

DATE: August 4, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-24452

## APPEAL BOARD DECISION AND REVERSAL ORDER

### APPEARANCES

#### FOR GOVERNMENT

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

#### FOR APPLICANT

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) issued the Applicant a Statement of Reasons (SOR) which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guidelines H (Drug Involvement). Administrative Judge Robert Robinson Gales issued an unfavorable security clearance decision, dated April 5, 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 his application of Drug Involvement Disqualifying Condition 5, (2) whether the Administrative Judge erred by using an adverse credibility determination as a substitute for record evidence, (3) whether the Administrative Judge erred by not applying Drug Involvement Mitigating Condition 2, (4) whether the Administrative Judge erred in his application of Drug Involvement Mitigating Condition 1, and (5) whether the Administrative Judge erred in finding that Applicant's motivation for ceasing to use marijuana was "unknown." 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 his application of Drug Involvement Disqualifying Condition 5. <sup>(1)</sup>  
Applicant argues the Judge erred in applying Disqualifying Condition 5 under the facts of her case.

In his decision, the Judge stated: "As for such [drug] abuse occurring after receipt of a security clearance, I believe DI DC E2.A8.1.2.5. applies." <sup>(2)</sup> His conclusion appears to be based solely upon the second sentence of the Disqualifying Condition ("*Recent* drug involvement, especially following the granting of a security clearance, or an express intent not to discontinue use, will *almost invariably* result in an unfavorable determination"). However, that sentence appears in a context which is clearly articulated in the first sentence of the Disqualifying Condition ("Failure to successfully complete a drug treatment program prescribed by a credentialed medical professional"). No such context is present in this case. According to the record evidence, Applicant was never the subject of any prescribed drug treatment program, <sup>(3)</sup> and thus never failed to successfully complete such a program. Moreover, the Government only argued the applicability of Disqualifying Conditions 1 and 2 with respect to the facts of her case--not Disqualifying Condition 5. <sup>(4)</sup> The Judge did not articulate a basis for applying one sentence from the Disqualifying Condition outside the context of a failed drug program. Further, by the Judge's description elsewhere in the decision, Applicant's last use of marijuana, four years prior to the close of the record, might reasonably be considered not recent. Thus, even if the Judge's application of Disqualifying Condition 5 had been proper, it would have been in conflict with a conclusion stated elsewhere in his decision. Accordingly, the Judge erred in applying Disqualifying Condition 5 in Applicant's case.

2. Whether the Administrative Judge erred by using an adverse credibility determination as a substitute for record

evidence. Applicant argues the Judge erred in concluding that the security concerns raised by her history of using marijuana, a total of four times and once in the last twelve years, had not been mitigated because the Judge improperly used an adverse credibility determination with respect to Applicant's statement that she had not used marijuana since 2000 and the Judge insinuated that she had not been abstinent since then. The Board construes this argument as an assertion that the Judge erred by using an adverse credibility determination as a substitute for record evidence.

An unfavorable credibility determination provides a 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 the applicant did something (*e.g.*, engaged in drug abuse after 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. A Judge's disbelief of the applicant's testimony cannot relieve Department Counsel of its burden of proof, nor can it impose a burden of disproof on the applicant. Of course, a Judge faced with a non-credible applicant could be suspicious and doubtful about that applicant's prior and current statements. But such suspicions and doubts, on their own, cannot support findings and conclusions that disregard the burdens of proof set by the Directive.

In this case, the Judge made findings about Applicant's conduct and credibility which went beyond what was reasonably supportable by the record evidence<sup>(5)</sup>--given that Applicant had reported the disqualifying conduct, the SOR contained no allegations of falsification by the Applicant, and the Judge did not have an opportunity to evaluate Applicant's demeanor in the context of a hearing. Near the end of his decision, the Judge noted that the Applicant had abstained from using marijuana since 2000.<sup>(6)</sup> However, at other junctures, as Applicant points out, the Judge stated that "supposedly, she has not used marijuana since 2000"<sup>(7)</sup> and characterized Applicant's drug involvement as "purportedly ending in about 2000."<sup>(8)</sup> Absent evidence of drug use after 2000, the Judge's language indicates the Judge is implicitly finding Applicant has not been abstinent since 2000. Given the record evidence, the Judge's negative credibility determination is not sufficient to warrant the Judge's implicit finding that Applicant has not really been abstinent since 2000. There is no basis in the record to find drug use after 2000, or more than the four episodes of drug use in Applicant's life. Therefore, the Judge erred in using an adverse credibility determination as a substitute for record evidence.

3. Whether the Administrative Judge erred by not applying Drug Involvement Mitigating Condition 2.<sup>(9)</sup> Applicant argues the Judge erred in concluding that the security concerns raised by her prior marijuana use had not been mitigated because Applicant's use of marijuana one time in 2000, after eight years of abstinence, was an isolated or aberrational event.

In his decision, the Judge did not specifically address the applicability of Drug Involvement Mitigating Condition 2. However, the Judge stated that, absent Applicant's use of marijuana on the single occasion in 2000, her three uses during the period 1986 to 1992 might not have been of further concern.<sup>(10)</sup> Given that conclusion, the Judge erred in not explaining why (or why not) a single use of marijuana in 2000--bracketed by 8-year and 4-year periods of abstinence--was not, under the particular circumstances of this case, an isolated or aberrational event.

4. Whether the Administrative Judge erred in his application of Drug Involvement Mitigating Condition 1.<sup>(11)</sup> Applicant argues the Judge erred in concluding that the security concerns raised by her prior marijuana use had not been mitigated because Applicant's last use of marijuana, which occurred four years ago in 2000, was not recent.

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.<sup>(12)</sup> 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 on a reasoned analysis of the facts and circumstances of an applicant's case based on a careful evaluation of the totality of the record within the parameters set by the Directive.<sup>(13)</sup> 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.<sup>(14)</sup> The Board has previously noted that where an applicant had extensive marijuana use and renewed marijuana use after periods of abstinence, a Judge may articulate a rational basis for doubts about whether the most recent period of abstinence was sufficient to conclude the applicant had put marijuana use behind them. *See, e.g.*, ISCR Case No. 02-08032 (May 14, 2004) at p. 8. Here, with no extensive use established,<sup>(15)</sup> the Judge did not articulate such a rationale. Rather, the Judge concluded: "It might reasonably be argued the drug involvement, purportedly ending in about 2000, was not recent, a condition recognized under Drug Involvement Mitigating Condition (DI MC) E2.A8.1.3.1. (*the drug involvement was not recent*). However, while the presence or absence of rehabilitation and other pertinent behavioral changes are significant factors in the overall adjudicative process, the presence or absence of one particular mitigating condition is not controlling."<sup>(16)</sup> The Board concludes that the Judge determined Applicant's drug use was not recent, but did not consider that fact to be mitigating. The Judge did not articulate a sufficient rationale for discounting the mitigating effect of Mitigating Condition 1 after stating that, arguably, the Mitigating Condition applied. Such a failure was error.

5. Whether the Administrative Judge erred in finding that Applicant's motivation for ceasing to use marijuana was "unknown." Applicant contends that the Judge erred in finding that Applicant's motivation for ceasing to use marijuana was "unknown" based upon the record before him. That finding is inconsistent with other findings in the decision which were reasonably supported by the record evidence.<sup>(17)</sup> Therefore, that finding is unsustainable.

### Conclusion

Applicant has met her 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. Directive, Enclosure 2, Item E2.A8.1.3.2. ("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 express intent not discontinue use, will *almost invariably* result in an unfavorable determination").

2. Decision at p.6.

3. Government Exhibit 6 at p. 2.

4. Government's File of Relevant Material at p. 3.

5. For example, the Judge stated with respect to Applicant's single use of marijuana in 2000: "apparently to divert her attention from perceived emotional issues, she returned to marijuana. Her resumption of marijuana abuse while holding a security clearance amounted to a sundering of her fiduciary relationship with the government. In so doing, she took that special relationship and effectively dashed the trust and confidence which she had previously enjoyed. Further damaging trust and confidence, she broke her earlier vow to abstain." Decision at p. 6.

6. Decision at p.6.

7. Decision at p. 3.

8. Decision at p. 6.

9. Directive, Enclosure 2, Item E2.A8.1.3.2. ("The drug involvement was an isolated or *aberrational* event).

10. Decision at p. 5-6.

11. Directive, Enclosure 2, Item E2.A8.1.3.1. ("The drug involvement was not recent").

12. 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).

13. *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).

14. *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.").

15. Applicant used marijuana four times, once each in 1986, 1987, 1992 and 2000.

16. Decision at p. 6.

17. In another part of his decision, the Judge stated: "Applicant now claims she must be a good role model and set a good example for her two children, aged 14 and 10 and her niece aged 14. She also acknowledges that marijuana use is illegal. And she does not wish to jeopardize her job. Those reasons are valid . . ." Decision at p. 6.