

DATE: June 22, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-19479

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Lauren M. Chun, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated July 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 E (Personal Conduct) and Guideline H (Drug Involvement). Administrative Judge Darlene Lokey Anderson issued an unfavorable security clearance decision, dated February 24, 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 failing to examine relevant evidence and ignored evidence favorable to Applicant; (2) whether the Administrative Judge erred by finding Applicant not credible; (3) whether the Administrative Judge erred by finding Applicant falsified a security clearance application; (4) whether the Administrative Judge erred by reaching adverse conclusions concerning Applicant's history of marijuana use; and (5) whether the Administrative Judge erred by reaching adverse conclusions under Guideline E (Personal Conduct). 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 failing to examine relevant evidence and ignored evidence favorable to Applicant. Applicant contends the Administrative Judge failed to consider evidence submitted by Applicant, and ignored relevant evidence that is favorable to him. This claim of error is not persuasive.

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise.⁽¹⁾ Moreover, there is no requirement that a Judge specifically mention and discuss every piece of record evidence.⁽²⁾ The presumption that the Judge considered all the record evidence is not rebutted merely because Applicant can argue for an alternate interpretation of the record evidence that is favorable to him.

2. Whether the Administrative Judge erred by finding Applicant not credible. The Administrative Judge concluded "I do not find [Applicant] credible" (Decision at p. 6). Applicant challenges that negative credibility determination, arguing: (a) he "presented overwhelming evidence to prove he was a credible and trustworthy individual"; (b) the Judge reached her negative credibility determination by focusing only on Applicant's answers to certain questions on the security clearance application he completed in November 2000 and "disregarding" evidence to the contrary; and (c) it was improper for the Judge to consider, in connection with assessing Applicant's credibility, his answer to a question in the security clearance application that was not alleged in the SOR.

As discussed earlier in this decision, the Board does not find persuasive Applicant's claim that the Administrative Judge disregarded evidence favorable to Applicant. Moreover, the Board rejects Applicant's argument that the only evidence supporting the Judge's negative credibility determination is Applicant's answers to certain questions on the security

clearance application. The Judge had the opportunity to assess Applicant's demeanor when he testified at the hearing, and the opportunity to consider whether Applicant's explanations were credible in light of the record evidence as a whole. ⁽³⁾

Applicant is correct that the SOR did not allege that his answer to Question 29 of the security clearance application was falsified. However, the credibility of a witness (including an applicant) is always relevant and material to the Administrative Judge's assessment of a witness's testimony. Furthermore, in assessing the credibility of a witness (including an applicant), a Judge is not limited to considering only those matters specifically alleged in an SOR. ⁽⁴⁾ Accordingly, it was not legal error for the Judge, when assessing Applicant's credibility, to consider Applicant's answer to Question 29 of the security clearance application.

There is merit to Applicant's argument that his answer to Question 29 was not incorrect. Given the record evidence in this case, the Administrative Judge's conclusion that Applicant's answer to Question 29 was false is not sustainable. ⁽⁵⁾ However, the Judge's credibility determination does not turn on her conclusion about Question 29. Considering the record evidence as a whole, discounting the Judge's conclusion about Applicant's answer to Question 29, and giving due deference to the Administrative Judge's credibility determination (Directive, Additional Procedural Guidance, Item E3.32.1), the Board concludes the Judge's negative credibility determination is sustainable.

3. Whether the Administrative Judge erred by finding Applicant falsified a security clearance application. The Administrative Judge found that Applicant falsified a security clearance application he completed in November 2000 by misrepresenting his history of marijuana use. Applicant contends the finding of falsification is in error because: (a) Applicant's explanations and the record evidence as a whole show he did not act with the intent to deceive or mislead the government about his history of marijuana use; and (b) Applicant subsequently disclosed the full extent of his marijuana use to a federal investigator.

(a) There is no dispute that Applicant did not fully disclose his marijuana use when he completed the security clearance application in November 2000. In order to reach a decision on the SOR allegations concerning falsification, the Administrative Judge had to make a finding as to Applicant's intent or state of mind when he completed the security clearance application. Applicant's statements about his intentions and state of mind are relevant and material evidence that the Judge had to consider. However, the Judge was not compelled to accept Applicant's statements. Rather, the Judge could consider Applicant's statements in light of the record evidence as a whole and her assessment of the credibility of Applicant's testimony, and make a finding about Applicant's intent or state of mind when he completed the security clearance application. ⁽⁶⁾ Moreover, the favorable character evidence submitted by Applicant did not preclude the Judge from finding that Applicant falsified the security clearance application. Considering the record evidence as a whole, and giving deference to the Judge's credibility determination, the Judge's finding of falsification is sustainable.

(b) Even if the Administrative Judge found credible Applicant's claim that he fully disclosed his marijuana use when he was interviewed by a federal investigator, such a conclusion would not preclude the Judge from finding Applicant falsified the security clearance application. There is nothing factually, logically, or legally impermissible about a finding that Applicant engaged in falsification in November 2000, but made truthful disclosures to an investigator in 2002.

4. Whether the Administrative Judge erred by reaching adverse conclusions concerning Applicant's history of marijuana use. Applicant challenges the Administrative Judge's adverse conclusions about his history of marijuana use. In support of this claim of error, Applicant argues: (a) other Hearing Office Judges reached favorable conclusions in other drug cases with similar facts; (b) the Judge should have applied Drug Involvement Mitigating Conditions 1 and 3; and (c) Applicant proposed to undergo random drug tests, take polygraph tests, and answer questions about his drug use on an annual basis.

(a) Applicant's reliance on the decisions of Hearing Office Administrative Judge's in other drug cases is misplaced. Decisions by Hearing Office Judges are not legally binding precedent. ⁽⁷⁾ The Judge in this case was not under a legal obligation to follow decisions by her colleagues in other cases, nor was the Judge under a legal obligation to explain why her conclusions were distinguishable from or reconcilable with decisions by her colleagues in other cases. Even if the Board were to conclude that the Judge's decision in this case cannot be distinguished from or reconciled with the

Hearing Office decisions cited by Applicant, it does not follow that the Judge's adverse conclusions about Applicant's history of marijuana use are arbitrary, capricious, or contrary to law.

(b) Because the Administrative Judge found that Applicant last used marijuana in April 1999, the Judge's failure to explain why she concluded Drug Involvement Mitigating Condition 1⁽⁸⁾ was not applicable suggests arbitrary and capricious action because that mitigating condition appears to apply to this case.⁽⁹⁾ Apart from the language of any Adjudicative Guidelines disqualifying or mitigating condition that specifically mentions recency, the recency of an applicant's conduct is a relevant factor under the Directive.⁽¹⁰⁾ The Board has declined to set any "bright-line" rule as to what constitutes "recent" under the Directive,⁽¹¹⁾ and resolution of this appeal does not require that the Board try to formulate such a "bright-line" rule. However, if the record shows that a significant period of time has passed without evidence that an applicant has engaged in misconduct, then the Judge's decision cannot simply be silent about what, as a matter of common sense, appears to be a relevant factor⁽¹²⁾ that could be an important aspect of the case. In such a situation, the Judge's decision must contain sufficient discussion or explanation that shows the Judge has a rational basis -- under the particular facts of the case -- for concluding: (i) the passage of time is or is not significant; (ii) the passage of time is or is not entitled to be given much weight; (iii) the passage of time is or is not outweighed by other relevant factors; (iv) the passage of time is or is not sufficient to demonstrate reform or rehabilitation; or (v) whatever other conclusion(s) the Judge reaches concerning the meaning or significance of the passage of time.⁽¹³⁾

In this case, the Administrative Judge failed to articulate any discernable reason for why she apparently concluded Applicant's marijuana use was "recent" despite her finding that it last occurred almost four years before the hearing. However, the Board concludes this error is harmless because the Judge's unfavorable decision is sustainable based on her findings and conclusions about Applicant's falsification of the security clearance application.

In light of the Administrative Judge's finding that Applicant used marijuana for a period of approximately nine years after he had told the government he stopped using marijuana and did not intend to use it again (Decision at p. 2), it was not arbitrary, capricious, or contrary to law for the Judge to conclude Drug Involvement Mitigating Condition 3⁽¹⁴⁾ was not applicable.

(c) Applicant's proffer to undergo random drug tests and submit to other conditions does not demonstrate error by the Administrative Judge. Under the Directive, there is no authority to grant a conditional or probationary security clearance.⁽¹⁵⁾

5. Whether the Administrative Judge erred by reaching adverse conclusions under Guideline E (Personal Conduct).

Applicant contends, in the alternative, that the Administrative Judge should have concluded he had mitigated the security concerns under Guideline E. In support of this contention, Applicant argues the Judge erred by concluding none of the Personal Conduct mitigating conditions applies despite record evidence that supports the application of Personal Conduct Mitigating Conditions 1, 2, and 3.

Applicant's argument concerning Personal Conduct Mitigating Condition 1⁽¹⁶⁾ lacks merit. Applicant's overall history of marijuana use was pertinent to a determination of his judgment, trustworthiness, and reliability because drug abuse raises security concerns.⁽¹⁷⁾ It is untenable for Applicant to argue his history of marijuana use was not pertinent.

Applicant's argument concerning Personal Conduct Mitigating Condition 2⁽¹⁸⁾ also lacks merit. In support of that argument, Applicant cites a decision by a Hearing Office Administrative Judge. Applicant's reliance on that decision is misplaced for two reasons: First, a decision by a Hearing Office Judge is not legally binding precedent that the Board has to follow. Second, the decision cited by Applicant is not persuasive authority because it sets forth an interpretation of Personal Conduct Mitigating Condition 2 that the Board has repeatedly rejected.⁽¹⁹⁾ Given the record evidence in this case, Personal Conduct Mitigating Condition 2 is not applicable.

Applicant's argument concerning Personal Conduct Mitigating Condition 3⁽²⁰⁾ is not persuasive. Given the record evidence in this case, Applicant has failed to demonstrate the Judge's decision to not apply this mitigating condition was arbitrary, capricious, or contrary to law.

Conclusion

Applicant has not demonstrated error below that warrants remand or reversal. Accordingly, the Board affirms the Administrative Judge's unfavorable security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, 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. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2.

2. *See, e.g.*, ISCR Case No. 02-00305 (February 12, 2003) at p. 3.

3. The Board does not find persuasive Applicant's claim that the Administrative Judge reached her negative credibility determination without considering "[Applicant's] demeanor or behavior at the hearing." There is a rebuttable presumption that Judges carry out their duties in good faith. *See, e.g.*, ISCR Case No. 02-17609 (May 19, 2004) at p. 3. Absent a strong showing to the contrary, the Board is not inclined to accept an assertion that a Judge listened to a witness's testimony without considering the witness's demeanor. *Cf.* ISCR Case No. 97-0765 (December 1, 1998) at p. 5 (quoting federal case for proposition that a party has a heavy burden of persuasion on appeal if it asserts the judge below "indulg[ed] in the adjudicatory equivalent of a shell game").

4. *See, e.g.*, ISCR Case No. 01-19278 (April 22, 2003) at pp. 8-9. If the trier of fact were limited to considering only those matters alleged in a criminal indictment, a civil complaint, or an administrative pleading (such as an SOR) when making a credibility determination, then the trier of fact would -- for all practical purposes -- be severely hamstrung when trying to make a meaningful decision about the credibility of a witness. After all, the trier of fact is entitled to assess the demeanor of a witness in order to decide whether the witness's testimony is credible, and it is impossible to make allegations about witness demeanor before the witness testifies. Moreover, even under a strict application of the Federal Rules of Evidence (which is not required in these proceedings), a witness's credibility can be challenged by evidence of various matters (*e.g.*, prior inconsistent statement, certain kinds of convictions, bias, or untruthful character) that are not alleged in a criminal indictment, a civil complaint, or an administrative pleading.

5. *See* ISCR Case No. 02-01181 (January 30, 2004) at p. 6; ISCR Case No. 97-0595 (February 19, 1999) at pp. 2-3.

6. *See, e.g.*, ISCR Case No. 02-12528 (April 22, 2004) at p. 5.

7. *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).
8. "The drug involvement was not recent" (Directive, Adjudicative Guidelines, Item E2.A8.1.3.1).
9. *See, e.g.*, ISCR Case No. 02-32254 (May 26, 2004) at p. 4 ("If there are Adjudicative Guidelines that, on their face, appear to be applicable to the facts of a particular case, then the Judge must apply them or articulate a rational basis for not doing so."). As discussed earlier in this decision (at p. 2), it would be arbitrary and capricious if the Administrative Judge does not consider relevant factors, or fails to consider an important aspect of the case.
10. *See* Directive, Section 6.3.2 and Adjudicative Guidelines, Item E2.2.1.3.
11. *See, e.g.*, ISCR Case No. 02-22173 (May 26, 2004) at p. 4.
12. Recency, likelihood of recurrence, and the presence or absence of rehabilitation are explicitly mentioned as general factors in the Directive. Moreover, they also appear in some of specific provisions of the Adjudicative Guidelines.
13. *See, e.g.*, ISCR Case No. 02-08032 (May 14, 2004) at pp. 7-8.
14. "A demonstrated intent not to abuse any drugs in the future" (Directive, Adjudicative Guidelines, Item E2.A8.1.3.3).
15. *See, e.g.*, ISCR Case No. 01-23661 (October 27, 2003) at p. 4.
16. "The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability" (Directive, Adjudicative Guidelines, Item E2.A5.1.3.1).
17. *See AFGE Local 1533 v. Cheney*, 944 F.2d 503, 506 n.6 (9th Cir. 1991)(discussing security risks posed by use of illegal drugs).
18. "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).
19. *See, e.g.*, ISCR Case No. 02-19896 (December 29, 2003) at pp. 5-6.
20. "The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts" (Directive, Adjudicative Guidelines, Item E2.A5.1.3.3).