

DATE: October 26, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-30864

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT

Steven L. Murray, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated March 8, 2004, 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). Administrative Judge Kathryn Moen Braeman issued an unfavorable security clearance decision, dated April 26, 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 issue has been raised on appeal: whether it was arbitrary, capricious, or contrary to law for the Administrative Judge to conclude Applicant had not successfully mitigated his history of marijuana use. 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 ⁽¹⁾

The Administrative Judge made the following findings of fact about Applicant's history of marijuana use: (a) Applicant used marijuana, with varying frequency, during the period 1971-2001 (except for abstinence during the period 1987-1988); (b) during the period 1979-1985, Applicant used marijuana while he had a security clearance; (c) during the period 1979-1985, Applicant reported to work under the influence of marijuana about ten to twenty times, and used marijuana once in the company parking lot; (d) Applicant knew his use of marijuana while he had a security clearance was a violation of DoD security policy; (e) Applicant purchased marijuana for his use, and cultivated it in the mid-1970's; (f) during the periods 1993-1995 and 1999-2000, Applicant used marijuana with his two children after they had graduated from high school (with his children providing the marijuana on those occasions); (g) Applicant stopped using marijuana in September 2001 and does not intend to use it in the future; and (h) Applicant allowed friends to use marijuana in his home in August 2002.

Although Applicant does not challenge the Administrative Judge's findings of fact about his history of marijuana use, Applicant does contend it was arbitrary, capricious, and contrary to law for the Judge to conclude that he failed to present evidence sufficient to mitigate his history of marijuana use. In support of this contention, Applicant argues: (1) the Judge failed to give due weight to the evidence showing Applicant has been candid about his history of marijuana use and remorseful about it; (2) the Judge failed to give due weight to the favorable evidence presented by Applicant that shows he has not used marijuana since September 2001 and does not intend to use it in the future; (3) the Judge failed to apply Drug Involvement Mitigating Conditions 1, 2, 3, and 4; and (5) the Judge's decision is not consistent with certain prior Board decisions. For the reasons that follow, the Board concludes Applicant has failed to demonstrate the Judge committed harmful error.

To the extent that Applicant asks the Board to weigh the record evidence and make its own findings of fact on appeal, Applicant seek a form of review not authorized by the Directive. Although an Administrative Judge's findings of fact are ⁽²⁾

subject to review on appeal, such review must be conducted within the constraints of the Directive. Applicant's claims of error will be considered within those constraints. A Judge must weigh the record evidence, and make findings of fact and reach conclusions about a case. There is no simple formula or rule of law on how a Judge must weigh record evidence. Subject to review for action that is arbitrary, capricious, or contrary to law, the Judge has discretion to weigh the record evidence, draw reasonable inferences from the record evidence, and make pertinent findings of fact.⁽³⁾ Apart from strongly disagreeing with the Judge's weighing of the record evidence in this case, Applicant has not shown that the Judge acted in a manner that is arbitrary, capricious, or contrary to law when she weighed the evidence in this case.

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically stated otherwise.⁽⁴⁾ That presumption is not rebutted merely because an appealing party disagrees with the Judge's weighing of the record evidence.⁽⁵⁾ Apart from the presumption that the Judge considered all the record evidence, a review of the decision below shows the Judge acknowledged and took into account the favorable evidence presented by Applicant. Just because the Judge did not give more weight to the evidence presented by Applicant, it does not follow that the Judge simply ignored or failed to consider it.⁽⁶⁾

Applicant's claims of error concerning Drug Involvement Mitigating Conditions 2 and 4 lack merit. Given the record evidence of Applicant's lengthy history of marijuana use, it is untenable for Applicant to argue the Administrative Judge should have applied Drug Involvement Mitigating Condition 2⁽⁷⁾ to the August 2002 incident. It was entirely proper and reasonable for the Judge to consider the totality of Applicant's history of marijuana use -- not just the August 2002 incident in isolation -- when evaluating Applicant's case. Furthermore, Department Counsel correctly notes that the record evidence in this case does not warrant the Judge applying Drug Involvement Mitigating Condition 4⁽⁸⁾ because there is no evidence that Applicant has undergone treatment for his marijuana use. Although Applicant offered the testimony of an expert who evaluated him, that expert testimony did not show that he has undergone treatment for his history of marijuana use. The Judge was not required to apply Drug Involvement Mitigating Conditions 2 and 4 when the record evidence does not support their application.

The Administrative Judge gave an explanation for why she concluded that application of Drug Involvement Mitigating Condition 3⁽⁹⁾ was not warranted at this time. The Board concludes that, given the record evidence in this case, Applicant has not articulated a persuasive argument for why the Judge's explanation is arbitrary, capricious, or contrary to law.

Applicant's claim of error concerning Drug Involvement Mitigating Condition 1⁽¹⁰⁾ has more substance to it. The Administrative Judge's discussion of Drug Involvement Mitigating Condition 1 is not a model of clarity. However, even if the Board were to conclude that the Judge's discussion of Drug Involvement Mitigating Condition 1 was inadequate in light of her finding that Applicant had not used marijuana since September 2001, such a conclusion would not warrant reversal or remand. A Judge must apply pertinent Adjudicative Guidelines disqualifying and mitigating conditions.⁽¹¹⁾ However, the mere presence or absence of an Adjudicative Guidelines disqualifying or mitigating condition is not solely dispositive of a case.⁽¹²⁾ Even if there is an Adjudicative Guidelines disqualifying or mitigating condition that is applicable, the Judge must consider the applicable disqualifying or mitigating condition in light of the record evidence as a whole and any pertinent general factors,⁽¹³⁾ and decide what weight can reasonably be given to the applicable disqualifying or mitigating condition.⁽¹⁴⁾ In this case, the Judge's decision sets forth an explanation of her unfavorable conclusions under Guideline H (Drug Involvement) that is sufficient to persuade the Board that the Judge evaluated Applicant's history of marijuana use in light of the record evidence as a whole (both favorable and unfavorable) in a manner that is consistent with Directive, Section 6.3 and Directive, Additional Procedural Guidance, Item E3.1.25. Accordingly, no useful purpose would be served by remanding the case to the Judge for further discussion of Drug Involvement Mitigating Condition 1.⁽¹⁵⁾

The two Board decisions cited by Applicant are pertinent, but they do not persuade the Board that the Administrative Judge committed harmful error in this case. The Board decisions in ISCR Case No. 02-08032 (May 14, 2004) and ISCR Case No. 02-24452 (August 4, 2004) are distinguishable because the Board concluded, in those cases, that the Judges had failed to articulate a rational basis for their conclusions, while in this case, the Board concludes that -- with the

exception of one harmless error discussed in the preceding paragraph --- the Judge articulated a sufficient basis for her unfavorable conclusions under Guideline H (Drug Involvement).

Conclusion

The Board affirms the Administrative Judge's decision because Applicant has failed to demonstrate error that warrants remand or reversal.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

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

1. The Administrative Judge found in Applicant's favor with respect to SOR paragraph 1.h. That favorable formal finding is not at issue on appeal.
2. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1.
3. *See, e.g.*, ISCR Case No. 02-09892 (July 15, 2004) at p. 5; ISCR Case No. 02-02892 (June 28, 2004) at pp. 3-4.
4. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2.
5. *See, e.g.*, ISCR Case No. 03-05647 (December 30, 2004) at pp. 3-4.
6. *See, e.g.*, ISCR Case No. 03-09915 (December 16, 2004) at p. 3.
7. "The drug involvement was an isolated or aberrational event" (Directive, Adjudicative Guidelines, Item E2.A8.1.3.2).
8. "Satisfactory completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a credentialed medical professional" (Directive, Adjudicative Guidelines, Item E2.A8.1.3.4).
9. "A demonstrated intent not to abuse any drugs in the future" (Directive, Adjudicative Guidelines, Item E2.A8.1.3.3).
10. "The drug involvement was not recent" (Directive, Adjudicative Guidelines, Item E2.A8.1.3.1).
11. *See* Directive, Section 6.3 and Additional Procedural Guidance, Item E3.1.25.

12. *See, e.g.*, ISCR Case No. 02-09389 (December 29, 2004) at p. 4; ISCR Case No. 02-32006 (October 28, 2004) at p. 5.
13. Directive, Section 6.3 and Adjudicative Guidelines, Item E2.2.1.
14. *See, e.g.*, ISCR Case No. 02-05110 (March 22, 2004) at pp. 4-6; ISCR Case No. 01-08565 (March 7, 2003) at p. 5.
15. *See, e.g.*, ISCR Case No. 00-250 (July 11, 2001) at p. 6 (discussing harmless error doctrine).