

DATE: January 31, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-11655

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 the Applicant a Statement of Reasons (SOR), dated November 25, 2003, 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 Thomas M. Crean issued an unfavorable security clearance decision, dated October 15, 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 issue: whether the Administrative Judge erred by concluding that the security concerns raised by Applicant's drug involvement had not been mitigated. 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 erred by concluding that the security concerns raised by Applicant's drug involvement had not been mitigated. On appeal, Applicant contends the Judge should have concluded that the security concerns raised by his prior drug use had been mitigated because: (1) the drug use was not recent, ⁽¹⁾ (2) it was isolated or aberrational, ⁽²⁾ (3) Applicant has demonstrated an intent not to abuse drugs in the future, ⁽³⁾ and (4) Applicant's marijuana use was actually less than stated by the Judge in his conclusions. In support of those contentions, Applicant asserts that: (i) his last use of drugs was in April 2003--over 18 months prior to the Judge's decision, (ii) in his September 2004 response to the Government's File of Relevant Material (FORM), Applicant stated that he did not intend to use marijuana again, (iii) Applicant used Percoset on only one occasion and Ritalin on only two occasions in the last 10 years, and (iv) Applicant only used marijuana on a quarterly to yearly basis, rather than on a quarterly basis from 1992 to 2003. For the reasons set forth below, we affirm the Judge's decision.

The application of Adjudicative Guidelines disqualifying and mitigating conditions requires the exercise of sound discretion in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 01-14740 (January 15, 2003) at p. 7. Thus, the presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. An applicant's disagreement with the Judge's weighing of the record evidence is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law.

Given the record evidence in this case, the Administrative Judge's findings about Applicant's lengthy and serious history of improper or illegal drug use reflect a reasonable interpretation of record evidence as a whole. Applicant's challenge to the Judge's findings of fact reflect strong disagreement with the Judge's findings, but fail to demonstrate the Judge's findings are erroneous. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1. In light of the Judge's findings,

the Judge had a rational basis to conclude that Applicant's overall history of improper or illegal drug use raised serious security concerns under Guideline H, and that the evidence which the Applicant had presented in mitigation was insufficient to overcome those security concerns. The Board does not find persuasive Applicant's contention that the Judge should have concluded his drug abuse history was mitigated under the Drug Involvement mitigating conditions. Therefore, we conclude that the Judge's decision was not arbitrary, capricious, or contrary to law.

Conclusion

Applicant has failed to demonstrate error below. Therefore, the Board affirms the Administrative Judge's adverse security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, 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.A8.1.3.1. ("The drug involvement was not recent").
2. Directive, Enclosure 2, Item E2.A8.1.3.2. ("The drug involvement was an isolated or *aberrational* event").
3. Directive, Enclosure 2, Item E2.A8.3.3. ("A demonstrated intent not to abuse any drugs in the future").