

DATE: April 29, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-10502

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 June 9, 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). The Applicant elected to have the case decided on the administrative record, as opposed to having a hearing. Consequently, the government prepared a File of Relevant Material (FORM) to which Applicant made a response. Administrative Judge Joseph Testan issued an unfavorable security clearance decision dated January 15, 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 the Administrative Judge erred by concluding that Applicant's 1994 falsification of a personnel security questionnaire had not been mitigated; (2) whether the Administrative Judge erred by concluding that Applicant's marijuana use had not been mitigated; and (3) whether the Administrative Judge's decision was arbitrary, capricious, or contrary to law. 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 concluding that Applicant's 1994 falsification of a 1994 personnel security questionnaire had not been mitigated. The Administrative Judge found, and Applicant concedes, that Applicant falsified a March 1994 personnel security questionnaire by denying he had ever used illegal drugs when answering questions about prior illegal drug use. Applicant had in fact used marijuana occasionally for several years prior to completing the questionnaire. The Administrative Judge indicated in his decision that he had considered the facts that the falsification was not recent and that it appeared to be an isolated incident.⁽¹⁾ The Judge concluded, however, that these facts were insufficient to mitigate Applicant's dishonesty absent independent evidence in the record indicating that he is now a reliable and trustworthy individual. The Judge also concluded that there was an absence of credible evidence that Applicant voluntarily provided the correct information about his marijuana use to the Department of Defense subsequent to his 1994 falsification.

On appeal, Applicant asserts that he has met the criteria cited under the Personal Conduct mitigating conditions⁽²⁾ since he corrected his incorrect answer about drugs on his personnel security questionnaire "at the first possible chance in October 1994 when I interviewed with an agent." Applicant also asserts that his falsification was an isolated incident that happened "a long time ago" and he subsequently provided correct information about his marijuana use during a 2001 reinvestigation. He does not believe "the court has good cause to find against me on the Guideline E charges."

Applicant has failed to establish error on the part of the Administrative Judge with regard to the latter's consideration of Personal Conduct Mitigating Conditions E2.A5.1.3.2. and E2.A5.1.3.3.

Application of Personal Conduct Mitigating Condition E2.A5.1.3.3. in Applicant's favor requires that Applicant meet his burden of establishing that he made prompt, good-faith efforts to correct his concealment of his marijuana use up to 1994 before being confronted with the facts. The record evidence establishes only that Applicant revealed his marijuana use to a Defense Security Service Agent in an interview in October 1994, some seven months after the falsification of the personnel security questionnaire in March 1994. There is also no record evidence establishing that Applicant made this revelation before being confronted with the facts of his prior marijuana use. Consequently, the Judge's decision not to apply Personal Conduct Mitigating Condition E2.A5.1.3.3. is sustainable.

Applicant has failed to establish error on the part of the Administrative Judge with regard to the Judge's conclusion that facts supporting the application of Personal Conduct Mitigating Condition E2.A5.1.3.2 did not operate to overcome the government's security concerns. As noted in the preceding paragraph, Applicant has the burden of establishing his case in mitigation. Additionally, the application of Adjudicative Guidelines disqualifying and mitigating conditions does not turn simply on a finding that one or more of them applies to the particular facts of a case. Rather, the application of a disqualifying or mitigating condition requires the exercise of sound discretion in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 01-14740 (January 15, 2003) at pp. 7-8. Thus, the Administrative Judge could reasonably conclude that, notwithstanding the isolated and dated nature of the 1994 falsification, there was insufficient evidence in the record of Applicant's general reliability and trustworthiness to warrant application of the mitigating condition in Applicant's favor. Moreover, the Administrative Judge concluded that there was insufficient evidence in the record to establish the voluntary nature of Applicant's subsequent disclosure of correct information. Given the record evidence and Applicant's burden, that conclusion is sustainable.

Regarding the Administrative Judge's adverse conclusions under the Personal Conduct guideline, Applicant contends that the 1994 falsification was previously considered by the government and resolved in his favor since he was subsequently granted a security clearance. A prior favorable security clearance decision does not give rise to a vested right or interest in continued retention of a security clearance. *See, e.g.*, ISCR Case No. 01-21528 (July 26, 2002) at p. 3. To the extent that Applicant's argument could be construed as raising the question whether DoD is equitably estopped from denying or revoking his security clearance, it is unpersuasive because the federal government is not equitably estopped from denying or revoking access to classified information. *See, e.g.*, ISCR Case No. 96-0461 (December 31, 1997) at p. 4 (citing prior Board decisions); DISCR Case No. 88-1733 (February 20, 1991) at p. 3 (citing federal cases). Therefore the prior favorable resolution of Applicant's 1994 falsification does not preclude subsequent consideration of that falsification in the changed context of a later adjudication. In this case the Administrative Judge's adverse conclusions with regard to Applicant's 1994 falsification and his failure to mitigate same were sustainable, especially in light of the Judge's negative assessment of Applicant's credibility.

2. Whether the Administrative Judge erred by concluding that Applicant's marijuana use had not been mitigated. The record establishes that Applicant's last use of marijuana was in 2001. The Administrative Judge concluded that Applicant's use of marijuana, particularly after he had obtained a security clearance, reflected adversely on his judgment, reliability and his trustworthiness. The Judge also concluded that Applicant had avoided taking responsibility for his illegal drug use by Applicant's implying that statements made by a Defense Security Service agent to him during a 1994 interview led him to believe that continued occasional use of marijuana was "no big deal." The Administrative Judge concluded that Applicant's assertions in this regard were not credible and were an attempt to shift the responsibility for his post-1994 illegal marijuana use to the DSS agent. Given these facts, the Judge ultimately concluded that Applicant's statements that he did not intend to use marijuana in the future were not worthy of belief, and that it was not clearly consistent with the national interest to grant Applicant access to classified information.

On appeal, Applicant argues that he has met the criteria cited in the Drug Involvement mitigating conditions⁽³⁾ and that the Judge's conclusion that his statements constituted an attempt to shift the responsibility for his illegal marijuana use while holding a security clearance to the DSS agent was based on a misinterpretation of the evidence. Applicant fails to demonstrate error on the part of the Administrative Judge.

In his appeal brief, Applicant characterizes his marijuana use as consisting of a few isolated incidents with the last incident not being recent. He repeats his assertion below that he has no intentions of using drugs in the future. This portion of Applicant's appeal comprises an interpretation of the record evidence that differs from the one adopted by the Administrative Judge and comprises Applicant's disagreement with the Judge's assessment of his credibility. These

assertions are insufficient to establish error on the part of the Administrative Judge. The record evidence does not support Applicant's characterization of his marijuana use as isolated. Viewing the evidence in the case as a whole, the Judge's decision not to apply Drug Involvement Mitigating Condition E2.A8.1.3.1. and his conclusion that the marijuana use was not mitigated owing to lack of recency are supportable. A credibility determination of an administrative judge is entitled to deference on appeal and will not be disturbed absent a specific showing that the Judge's conclusions in this regard are arbitrary, capricious or contrary to law. In this case, the Administrative Judge's negative assessment of Applicant's credibility and his corresponding discounting of Applicant's stated intentions concerning future marijuana use are sustainable.

An Administrative Judge's conclusions are sustainable if they are based on the record evidence or upon reasonable inferences drawn from that evidence. In a signed sworn statement given to the DSS in December 2001, Applicant related that during a 1994 interview, a DSS agent left him with the impression that very limited use of marijuana was "no big deal." Applicant stated that the agent told him that DSS was more concerned with hard core users of marijuana and users of the more serious drugs. Applicant then stated, "I was never asked what my future intentions were with respect to the use of marijuana or other drugs. As a result, I continued to use marijuana on a very infrequent basis..." In his response to the FORM in June 2003, Applicant again discussed the 1994 DSS interview. Applicant claimed the DSS agent relaxed him by telling him that occasional use of marijuana was not a big issue. Applicant then said, "Since then, I used marijuana a few isolated times..." The Administrative Judge inferred from these statements of the Applicant in the record that Applicant was claiming that in 1994 a DSS agent led him to believe that he could continue to use marijuana on an occasional basis even though he had a security clearance. The Judge further inferred that Applicant was attempting to shift the responsibility for his continued marijuana use to the DSS agent. Despite Applicant's assertions on appeal that the Judge misinterpreted his statements, the record evidence reasonably supports the Judge's conclusions.

3. Whether the Administrative Judge's decision was arbitrary, capricious, or contrary to law.

Applicant further contends on appeal that: (1) favorable evidence indicates that he is an upstanding citizen but he did not provide favorable referrals in the process of responding to the FORM because he did not think they were needed; and (2) the Administrative Judge overlooked evidence of his good character because he did not consider the fact that all of the government's evidence was provided by Applicant as opposed to being discovered by investigators. The Board interprets these assertions as a claim that the Administrative Judge's decision is arbitrary, capricious, and contrary to law.

Applicant's discussion about favorable evidence includes matters that were not made part of the record below. As such, they constitute new evidence, which the Board cannot consider on appeal. *See*, Directive, Additional Procedural Guidance, Item E3.1.29. Moreover, during the proceedings below, Applicant had ample opportunity to present evidence for the Administrative Judge to consider in his case. His decision not to submit such favorable evidence was a tactical decision, the consequences of which he cannot reasonably complain about on appeal.

Applicant claims that his voluntarily disclosures of his marijuana use were the sole source of the government's case and that the Administrative Judge should have considered this when assessing Applicant's character. Given the Administrative Judge's sustainable findings about Applicant's falsification and the Judge's sustainable conclusions about the inapplicability of various mitigating conditions, Applicant's claim of voluntary disclosure is one that the Judge was not bound to accept, and, in fact, reasonably rejected. The fact that the government's case is based solely upon information provided by the Applicant does not undermine the security significance of that information and did not mandate that the Administrative Judge consider such disclosures as evidence of Applicant's good character. Applicant has failed to establish error on the part of the Administrative Judge.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error below. Therefore, the decision below is affirmed.

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

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. The Administrative Judge was referencing Personal Conduct Mitigating Condition E2.A5.1.3.2., which states, "The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily."

2. Although he is not specific as to which Personal Conduct mitigating conditions he is referring to, the substance of Applicant's appeal arguments on this issue relate only to two of them, namely: Personal Conduct Mitigating Condition E2.A5.1.3.2., cited in Footnote 1 (which is the only Personal Conduct mitigating condition discussed by the Judge) and Personal Conduct Mitigating Condition E2.A5.1.3.3 ("The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts.").

3. Again, Applicant does not specifically identify the mitigating conditions to which he refers. However, the Drug Involvement mitigating conditions that relate to his appeal arguments are: Drug Involvement Mitigating Condition E2.A8.1.3.1. ("The drug involvement was not recent"), Drug Involvement Mitigating Condition E2.A8.1.3.2. ("The drug involvement was an isolated or aberrational event") and Drug Involvement Mitigating Condition E2.A8.1.3.3. ("A demonstrated intent not to abuse any drugs in the future").