

DATE: November 23, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-10454

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

John R. Campbell, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated July 29, 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). Administrative Judge Henry Lazzaro issued an unfavorable security clearance decision dated July 16, 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 in finding the Department Counsel had produced sufficient evidence to raise a security concern under Guideline H (Drug Involvement); and (2) whether the Administrative Judge erred in concluding that Applicant had not successfully mitigated or extenuated the security concerns under Guideline H (Drug Involvement). 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 in finding the Department Counsel had produced sufficient evidence to raise a security concern under Guideline H (Drug Involvement). Relying on an unrelated decision by another Hearing Office Administrative Judge, ⁽¹⁾ Applicant argues that the government must present "substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the granting of a security clearance." Applicant claims that the only record evidence that she smoked marijuana five times between 1991 and 2000, is her own voluntary disclosure. Applicant asserts that there is no other evidence for revoking her clearance: no drug conviction, no drug arrest, no failure to pass drug screening, no manufacture, sale, purchase or distribution, and no diagnosis of drug dependence or abuse.

In this case Applicant admitted, and did not controvert, that she smoked marijuana cigarettes on five occasions: twice in 1991, once in 1996, and twice in 2000. These incidents occurred while Applicant possessed a security clearance, and Applicant attributed her use of marijuana in these instances to curiosity and peer pressure. Applicant admitted that she broke the law at the time (Hearing Transcript at p. 23) and knew that she could not use any illegal drugs while holding a security clearance (Hearing Transcript at p. 30). The Judge concluded that two Drug Involvement Disqualifying Conditions, which raised security concerns, applied here: "any drug abuse" and "[r]ecent drug involvement, especially following the granting of a security clearance . . . will almost invariably result in an unfavorable determination" (Directive, Adjudicative Guidelines, Items E2.A8.1.2.1 and E2.A8.1.2.5). The Judge had a rational basis to conclude Applicant's admitted conduct is disqualifying. There is no requirement that the Department Counsel demonstrate direct evidence of a nexus between an applicant's conduct and a decision to deny or revoke access to classified information. *See Gayer v. Schlesinger*, 490 F. 2d 740, 750 (D.C. Cir. 1973). All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the

high degree of judgment, reliability or trustworthiness required of persons handling classified information. See, e.g., ISCR Case No. 99-0433 (May 24, 2000) at pp. 3-4. Drug abuse is a legitimate reason for denying access to classified information, and an applicant's history of drug abuse has a rational connection or nexus to her security eligibility. See, e.g., ISCR Case No. 00-0311 (March 8, 2001) at p. 2. Given the record evidence in this case, it was not arbitrary, capricious or contrary to law for the Administrative Judge to conclude Applicant's marijuana use raised security concerns under Guideline H.

2. Whether the Administrative Judge erred in concluding that Applicant had not successfully mitigated or extenuated the security concerns under Guideline H (Drug Involvement). Applicant disputes the Administrative Judge's conclusion that he considered all mitigating conditions under Guideline H (Drug Involvement) and that none apply. Applicant contends that this conclusion is in conflict with the Judge's findings and record evidence because: (a) the drug involvement was not recent; (b) the drug involvement was an isolated or aberrational event; (c) Applicant demonstrated intent not to abuse any drugs in the future; (d) Applicant's psychiatrist indicated that Applicant did not meet the criteria for a diagnosis of substance abuse or substance dependence and did not prescribe any treatment for substance abuse; and (e) Applicant voluntarily reported the drug involvement. The Board construes Applicant's appeal as raising the issue of whether the Judge erred in concluding that Applicant had not mitigated or extenuated security concerns about her conduct under Guideline H (Drug Involvement).

An applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision. Directive, Additional Procedural Guidance, Item E3.1.15.

Applicant argues that because more than four years elapsed between the time of her last drug involvement (May 2000) and the date of the hearing, the Judge erred in concluding that the drug involvement was recent. Applicant also suggests that each of the drug involvements should be viewed as isolated as "further demonstrated by [Applicant's] testimony that she never experimented with drugs at any other point in her life."

The Administrative Judge concluded that he was unable to find sufficient attenuation from Applicant's past misconduct to warrant a finding that her conduct was not recent. He did not have to view each of the incidents in isolation, but consistent with the "whole person" concept, ⁽²⁾ properly considered the five incidents together as part of Applicant's pattern of conduct that demonstrated poor judgment and irresponsibility, especially considering her maturity and security clearance status at the time she engaged in the incidents. Cf. ISCR Case No. 99-0122 (April 7, 2000) at p. 3. The Board has declined to set any "bright-line" rule as to what constitutes "recent" under the Directive, but if a significant period of time has passed without evidence that the Applicant engaged in misconduct, the Judge's decision must include discussion or explanation that shows that the Judge had a rational basis for his decision. See, e.g., ISCR Case No. 02-19479 (June 22, 2004) at pp. 6-7. In this case, the Judge articulated a sufficient basis, supported by the record evidence, for his conclusion that Applicant had not mitigated her marijuana use despite the passage of time since her last use. Whether the Board would reach the same conclusion or articulate the same kinds of reasons as the Judge did is not legally relevant. The Board does not have to agree with the Judge to conclude Applicant has not demonstrated the Judge's analysis is arbitrary, capricious, or contrary to law.

Applicant claims that the Administrative Judge erred by not applying Drug Involvement Mitigating Condition 3 ⁽³⁾ in her favor because: (a) the Judge found that Applicant "adamantly asserts she will never again abuse any controlled substance"; (b) Applicant volunteered her history of drug use; (c) a medical professional found that Applicant was neither an abuser or drug dependent; and (d) Applicant no longer associates with the persons that provided the marijuana and is no longer curious.

There is a rebuttable presumption that the Judge considered all record evidence unless the Judge states otherwise. See, e.g., ISCR Case No. 01-15891 (May 16, 2003) at pp. 6-7. The mere presence of some favorable record evidence does not compel a Judge to render a favorable security clearance decision. A Judge must consider and weigh such evidence in light of the record as a whole and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. Applicant's ability to cite favorable record evidence does not demonstrate the Judge erred. See, e.g., ISCR Case No. 01-07735 (June 25, 2002) at p. 3. A reading of the decision below shows the Administrative Judge considered the favorable evidence presented by Applicant, but did so in light of the record evidence as a whole. Considering the record

evidence as a whole, the Board concludes that it was not arbitrary, capricious or contrary to law for the Judge to conclude that Applicant failed to mitigate her drug use.

Applicant also claims that she fully satisfied the requirements of Drug Involvement Mitigating Condition 4.⁽⁴⁾ Applicant's characterization of her medical and psychological treatment in this manner does not find support in the record below. In responding to the SOR Applicant stated that "[t]he counseling I have sought in the past is in no way related to my illegal drug use." Applicant testified that she consulted the medical professional for "anxiety and depression, never drugs" (Hearing Transcript at p. 29). By its plain meaning, Drug Involvement Mitigating Condition 4 applies in situations where a person is treated in a "prescribed drug treatment program" that includes "rehabilitation and aftercare requirements." The record evidence in this case does not show Applicant was treated in "a prescribed drug treatment program." The Judge was not required to apply an Adjudicative Guidelines mitigating condition not supported by the record evidence before him.

Finally, Applicant's honesty with the government about her past drug abuse is a relevant factor that weighed in her favor.⁽⁵⁾ However, an applicant's honesty with the government does not preclude the government from considering the security significance of the conduct that an applicant admits. *See, e.g.*, ISCR Case No. 02-31537 (April 7, 2004) at p. 3. Applicant's honesty about her past drug abuse did not preclude the Judge from considering the facts and circumstances of Applicant's drug abuse in making a decision as to her security eligibility, nor did Applicant's honesty compel the Judge to make a favorable security clearance decision.

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 D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. Applicant also cites several other Hearing Office decisions throughout the appeal brief, including some by the Judge below, to support other aspects of her appeal. In each instance, Applicant failed to persuade the Board that the decision cited should be considered as persuasive authority. *See, e.g.*, ISCR Case No. 01-22606 (June 30, 2003) at pp. 3-5 (discussing precedential value of decisions by Hearing Office Administrative Judges, and the burden a party has when arguing that such decisions should be accepted as persuasive authority).

2. Directive, Section 6.3 and Adjudicative Guidelines, Item E2.2.1.
3. "A demonstrated intent not to abuse any drugs in the future" (Directive, Adjudicative Guidelines, Item E2.A8.1.3.3).
4. "Satisfactory completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a credentialed medical professional" (Directive, Adjudicative Guidelines, Item E2.A8.1.3.4).
5. Directive, Adjudicative Guidelines, Item E2.2.5.1.