

DATE: May 26, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-22173

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

David I. West, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated September 4, 2003 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline F (Financial Considerations) and Guideline H (Drug Involvement). Administrative Judge Henry Lazzaro issued an unfavorable security clearance decision dated February 17, 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 issue has been raised on appeal: whether the Administrative Judge's unfavorable decision is 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 Issue<sup>(1)</sup>

The Administrative Judge found that Applicant used marijuana with strangers and recently acquired friends on two or three occasions during a weekend in July 2001. The Judge applied Drug Involvement Disqualifying Condition 5<sup>(2)</sup>

because at the time of the marijuana use Applicant had a security clearance. The Judge concluded: (a) the particular facts and circumstances under which Applicant used marijuana demonstrated "a serious lack of judgment"; and (b) Applicant's use of marijuana was aggravated because her drug use was incompatible with the criminal law, her employment, her possession of a commercial driver's license, and her possession of a security clearance.

On appeal, Applicant argues the Administrative Judge's unfavorable decision is arbitrary, capricious, or contrary to law because: (1) the Judge erred by deciding that Drug Involvement Mitigating Condition 1 is not applicable; (2) the Judge's decision is not compatible with the favorable outcomes in other DOHA cases involving drug use; and (3) the record evidence as a whole supports a favorable security clearance decision. For the reasons that follow, the Board concludes Applicant has failed to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law.

Drug Involvement Mitigating Condition 1 states "The drug involvement was not recent." The Directive does not define "recent" and the Board has declined to adopt any "bright-line" definition for what constitutes "recent" conduct. Rather, the Board has indicated the matter requires an Administrative Judge to evaluate the record evidence as a whole and reach a reasonable conclusion as to the recency of an applicant's conduct. *See, e.g.*, ISCR Case No. 98-0582 (November 12, 1999) at pp. 5-6 (recency under Drug Involvement Mitigating Condition 1); ISCR Case No. 98-0394 (June 10, 1999) at pp. 2-3 (recency under Sexual Behavior Mitigating Condition 2). This case does not persuade the Board that it should adopt any "bright-line" definition for what constitutes "recent" conduct. As noted earlier in this decision, the Board does not review cases *de novo*. The Board does not have to agree with the Judge to conclude that, given the record evidence in this case, the Judge had a sufficient basis to conclude Applicant's marijuana use was recent enough to warrant application of Drug Involvement Disqualifying Condition 5, and not warrant application of Drug Involvement

## Mitigating Condition 1.

Applicant's citation of five decisions by Hearing Office Administrative Judges in other cases does not demonstrate error by the Judge in this case. Decisions of Hearing Office Judges are not legally binding precedent that must be followed by their colleagues. Furthermore, those decisions are not legally binding precedent that the Board must follow or distinguish. *See* ISCR Case No. 01-22606 (June 30, 2003) at pp. 3-5 (discussing precedential value of decisions by Hearing Office Judges). The Judge in this case was not required to follow decisions by his colleagues in other cases, or distinguish or reconcile his decision in this case with decisions by his colleagues in other cases. Moreover, the Board is not required to review the Judge's decision in this case with reference to decisions by his colleagues in other cases to determine whether the Judge's decision in this case can be distinguished from, or reconciled with, those other decisions.

Applicant's last argument sets forth a plausible, alternate interpretation of the record evidence. However, Applicant's ability to do so is not sufficient to demonstrate the Judge's conclusions are arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 01-19513 (January 22, 2004) at p. 5. The Judge's conclusions reflect a legally permissible analysis of the facts and circumstances of Applicant's case that is consistent with pertinent provisions of the Directive, including the general factors of Section 6.3 and Enclosure 2, Item E2.2.1. Applicant clearly believes the Judge should have weighed the record evidence differently and concluded the favorable evidence outweighed the unfavorable evidence sufficiently to warrant a favorable security clearance decision. However, the Board will not disturb a Judge's weighing of the record evidence unless the appealing party demonstrates the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. Applicant's strong disagreement with the Judge's weighing of the record evidence is not sufficient to demonstrate the Judge weighed it improperly. *See, e.g.*, ISCR Case No. 01-07292 (January 29, 2004) at p. 4.

Because the Board does not review cases *de novo*, the Board need not decide whether it would have reached the same result as the Administrative Judge did in this case. Given the limits of the Board's appellate authority under the Directive, all the Board must do is decide whether Applicant has demonstrated factual or legal error. Applicant has not demonstrated such error.

## Conclusion

The Board affirms the Administrative Judge's decision because Applicant has not demonstrated error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billet

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. The Administrative Judge entered formal findings in favor of Applicant with respect to the SOR paragraphs under Guideline F. Those favorable formal findings are not at issue on appeal.

2. "Failure to successfully complete a drug treatment program prescribed by a credentialed medical professional. Recent drug involvement, especially following the granting of a security clearance, or an expressed intent not to discontinue use, will almost invariably result in an unfavorable determination" (Directive, Adjudicative Guidelines, Item E2.A8.1.2.5). The first sentence of Drug Involvement Disqualifying Condition 5 is not pertinent to this case.