

DATE: May 13, 2005

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 02-12789

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Francisco J. Mendez, Esq., Department Counsel

FOR APPLICANT

Thomas R. Lujan, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR), dated May 23, 2003, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guideline E (Personal Conduct). Administrative Judge James A. Young issued an unfavorable security clearance decision, dated October 13, 2004.

Applicant appealed the Administrative Judge's unfavorable decision. The 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 in making certain material findings of fact, (2) whether the Administrative Judge's negative credibility determination of Applicant was supported by the record evidence, (3) whether the Administrative Judge's use of his negative credibility determination of Applicant to reach his adverse conclusion in the case was proper, and (4) whether the Administrative Judge erred by failing to apply the "whole person" concept as set forth in the Directive. For the reasons that follow, the Board reverses 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 making certain material findings of fact. Applicant argues that the Administrative Judge's adverse security clearance decision was predicated on several factual findings that Applicant contends were erroneous. For the reasons that follow, we find Applicant has failed to demonstrate error with this argument.

Applicant argues that the Administrative Judge erred when he concluded that Applicant had deserted from the military. In support of this argument, Applicant submits a copy of the charge sheet included in his Army Administrative Discharge packet, which reflects that Applicant was charged with Absence without Leave under Article 86, Uniform Code of Military Justice (UCMJ). Applicant also asserts that, although the Commander's Report of Disciplinary Action DA Form 4833, which was introduced into evidence by Department Counsel as Government's Exhibit 3, reflects "Desertion (Apprehended by Civilian Authorities) (Art #85, UCMJ)," that document was in error. It is Applicant's contention that the Judge contravened the best evidence rule when he relied on the Government's exhibit--a purely administrative report, filed after the fact by the authorities at Fort X--rather than on the authentic base Charge Sheet prepared at Fort Y, which actually formed the basis of Applicant's discharge.⁽¹⁾

Even if the Board assumes, solely for the purposes of discussion, that Applicant's contentions in this regard are correct, they do not demonstrate error on the part of the Administrative Judge. The Charge Sheet to which Applicant refers was not part of the record below; it has been submitted for the first time on appeal. Therefore, the Judge could not have reasonably been expected to have considered it in making his findings. Moreover, the Board may not consider new evidence on appeal. Directive, Additional Procedural Guidance, Item E3.1.29. Accordingly, we may not consider Applicant's new evidence and its submission does not demonstrate error on the part of the Judge, or otherwise render his

findings in this regard arbitrary, capricious or contrary to law.

Applicant also argues that the Administrative Judge erred in finding Applicant was "apprehended" by the State Police. In support of this argument, Applicant submits a copy of a page from his Department of Defense, Report of Investigation (ROI), which indicates that the Government's security clearance investigators conducted a search of State Police records and found no entries involving Applicant.⁽²⁾ It is Applicant's contention, that if he had been arrested or apprehended by the State Police, such an event would have been reflected in their records, and that the absence of such an entry corroborates Applicant's statements concerning his interaction with the State Police and his return to military custody.

Again, even if the Board assumes, solely for the purposes of discussion, that Applicant's contentions in this regard are correct, they do not demonstrate error on the part of the Administrative Judge. Applicant's ROI was not part of the record below and the portion of it to which Applicant refers has been submitted for the first time on appeal. Therefore, the Judge could not have reasonably been expected to have considered any favorable evidence contained in the ROI in making his findings. As noted above, the Board may not consider new evidence on appeal. Directive, Additional Procedural Guidance, Item E3.1.29. Accordingly, we may not consider Applicant's new evidence and its submission does not demonstrate error on the part of the Judge, or otherwise render his findings in this regard arbitrary, capricious or contrary.

2. Whether the Administrative Judge's negative credibility determination of Applicant was supported by the record evidence. In his decision, the Administrative Judge cites numerous portions of Applicant's hearing testimony and identifies them as factors supporting his overall conclusion that Applicant was not credible or forthright when discussing aspects of the 1992 marijuana incident and the 1993 unauthorized absence from military control incident. On appeal, Applicant asserts that the Judge's conclusions about Applicant's negative credibility have no basis in the record evidence. Applicant's contentions have mixed merit.

Although the Board must give deference to a Judge's credibility determinations, those determinations are not immune from review. *See, e.g.*, DOHA Case No. 96-0316 (February 24, 1997) at p. 3; *See also, NLRB v. Cook Family Foods, Ltd.*, 47 F.3d 809, 816 (6th Cir. 1995). In this case, some of the Administrative Judge's stated reasons for his overall negative determination are sustainable. However, significant components of the Judge's negative credibility determination of Applicant are problematic.

The SOR alleged that Applicant tested positive for marijuana on a unit urinalysis screening examination on October 16, 1992. The record evidence established only a single use of marijuana by Applicant. In his decision, the Judge stated: "Applicant testified that he only used marijuana one time in his life and shortly thereafter he was required to take a urinalysis, which revealed his use. After observing his demeanor and listening carefully to his testimony, I found him not credible."⁽³⁾ Despite the absence of evidence of marijuana use at any time other than a single occasion in 1992, the Judge's language indicates the Judge is implicitly finding Applicant has used marijuana on more than that single occasion. The Judge goes on to conclude Applicant lied about his marijuana use and he then uses that conclusion to support his overall negative credibility determination of Applicant.

An unfavorable credibility determination provides an Administrative Judge with a basis for deciding to disbelieve an applicant's testimony. However, mere disbelief of that testimony, standing alone, is not a sufficient basis for a Judge to conclude that an applicant did something (e.g., engaged in drug use or other acts constituting poor judgment other than on a given date) for which there is no independent evidence. *See, e.g.*, ISCR Case No. 01-26893 (October 16, 2002) at p. 7; ISCR Case No. 97-0356 (April 21, 1998) at p. 3. An applicant does not have the burden of disproving a controverted fact; rather, the burden of proving controverted facts falls on Department Counsel. Directive, Additional Procedural Guidance, Item E3.1.14. If an applicant has not admitted to engaging in specific acts of misconduct, and if there is no record evidence in that regard, then a Judge has no rational basis to find such misconduct occurred. In this case, the Judge made findings about Applicant's conduct and credibility relating to marijuana use which went beyond what was reasonably supported by the record evidence. The Judge erred in using an adverse credibility determination as a substitute for record evidence. *See* ISCR Case No. 02-24452 (August 4, 2004) at pp. 4-5. The Judge then compounded the error by using the negative credibility determination relating to Applicant's marijuana use to support his broader conclusion that Applicant was generally not credible.

The Administrative Judge based his adverse credibility determination of Applicant in large part on his conclusion that Applicant's hearing testimony was inconsistent with other record evidence. Specifically, the Judge concluded: (a) Applicant's hearing testimony that he told military investigators about his one-time marijuana use was contrary to other evidence indicating that Applicant "immediately" requested legal counsel when he met with investigators, and therefore told them nothing, (b) Applicant's testimony that he left his military unit because of the pending marijuana charge is in conflict with an earlier statement that he left because of family problems, and (c) Applicant's claim that he was never charged with a criminal offense is at odds with other record evidence. A review of the record as a whole convinces the Board that, in these three instances, the record does not support the conclusion that Applicant's testimony was materially inconsistent with other record evidence to the extent sufficient to support an adverse credibility determination.

Applicant takes issue with the Administrative Judge's finding that he stopped his interview with military authorities investigating his marijuana use immediately after being advised of his rights and he takes issue with the Judge's conclusion that his testimony, that he admitted his marijuana use, was contradicted by other evidence. Applicant testified that he initially answered investigators' questions about his private use of marijuana at a party, but that he abruptly stopped and asked for an attorney when the investigators started asking him questions about his knowledge of a drug ring. In disbelieving Applicant's testimony, the Judge relied on a short passage from a military police blotter. (4) The military police blotter entry is cryptic and offers no details about the specifics of the interaction between Applicant and the investigators, and also fails to offer any details as to the chronology of events during the interview. The word "immediately" does not appear in the blotter and there is nothing in the entry from which the Judge's conclusion that Applicant "immediately" requested a lawyer reasonably could be inferred. The Judge's conclusion that this aspect of the Applicant's testimony conflicts with other record evidence is not reasonably supported by the record.

Applicant takes issue with the Administrative Judge's conclusion that "[t]here is no doubt from his testimony that Applicant left his unit because of the impending marijuana charge." Applicant also takes issue with the Judge's conclusion that this testimony conflicts with his earlier statement that he left his unit because of family problems. After a review of the whole of Applicant's hearing testimony and the larger record, the Board finds no evidence that reasonably supports the Judge's conclusion that Applicant's hearing testimony is in conflict with that evidence. Applicant did mention only marijuana use in close testimonial proximity to his description of his departure from his unit, but he never testified that it was the exclusive reason for his departure. Indeed, other portions of his hearing testimony describe the other problems he was having in his life during the general time frame covered by the SOR. A fair reading of the whole of Applicant's hearing testimony reveals that it is generally consistent with his earlier statements--in his security clearance application and in his answer to the SOR--that both his family problems and the positive marijuana urinalysis test were factors that led him to leave his unit. The record does not support the Judge's conclusion that Applicant gave testimony on this point that contradicted other record evidence.

The Administrative Judge found that Applicant claimed he was never charged with a criminal offense, but that he submitted a request for discharge in lieu of court-martial, an action that required he be under charges. The Judge therefore inferred that Applicant was being less than forthright because he stated he was not under charges at the time he submitted his request for discharge. The Judge misreads Applicant's testimony on this point. When Applicant's hearing testimony is considered as a whole, it is clear that his statements about never having been charged with an offense refer to the marijuana incident (5) and not the later unauthorized absence offense which was the subject of the Judge's scrutiny in the conclusions section of his decision. In his hearing testimony, Applicant never stated that he was not under charges for unauthorized absence at the time he submitted his request for discharge. Indeed, in his lengthy answer to the SOR, Applicant stated that, upon his return to military control, he was read charges of being absent without leave, but was never charged with any other violations of the Uniform Code of Military Justice. His hearing testimony reinforced this earlier statement and was reasonably consistent with the Judge's conclusion that Applicant had to have been under charges at the time he was processed for discharge from the military. (6) Again, the Judge's conclusion that Applicant's version of events on this point contradicted other record evidence and demonstrated lack of candor is not supported by the record.

In summary, while the previously identified errors do not render the Administrative Judge's negative credibility determination of Applicant wholly arbitrary or capricious, they do undercut it to a significant degree. In this case, Applicant was testifying about matters which had occurred over a decade earlier. Given that passage of time, it was not

unreasonable to expect testimony which reflected some degree of vagueness in recollection, minor inconsistency, or minimization. The Judge's overall use of the negative credibility determination in reaching his ultimate conclusion in the case must be evaluated in light of the aforementioned errors.

3. Whether the Administrative Judge's use of his negative credibility determination of Applicant to reach his adverse conclusion in the case was proper. The Administrative Judge ultimately concluded that Applicant failed to mitigate personal conduct concerns. In support of his conclusion, the Judge stated, "Applicant refused to accept responsibility for his actions in 1992 when he deserted. In 2004, Applicant tried to minimize the security concerns raised by his 1992-1993 conduct by being less than candid." On appeal, Applicant argues that the Judge substituted his flawed personal assessment of Applicant's credibility during the hearing for a proper, judicious assessment of all the evidence in the record. Applicant argues essentially that the Judge impermissibly used his negative credibility assessment of Applicant as a basis for his adverse security clearance decision.

As stated earlier, the record does not establish that the Administrative Judge's negative credibility assessment was wholly flawed. However, the fact that the Judge's credibility determination is sustainable in part does not end our analysis. Given the Judge's extensive and repeated discussion of his negative assessment of Applicant's credibility, Applicant's concerns on appeal about the manner in which the Judge used his negative determination in this case are well founded.

The Administrative Judge reasoned that Applicant did not sufficiently mitigate the Government's Guideline E case against him because at the hearing Applicant tried to minimize the security concerns raised by his 1992-1993 conduct. The Board finds this reasoning arbitrary, capricious and contrary to law. In the instant case, Applicant's security clearance eligibility was challenged solely on Applicant's conduct in 1992-1993. Minimizing the security concerns raised by Applicant's prior conduct was not alleged in the SOR. The Judge erred when relying on such a finding in concluding Applicant was ineligible for access to classified information. *See, e.g.*, DISCR Case No. 93-0519 (April 14, 1994) at pp. 5-6. Here, to the extent his assessments are supported by record evidence, the Judge did not act in an arbitrary or capricious manner by assessing Applicant's testimony and demeanor and reaching a conclusion about his credibility. However, the Judge's negative credibility determination, to the extent it is sustainable, cannot substitute for record evidence that Applicant has demonstrated unreliability and lack of trustworthiness since 1992-1993.

4. Whether the Administrative Judge erred by failing to apply the "whole person" concept as set forth in the Directive. (7) Applicant contends that the Administrative Judge erred by failing to apply the "whole person" factors and instead used an adverse credibility determination as a substitute for record evidence. For the reasons that follow, the Board finds Applicant's contention persuasive.

Applicant's conduct in 1992-1993--a single use of marijuana and a discharge in lieu of court-martial from the Army under less than honorable circumstances for being absent without leave--is of security concern. However, other uncontradicted record evidence indicated that: (a) prior to the incidents, Applicant had a good service record, (b) at the time of the incidents, Applicant was relatively young and immature, and experiencing family-related personal problems, (c) in subsequent years Applicant has exhibited age-appropriate maturity in his personal and professional life, and (d) there were no additional incidents of poor judgment indicative of a continuation or recurrence of the earlier poor judgment.

The Directive is silent on what constitutes a sufficient period of reform and rehabilitation. However, such silence does not mean an Administrative Judge has unfettered discretion in deciding what period of time is sufficient to demonstrate reform and rehabilitation. (8) The sufficiency or insufficiency of an applicant's period of conduct without recurrence of past misconduct does not turn on any bright-line rules concerning the length of time needed to demonstrate reform and rehabilitation, but rather a reasoned analysis of the facts and circumstances of an applicant's case based on a careful evaluation of the totality of the record evidence within the parameters set by the Directive. (9)

If the record evidence shows that a significant period of time has passed without evidence of misconduct by an applicant, then the Judge must articulate a rational basis for concluding why that significant period of time does not demonstrate changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation. (10) Here, with no evidence of subsequent incidents of misconduct, lack of judgment, or untrustworthiness during the 11-year period,

evidence of positive achievement on Applicant's part over that same period of time, and considering the problems with the Judge's use of the negative credibility determination of Applicant discussed earlier in this decision, the Judge did not articulate a sustainable rationale. Considering the record as a whole, the Judge erred by not applying the relevant Section 6.3 factors which were favorable to the Applicant.

In citing various factors in the record indicative of reform and mitigation, Applicant argues essentially that the Administrative Judge's decision is against the weight of the evidence. On appeal, the Board must consider not only whether there is evidence supporting the Judge's findings, but also whether there is record evidence that fairly detracts from the weight of the evidence supporting those findings. Directive, Additional Procedural Guidance, Item E3.1.32.1. *See, e.g.*, ISCR Case No. 96-0360 (September 25, 1997) at p. 2. Using that analysis here, the Board concludes the Judge's findings and conclusions about Applicant's current judgment and trustworthiness cannot be sustained on the basis of the record evidence as a whole.

Conclusion

Considering the totality of the errors identified herein, Applicant has met his burden of demonstrating harmful error that warrants reversal. Accordingly, pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.3, the Board reverses the Administrative Judge's unfavorable security clearance decision.

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: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. Applicant's Brief at pp. 18-19.

2. Applicant's Brief at p. 20.

3. Decision at p. 3.

4. Government Exhibit 2.

5. Hearing Transcript at pp. 41-42.

6. Hearing Transcript at p. 51.

7. Directive, Section 6.3 and Enclosure 2, Items E2.2.1.1 through E2.2.1.9. These factors include: (1) the nature, extent,

and seriousness of the conduct, (2) the circumstances surrounding the conduct, to include knowledgeable participation, (3) the frequency and recency of the conduct, (4) the individual's age and maturity at the time of the conduct, (5) the voluntariness of participation, (6) the presence or absence of rehabilitation and other pertinent behavioral changes, (7) the motivation for the conduct, (8) the potential for pressure, coercion, exploitation, or duress, and (9) the likelihood of continuation or recurrence.

8. The silence of the Directive with respect to specific time periods (in the general factors of Directive, Section 6.3 and Enclosure 2, Item E2.2.1, and in the Adjudicative Guidelines) does not relieve an Administrative Judge of the obligation to construe and apply pertinent provisions of the Directive in a reasonable, common sense way. *See, e.g.*, ISCR Case No. 02-11810 (June 5, 2003) at p. 4; ISCR Case No. 98-0394 (June 10, 1999) at pp. 2-3. Cf. ISCR Case No. 98-0611 (November 1, 1999) at pp. 2-3 (Administrative Judge must consider the record evidence as a whole in assessing the significance to be accorded to the passage of time since the applicant's last act of misconduct).

9. *See, e.g.*, ISCR Case No. 02-05110 (March 22, 2004) at pp. 4-6 (discussing reasons why security clearance adjudications are not reduced to mechanical, formula adjudication, nor left to the unfettered discretion of security clearance adjudicators).

10. *Compare* ISCR Case No. 98-0394 (June 10, 1999) at p. 4 (although the passage of three years since the applicant's last act of misconduct did not, standing alone, compel the Administrative Judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) with ISCR Case No. 01-02860 (May 7, 2002) at p. 3 ("The Administrative Judge articulated a rational basis for why she had doubts about the sufficiency of Applicant's efforts at alcohol rehabilitation.").