

DATE: August 25, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-31045

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

-----, Personal Representative

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated April 27, 2004, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline J (Criminal Conduct) and Guideline E (Personal Conduct). Administrative Judge Joseph Testan issued an unfavorable security clearance decision, dated March 9, 2005.

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 applying Criminal Conduct Disqualifying Condition 2 to Applicant's case; (2) whether some of the Administrative Judge's findings of fact concerning Applicant's history of marijuana are erroneous; and (3) whether the Administrative Judge erred by concluding Applicant's use of marijuana warranted application of Personal Conduct Disqualifying Condition 5 and 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 applying Criminal Conduct Disqualifying Condition 2 to Applicant's case.

Applicant contends the Administrative Judge erred by applying Criminal Conduct Disqualifying Condition 2-⁽¹⁾ despite his favorable conclusions with respect to each of the three incidents alleged under Guideline J (Criminal Conduct). This claim of error is moot in light of the Judge's formal findings in favor of Applicant with respect to the Guideline J.

2. Whether some of the Administrative Judge's findings of fact concerning Applicant's history of marijuana are erroneous. Applicant contends the Administrative Judge erred by finding: (a) Applicant used marijuana from 1970 to 2000 despite knowing such use was against DoD policy; (b) Applicant's testimony regarding his marijuana use is incredible; and (c) Applicant used marijuana during the period 1997-2000.

(a) Applicant's first claim of error has some merit. There is no record evidence that Applicant knew, prior to being granted a security clearance in 1984, that use of marijuana was contrary to DoD policy. Moreover, Applicant is correct that his use of marijuana prior to being granted a security clearance was not covered by DoD policy. Accordingly, the Judge erred to the extent he found Applicant's use of marijuana prior to being granted a security clearance was done with knowledge that such use was contrary to DoD policy.⁽²⁾ However, that error was harmless because there is record evidence that would support a finding that Applicant knew that his use of marijuana after he was granted a security clearance in 1984 was contrary to DoD policy.

(b) The Administrative Judge had the opportunity to personally observe Applicant's demeanor during his testimony and assess the credibility of Applicant's testimony. Apart from the Judge's assessment of Applicant's demeanor during his

testimony, the Judge also could consider the record evidence indicating that Applicant gave inconsistent answers about his marijuana history. Giving due deference to the Judge's credibility assessment,⁽³⁾ the Board concludes Applicant has not demonstrated the Judge's adverse credibility determination is unsustainable. By asking the Board to make an independent credibility determination in this case, Applicant seeks relief that is not authorized by the Directive or any generally applicable principle of law.

(c) Considering the record evidence in this case, and giving due deference to the Administrative Judge's credibility determination, the Board concludes Applicant has not demonstrated that it was unreasonable for the Judge to reject his claim that he only pretended to use marijuana during the period 1997-2000. The Judge's finding that Applicant used marijuana on occasions during that period is sustainable.

3. Whether the Administrative Judge erred by concluding Applicant's use of marijuana warranted application of Personal Conduct Disqualifying Condition 5 and adverse conclusions under Guideline E (Personal Conduct). Applicant challenges the Administrative Judge's application of Personal Conduct Disqualifying Condition 5,⁽⁴⁾ and the Judge's adverse conclusions under Guideline E. In support of these challenges, Applicant argues: (a) Applicant's use of marijuana prior to being granted a security clearance in 1984 could not reasonably be held against him for purposes of Personal Conduct Disqualifying Condition 5; (b) the Judge's erroneous finding that Applicant used marijuana during the period 1997-2000 undercuts the Judge's application of Personal Conduct Disqualifying Condition 5; (c) the Judge's application of Personal Conduct Disqualifying Condition 5 is undercut by the Judge's failure to consider record evidence favorable to Applicant; and (d) Applicant demonstrated he has reformed and is not likely to use marijuana in the future. For the reasons that follow, the Board concludes Applicant has not demonstrated harmful error by the Judge.

(a) As discussed earlier in this decision, the Administrative Judge erred to the extent he found Applicant's use of marijuana prior to being granted a security clearance was done in knowing violation of DoD policy. Accordingly, the Judge could not rely on Applicant's use of marijuana prior to being granted a security clearance to support application of Personal Conduct Disqualifying Condition 5. However, the Judge's error is harmless because the Judge had a rational basis for applying Personal Conduct Disqualifying Condition 5 to Applicant's use of marijuana after he was granted a security clearance in 1984. It was not arbitrary or capricious for the Judge to conclude Applicant engaged in a pattern of rule violations when he used marijuana after being granted a security clearance, despite knowing such use was contrary to DoD policy.

(b) As discussed earlier in this decision, the Administrative Judge's finding that Applicant used marijuana on occasions during the period 1997-2000 is sustainable. It was not arbitrary or capricious for the Judge to rely on that finding as support for application of Personal Conduct Disqualifying Condition 5.

(c) There is a rebuttable presumption that the Administrative Judge considered all the record evidence, unless the Judge specifically states otherwise. *See, e.g.,* ISCR Case No. 99-9020 (June 4, 2001) at p. 2. Applicant's appeal arguments are not sufficient to rebut that presumption. Moreover, much of the record evidence cited by Applicant in support of this argument does not undercut the Judge's conclusion that Applicant's use of marijuana after being granted a security clearance constituted a pattern of rule violations that warranted application of Personal Conduct Disqualifying Condition 5.

(d) Considering the record evidence as a whole, and giving due deference to the Administrative Judge's credibility determination, the Board concludes the Administrative Judge articulated a sustainable basis for his expressed doubts that Applicant had demonstrated he was likely to comply with DoD policy concerning drug use in the future.

Conclusion

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

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. "A single serious crime or multiple lesser offenses" (Directive, Adjudicative Guidelines, Item E2.A10.1.2.2).
2. Applicant does not challenge the Administrative Judge's finding that Applicant knew his marijuana use was against the law.
3. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1.
4. "A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency" (Directive, Adjudicative Guidelines, Item E2.A5.1.2.5).