijuana twice is sustainable. *See Directive, Additional Procedural Guidance, Item E3.1.32.1.*

Furthermore, even if the Board were to accept Applicant's argument about using marijuana only once, it would not demonstrate harmful error by the Administrative Judge. The Judge entered a favorable formal finding with respect to Guideline H (Drug Involvement). Given that favorable formal finding, the Judge's finding about the number of times Applicant used marijuana did not prejudice Applicant in any meaningful way. <sup>(1)</sup>

2. Whether the Administrative Judge erred by finding that Applicant falsified a security clearance application by denying any drug use. The Administrative Judge found that Applicant falsified a security clearance application she completed in July 1999 by denying any illegal drug use. Making allowances for Applicant's *pro se* status, the Board construes her argument that she has disclosed her marijuana use to the government as raising a challenge to the Judge's finding of falsification.

When responding to the SOR, Applicant denied that she falsified the security clearance application. That denial was not binding or conclusive on the Administrative Judge. Rather, the Judge had to consider Applicant's denial in light of the record evidence as a whole. A finding of falsification can be made even in the face of an applicant's denial of any intent to falsify. *See, e.g., ISCR Case No. 98-0583 (November 18, 1999) at p. 3.* Considering the record as a whole, the Judge's finding of falsification is sustainable. *See Directive, Additional Procedural Guidance, Item E3.1.32.1.*

3. Whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. On appeal, Applicant indicates that she does not understand how her clearance can be denied or revoked since she disclosed her marijuana use during a polygraph with another federal agency in June 2000. The Board construes this argument as raising the issue of whether the Judge's adverse decision is arbitrary, capricious, or contrary to law.

Applicant's argument fails to demonstrate the Administrative Judge erred. First, Applicant's argument relies, in part, on factual assertions that go beyond the record evidence. As noted earlier in this decision, the Board cannot consider new evidence on appeal. Second, Applicant's argument misses the point that failing to disclose her marijuana use when she completed the security clearance application in July 1999 is an act that is separate and distinct from any disclosures about marijuana use that she made in 2000 (to another federal agency) or in 2001 (to a Department of Defense investigator). As discussed earlier, the Judge's finding of falsification is sustainable.

The federal government must be able to response a high degree of trust and confidence in persons granted access to classified information. A finding of falsification provides a rational basis for an adverse security clearance decision. *See Harrison v. McNamara*, 228 F.Supp. 406, 408 (D. Conn. 1964)(lying on an application for a government position requiring a security clearance is sufficient to warrant dismissal), *aff'd per curiam*, 380 U.S. 261 (1965).

### **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: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. The number of times Applicant used marijuana is not relevant to the falsification issue in this case.