

DATE: April 16, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-23883

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 September 8, 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). Administrative Judge James A. Young issued an unfavorable security clearance decision dated March 9, 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 finding Applicant demonstrated a lack of candor; and (2) whether the Administrative Judge erred by concluding Applicant had not demonstrated sufficient mitigation of the security concerns raised by the facts and circumstances of his past drug abuse. 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

Much of Applicant's appeal brief consists of arguments about each of the allegations in the SOR that set forth reasons why Applicant wants the Board to conclude that he should be allowed to retain a security clearance. As noted earlier in this decision, the Board does not review an applicant's case *de novo*, there is no presumption of error below, and the appealing party has the burden of raising claims of factual or legal error by the Administrative Judge. Since most of Applicant's appeal arguments fail to make any claim of factual or legal error by the Judge, the Board need not address them.

The Board construes those portions of Applicant's appeal brief that do not ask the Board to review his case *de novo* as raising two issues: (1) whether the Administrative Judge erred by finding Applicant demonstrated a lack of candor; and (2) whether the Administrative Judge erred by concluding Applicant had not demonstrated sufficient mitigation of the security concerns raised by the facts and circumstances of his past drug abuse.

1. Whether the Administrative Judge erred by finding Applicant demonstrated a lack of candor. Applicant takes exception with the Administrative Judge's decision to the extent it refers to a lack of candor, arguing he has been frank and honest with the government about his history of drug use. This claim of error lacks merit.

The SOR did not allege that Applicant failed to disclose his drug use to the government. Furthermore, the Administrative Judge did not find that Applicant failed to disclose his drug use to the government. The only reference in the decision below to lack of candor appears in a sentence where the Judge cites language from the Concern portion of Guideline E (Personal Conduct). That passing reference does not indicate any factual or legal error by the Judge in this case.

An applicant's conduct and circumstances can raise security concerns even in the absence of any finding that the

applicant demonstrated a lack of candor or dishonesty with the government. Therefore, Applicant's disclosures to the government about his drug use did not preclude the Administrative Judge from considering the security significance of Applicant's overall history of drug use. *See, e.g.,* ISCR Case No. 02-15358 (July 22, 2003) at p. 6.

2. Whether the Administrative Judge erred by concluding Applicant had not demonstrated sufficient mitigation of the security concerns raised by the facts and circumstances of his past drug abuse. The Administrative Judge concluded that "Applicant failed to demonstrate that he has sufficiently mitigated the security concerns raised by his unreliability and questionable judgment" associated with his history of marijuana use, which included marijuana use while he had a security clearance and continued use of marijuana after he indicated in an October 1995 written statement that he had no intention of using drugs in the future. On appeal, Applicant argues his marijuana use should be considered mitigated because: (a) a Department of Defense investigator told him that his drug use would not be a problem; (b) he thought the Department of Defense condoned the social use of drugs so long as such use was acknowledged to the Department of Defense; and (c) he has always been honest about his drug use.

Applicant's claim about what a Department of Defense investigator told him about drug use was raised in Applicant's response to the File of Relevant Material (FORM). As the trier of fact, the Administrative Judge had to consider that claim, but he was not bound to accept it at face value. Rather, the Judge had to consider Applicant's claim in light of the record evidence as a whole. Although the Judge did not make a specific finding about that claim in his decision, the Judge's findings and conclusions indicate an implicit rejection of Applicant's claim. Considering the record as a whole -- including the fact that Applicant's claim about the investigator was not made until his response to the FORM and was not consistent with his February 2002 written statement or his September 2003 answer to the SOR -- the Board is not persuaded that the Judge's rejection of Applicant's claim about the investigator was arbitrary, capricious, or contrary to law.

There is no record evidence supporting Applicant's claim that he believed the Department of Defense condoned the social use of marijuana. Apart from the inherent implausibility of Applicant's claim that he believed the Department of Defense condones the social use of marijuana,⁽¹⁾ the record evidence in this case shows that Applicant was aware in late 1995 and early 1996 that illegal drug use was of concern to the Department of Defense.

Finally, as discussed earlier in this decision, Applicant's disclosures about his drug use did not preclude the Administrative Judge from considering the security implications of Applicant's overall history of drug use.

The Administrative Judge's findings about Applicant's history of marijuana use reflect a reasonable interpretation of the record evidence as a whole. Furthermore, given the record evidence in this case, it was not arbitrary, capricious, or contrary to law for the Judge to conclude Applicant had failed to meet his burden of persuasion under Directive, Additional Procedural Guidance, Item E3.1.15.

Conclusion

The Board affirms the Administrative Judge's decision because Applicant has failed to demonstrate error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. In these proceedings, an applicant's conduct is measured against the reasonable person standard. *See, e.g.*, ISCR Case No. 01-20906 (January 10, 2003) at p. 4 n.4. It strains credulity for Applicant to claim that he thought the Department of Defense condones the social use of marijuana. It is not reasonable for a person to claim they acted in reliance on a belief that a federal department or agency has a policy of condoning illegal drug use.