

DATE: January 26, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-02374

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT

Ronald E. Plesco, Jr., Personal Representative

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated July 24, 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). Administrative Judge Roger E. Willmeth issued a favorable security clearance decision, dated May 31, 2005.

Department Counsel appealed the Administrative Judge's favorable 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's finding that Applicant "experimented" with certain types of drugs was arbitrary, capricious, and unsupported by the record evidence; (2) whether the Administrative Judge's conclusion that Applicant no longer associates with persons that he once shared marijuana with at parties is supported by the record evidence; (3) whether the Administrative Judge's conclusion that Guideline H Mitigating Condition 1 applied to the case is arbitrary, capricious and unsupported by the record evidence; and (4) whether the Administrative Judge's conclusion that Guideline H Mitigating Condition 3 applied to the case is arbitrary, capricious and unsupported by the record evidence. 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's finding that Applicant "experimented" with certain types of drugs was arbitrary, capricious, and unsupported by the record evidence. The Administrative Judge found that Applicant used marijuana from 1995 until December 2002. The Judge also found that Applicant had experimented with numerous other drugs at varying times between 1997 and February 2002. The Judge indicated in his findings the number of times Applicant partook of these other drugs. On appeal, Department Counsel complains that the Judge's characterization of Applicant's use of the other drugs as experimental in nature improperly minimized the degree and frequency of Applicant's drug use from May 1995 until 2002. Department Counsel asserts that the Judge's error is not simply poor word choice, but rather an arbitrary and capricious assessment of Applicant's drug use that is unsupported by the record evidence.

The Administrative Judge made specific findings of fact concerning the frequency of Applicant's use of various drugs over the years. Given those detailed findings of fact, which are supported by the record evidence, it was arbitrary and capricious for the Judge to characterize Applicant's drug use as being "experimental" in nature. Such a characterization of Applicant's history of drug use does not reflect a reasonable or common sense interpretation of the record evidence and, indeed, runs contrary to the Judge's own findings of fact about Applicant's history of drug use. ⁽¹⁾ However, the Board does not consider portions, passages, or words used in a decision in isolation. Rather, the Board considers the Judge's decision in its entirety to discern what the Judge found and concluded. *See, e.g.*, ISCR Case No. 01-22311 (April 4, 2003) at p. 4. Viewed in the context of the Judge's specific findings of fact concerning the frequency of Applicant's use of various drugs over the years, the Judge's unsustainable characterization of that drug use as "experimental" in

nature is harmless error.

2. Whether the Administrative Judge's conclusion that Applicant no longer associates with persons that he once shared marijuana with at parties is supported by the record evidence. When discussing matters in mitigation, the Administrative Judge concluded that Applicant no longer associates with people with whom he shared marijuana at parties. On appeal, Department Counsel asserts that this conclusion is not supported by the record evidence. Department Counsel points to a portion of Applicant's hearing testimony where, when asked whether he currently associated with any individuals who have experimented with drugs, Applicant responded, "No. Occasionally seeing my college roommates aside, no." There is other record evidence establishing that Applicant used marijuana with his college friends. Given the record evidence in this case, it was error for the Judge to conclude that Applicant no longer associates with people with whom he shared marijuana at parties.

Department Counsel asserts that this error works to undercut the Administrative Judge's application of Guideline H Mitigating Factors 1 and 3. This error will be addressed further in the Board's discussion of the Judge's application of Guideline H Mitigating Conditions 1 and 3 later in this decision.

3. Whether the Administrative Judge's conclusion that Guideline H Mitigating Condition 1 ⁽²⁾ applied is arbitrary, capricious, and unsupported by the record evidence. The Administrative Judge found that Applicant had not engaged in any illegal drug use since December 2002. He then applied Guideline H Mitigating Condition 1 to the case. On appeal, Department Counsel asserts that the Judge's application of this mitigating factor is arbitrary and capricious and unsupported by the record evidence. Specifically, Department Counsel argues: (a) Guideline H Mitigating Condition 1 concerns "drug involvement" which is not limited to drug use; (b) it is unclear from the record evidence when Applicant ceased his "drug involvement," specifically, his interaction with friends or associates who continue to use drugs; (c) Applicant continues to associate with his college roommates, with whom he once used marijuana; and (d) the period of Applicant's non-involvement with drugs must be balanced against the frequency and length of Applicant's period of drug involvement, running from May until April 2003 or April 2004; (e) Applicant's drug use continued after he had graduated from college, after he began his current employment, and after he had completed his security clearance application and security interview. For the reasons that follow, the Board concludes that Department Counsel has failed to demonstrate error on the part of the Administrative Judge in his application of Guideline H Mitigating Condition 1.

Department Counsel's arguments about Applicant's continued "drug involvement" are untenable. There is no record evidence that Applicant used any illegal drug after December 2002. Department Counsel seems to be arguing that the term "drug involvement" as used in the Adjudicative Guidelines goes beyond illegal use or possession (possession including cultivation, processing, manufacture, purchase, sale or distribution) to include mere association with persons who once used drugs when there is no record evidence that these persons continue to use illegal drugs or used illegal drugs in Applicant's presence since December 2002. There is no support in the record evidence for Department Counsel's suggestion that Applicant's "drug involvement" extends beyond December 2002 to a period as recent as April 2004 simply because he continues to associate with friends and/or roommates from college.

Department Counsel correctly points out that the Board has declined to set any "bright-line" rule as to what constitutes "recent" under the Directive regarding illegal drug use. *See, e.g.*, ISCR Case No. 02-10454 (November 23, 2004) at p. 4. The Board has indicated the matter requires an Administrative Judge to evaluate the record evidence as a whole and reach a reasonable conclusion as to the recency of an applicant's conduct. *See, e.g.*, ISCR Case No. 02-22173 (May 26, 2004) at p. 4. The application of a mitigating condition like Guideline H Mitigating Condition 1 can depend upon a number of factors in addition to the simple passage of time. *See, e.g.*, ISCR Case No. 98-0611 (November 1, 1999) at p. 2. The interval of time presented in this case, slightly less than two and a half years, must be evaluated in light of other factors in the case, some mentioned by Department Counsel on appeal.

Department Counsel's argument highlights the presence of conflicting record evidence with respect to Guideline H Mitigating Condition 1. The Board does not have to agree with the Judge to conclude that, given the entirety of the record in this case, Department Counsel has not shown it was arbitrary or capricious for the Administrative Judge to conclude that Mitigating Condition 1 could be applied to the benefit of Applicant.

4. Whether the Administrative Judge's conclusion that Guideline H Mitigating Condition 3 ⁽³⁾ applied to the case is

arbitrary, capricious and unsupported by the record evidence. The Administrative Judge concluded that Applicant had demonstrated an intent not to use illegal drugs in the future to an extent sufficient to warrant the application of Guideline H Mitigating Condition 3. On appeal, Department Counsel asserts that the application of this mitigating condition was arbitrary, capricious and unsupported by the record evidence. Department Counsel makes much the same argument concerning the state of the record evidence that it made in its argument concerning the application of Guideline H Mitigating Condition 1. In addition, Department Counsel argues that there is other record evidence that undercuts the Judge's application of Guideline H Mitigating Condition 3.

Some of the other assertions of error made by Department Counsel with regard to the Administrative Judge's application of Guideline H Mitigating Condition 3 are repetitive of arguments it made with reference to the Judge's application of Guideline H Mitigating Condition 1. As before, these arguments identify record evidence that arguably detracts from the Judge's conclusion that Applicant has established mitigation, in this case Guideline H Mitigating Condition 3.

There is conflicting record evidence on the matter of Applicant's intentions concerning marijuana use. Department Counsel makes a plausible argument for why the Administrative Judge should have weighed the evidence differently and should have concluded that Guideline H Mitigating Condition 3 was not applicable. However, Department Counsel's ability to do so falls short of persuading the Board that the Judge's choice to apply that mitigating condition is not sustainable.

Conclusion

Department Counsel has failed to meet its burden on appeal of demonstrating error that warrants remand or reversal. Accordingly, the Board affirms the Administrative Judge's May 31, 2005 decision.

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

1. Applicant's characterization of his drug use as "experimentation" (*see, e.g.*, Government Exhibit 3; Hearing Transcript at p. 22) was not controlling or dispositive. The record evidence concerning the facts and circumstances of Applicant's drug use (including its frequency) -- not Applicant's characterization of his drug use -- should have been the basis for the Judge's conclusions as to the seriousness and frequency of Applicant's past drug use.

2. "The drug involvement was not recent."

3. "A demonstrated intent not to abuse any drugs in the future."

