

DATE: April 7, 2004

In Re:

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SSN: -----

Applicant for Security Clearance

CR Case No. 02-31537

**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 August 11, 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 Darlene Lokey Anderson issued an unfavorable security clearance decision dated December 31, 2003.

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 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**

Whether the Administrative Judge's decision was arbitrary, capricious, or contrary to law. The Administrative Judge found: (1) Applicant used marijuana from 1990 until 1994, and again in July 2002; and (2) in a written statement given to an investigator, Applicant indicated he might use marijuana in the future if someone offered it to him at a party. In Applicant's appeal brief, he attempts to explain why he made the statement about possible future drug use. He requests that the adverse security decision be reversed because of his honesty in revealing his marijuana use and his general reliability and trustworthiness. The Board construes Applicant's brief as raising the issue of whether the Administrative Judge's decision was arbitrary, capricious, or contrary to law.

Applicant's brief contains assertions that do not appear in the record below. As such these assertions constitute new evidence which cannot be considered on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29.

On appeal, Applicant raises no specific claim of error on the part of the Administrative Judge. Applicant's brief consists primarily of his explanation of the statement he made to the investigator about possible future drug use. There is no presumption of error below, and an appealing party bears the burden of establishing, with specificity, error in the record below. *See* ISCR Case No. 00-0050 (July 23, 2001) at p. 2. Applicant has failed to meet that burden.

Applicant emphasizes his honesty in voluntarily disclosing his marijuana use to the government. Applicant's honesty and truthfulness with the government about his history of marijuana use has not been challenged or placed into question by these proceedings. However, Applicant's honesty and candor with the government did not preclude the Administrative Judge from evaluating the security significance of Applicant's history of marijuana use. Even an honest applicant may pose a security risk based on conduct and circumstances unrelated to the applicant's truthfulness and veracity. *See, e.g.*, ISCR Case No. 01-22170 (October 2, 2003) at p. 5.

Applicant argues that he is a reliable and trustworthy person. There is no record evidence, favorable or unfavorable, that specifically deals with Applicant's reliability or trustworthiness. There is record evidence concerning Applicant's history of marijuana use. The Administrative Judge concluded that his marijuana use and his statement that he might use it again demonstrated poor judgment. The Judge's conclusions are reasonably supported by record evidence. The Administrative Judge's decision is not arbitrary, capricious, or contrary to law. The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snepp v. United States*, 444 U.S. 507, 511 n. 6 (1980). Security clearance decisions are not an exact science, but rather involve predictive judgments about whether a person may be at risk to fail to properly handle classified information. *Department of the Navy v. Egan*, 484 U.S. 518, 528-29 (1988). The record evidence of Applicant's overall history of marijuana use provides an adequate basis to sustain the Administrative Judge's decision. See ISCR Case No. 01-23671 (December 3, 2002) at p. 3 (discussing security significance of involvement with illegal drugs).

### **Conclusion**

Applicant has failed to meet his burden on appeal of demonstrating error below. Therefore, the decision below is affirmed.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board