

DATE: July 20, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-12882

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated October 22, 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), Guideline G (Alcohol Consumption), and Guideline E (Personal Conduct). Administrative Judge Roger E. Willmeth issued a favorable security clearance decision, dated January 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 erred by applying Personal Conduct Mitigating Condition 2; (2) whether the Administrative Judge erred by concluding Applicant's use of marijuana while holding a security clearance was mitigated; and (3) whether the Administrative Judge erred by evaluating Applicant's case in a piecemeal manner that is contrary to the whole person concept. 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⁾

1. Whether the Administrative Judge erred by applying Personal Conduct Mitigating Condition 2. The Administrative Judge concluded Applicant's falsification of a security clearance application in 1997 was mitigated under Personal Conduct Mitigating Condition 2.⁽²⁾ Department Counsel contends the Judge erred by applying Personal Conduct Mitigating Condition 2. In support of that contention, Department Counsel argues: (a) the Judge ignored record evidence that Applicant falsified a security clearance application in 2002 and falsified part of his answer to the SOR; (b) the Judge erred by concluding Applicant's 1997 falsification was not recent; (c) the Applicant's falsification of a security clearance application in 2002 and falsification of part of his answer to the SOR show Applicant did not subsequently disclose correct information to the government; and (d) the record evidence does not show that Applicant voluntarily disclosed to the government information about his marijuana use. For the reasons that follow, the Board concludes this claim of error is not persuasive.

First, Department Counsel's reliance on claims of falsifications that were not alleged in the SOR issued to Applicant runs afoul of the specific requirements of Executive Order 10865⁽³⁾ and the Directive⁽⁴⁾ that an applicant is entitled to receive notice of the allegations against him or her and a reasonable opportunity to respond to those allegations. By raising on appeal claims of falsification that were not alleged in the SOR, Department Counsel is, in effect, asking the Board to reverse the Administrative Judge's decision based on a theory that: (i) is contrary to the plain language of Executive Order 10865 and the Directive; and (ii) has the practical effect of asking the Board to amend the SOR on appeal in violation of the terms of Directive, Additional Procedural Guidance Item E3.1.17.⁽⁵⁾ If Department Counsel wanted to try Applicant's case on the theory that he falsified a security clearance application in 2002 and falsified part of his answer to the SOR in 2003, Department Counsel could have moved to amend the SOR in compliance with the

requirements of Directive, Additional Procedural Guidance, Item E3.1.17.⁽⁶⁾ Department Counsel did not move to amend the SOR in Applicant's case. Accordingly, the claims of falsifications raised by Department Counsel on appeal were not part of the case before the Judge. Moreover, having failed to make such allegations in a timely and proper manner during the proceedings below, Department Counsel is foreclosed from raising them for the first time on appeal.⁽⁷⁾

Second, the Board does not have to agree with the Administrative Judge to conclude it was not arbitrary or capricious for the Judge to characterize Applicant's 1997 falsification as being not recent within the meaning of Personal Conduct Mitigating Condition 2. The Judge was not compelled, as a matter of law, to conclude that a falsification which occurred almost seven years before the close of the record evidence was recent.

Third, Department Counsel's third argument -- like its first argument -- relies on claims of falsification not alleged in the SOR. For the same reasons that Department Counsel's first argument is fatally flawed, so too is its third appeal argument.

Fourth, given the record evidence in this case, it was not arbitrary or capricious for the Administrative Judge to find that Applicant voluntarily disclosed his marijuana use to the government in 2002.

For all these reasons, taken cumulatively, the Board concludes Department Counsel's claim that the Administrative Judge erred by applying Personal Conduct Mitigating Condition 2 is unpersuasive.

2. Whether the Administrative Judge erred by concluding Applicant's use of marijuana while holding a security clearance was mitigated. Department Counsel contends the Administrative Judge erred by concluding that Applicant's use of marijuana while holding a security clearance was mitigated because: (a) Applicant's use of marijuana "is only potentially mitigated by [Personal Conduct Mitigating Conditions] 1 and 7"; (b) Applicant's use of marijuana was material to a security clearance determination and was not mitigated under Personal Conduct Mitigating Condition 1; (c) there is no record evidence that Personal Conduct Mitigating Condition 7 is applicable to Applicant's case; and (d) the Judge's finding of mitigation is erroneous, as a matter of law, because the Judge did not articulate a rational basis for concluding Applicant's use of marijuana was mitigated under the Personal Conduct Mitigating Conditions or any other Adjudicative Guidelines mitigating condition. Department Counsel's claim of error is predicated on a theory that has been repeatedly rejected by the Board.

An Administrative Judge must apply pertinent provisions of the Adjudicative Guidelines.⁽⁸⁾ However, the mere presence or absence of an Adjudicative Guidelines disqualifying condition or mitigating condition is not solely dispositive of a case.⁽⁹⁾ The applicability of an Adjudicative Guidelines disqualifying condition does not compel a Judge, as a matter of law, to render an unfavorable security clearance decision.⁽¹⁰⁾ The applicability of an Adjudicative Guidelines mitigating condition does not compel a Judge, as a matter of law, to render a favorable security clearance decision.⁽¹¹⁾ The absence of a specific Adjudicative Guidelines disqualifying condition that is applicable to the facts of a case does not preclude a Judge from making an unfavorable decision.⁽¹²⁾ The absence of a specific Adjudicative Guidelines mitigating condition that is applicable to the facts of a case does not preclude a Judge from making a favorable decision.⁽¹³⁾ Indeed, the application of the Adjudicative Guidelines is not reducible to a simple formula, but rather requires the exercise of sound judgment within the parameters set by the Directive.⁽¹⁴⁾ Those parameters include the requirement that an Administrative Judge evaluate an applicant's security eligibility in light of the general factors set forth in the Directive,⁽¹⁵⁾ which are not nullified or rendered superfluous by the specific Adjudicative Guidelines disqualifying and mitigating conditions.⁽¹⁶⁾ Accordingly, even if a particular Adjudicative Guideline disqualifying or mitigating condition is not applicable to a given case, the Judge must still evaluate an applicant's security eligibility in a manner that is consistent with other pertinent provisions of the Directive. Therefore, it is untenable for Department Counsel to argue Applicant's use of marijuana "is only potentially mitigated by [Personal Conduct Mitigating Conditions] 1 and 7." Because the Judge was not compelled, as a matter of law, to conclude Applicant's use of marijuana was not mitigated unless one or more Personal Conduct mitigating conditions applied, Department Counsel's arguments concerning Personal Conduct Mitigating Conditions 1 and 7 fail to demonstrate the Judge erred in this case.⁽¹⁷⁾

Department Counsel's arguments concerning the Personal Conduct mitigating conditions also are not persuasive because they are based, in part, on the premise that Applicant's use of marijuana while holding a security clearance could only be mitigated under the Personal Conduct mitigating conditions because that conduct was alleged in the SOR under Guideline E (Personal Conduct). Drug abuse while holding a security clearance is specifically mentioned in Drug Involvement Disqualifying Condition 5. ⁽¹⁸⁾

Drug abuse while holding a security clearance is not mentioned under any of the Personal Conduct disqualifying or mitigating conditions, but could be construed as falling under the Concern portion of Guideline E (Personal Conduct) and, depending on the circumstances, under some of the Personal Conduct disqualifying conditions. Although there may be a rational basis for alleging drug abuse while holding a security clearance under Guideline E, given the nature of drug abuse itself and the explicit reference to drug abuse while holding a security clearance in Drug Involvement Disqualifying Condition 5, the Board concludes the Judge was not compelled, as a matter of law, to evaluate Applicant's drug use while holding a security clearance only under Guideline E without regard to pertinent provisions of the Drug Involvement disqualifying and mitigating conditions.

The Board does not have to agree with the Administrative Judge's conclusions about Applicant's use of marijuana while he held a security clearance to conclude that Department Counsel's claim of error is not persuasive.

3. Whether the Administrative Judge erred by evaluating Applicant's case in a piecemeal manner that is contrary to the whole person concept. Department Counsel contends the Administrative Judge improperly evaluated Applicant's case in a piecemeal manner that is contrary to the whole person concept because: (a) the Judge failed to consider Applicant's marijuana use while he had a security clearance; (b) the Judge failed to consider Applicant's minimization of his drug abuse and falsification of a security clearance application in 2002; (c) the Judge failed to consider whether the entirety of Applicant's conduct -- viewed under the whole person concept -- precluded a favorable security clearance decision independent of whether Applicant's different forms of misconduct could be considered mitigated under Guideline H, Guideline G, and Guideline E separately.

A reading of the decision below shows the Administrative Judge specifically noted Applicant's use of marijuana while holding a security clearance in his findings of fact and in his conclusions. Given those references, the Board is not persuaded by Department Counsel's argument that the Judge simply failed to consider that aspect of this case.

Department Counsel's second argument is predicated on its untenable claim that Applicant falsified a security clearance application in 2002. For the reasons stated earlier in this decision, this argument fails to demonstrate the Administrative Judge erred.

There is merit to Department Counsel's argument that an Administrative Judge's analysis of an applicant's security eligibility under the whole person concept ⁽¹⁹⁾ should not be limited to evaluating the applicant's conduct under each Guideline alleged in the SOR without regard to whether the totality of the applicant's conduct raises questions about the applicant's security eligibility that -- viewed cumulatively -- may be sufficient to preclude a determination that it is clearly consistent with the national interest to grant or continue a security clearance for the applicant. ⁽²⁰⁾ However, Department Counsel does not persuasively argue that the Judge's decision in this case fails to reflect an evaluation of Applicant's security eligibility in terms of the whole person concept. The Board does not have to agree with the conclusions reached by the Judge in this case to conclude Department Counsel has failed to meet its burden of persuasion on appeal with this particular argument.

Conclusion

The Board affirms the Administrative Judge's decision because Department Counsel has failed to meet its burden on appeal of demonstrating error below.

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. On appeal, Department Counsel proposes additions to the Administrative Judge's findings of fact. For the reasons stated in ISCR Case No. 03-06174 (February 28, 2005) at p. 3, the Board declines to adopt those proposed factual findings.
2. "The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily" (Directive, Adjudicative Guidelines, Item E2.A5.1.3.2).
3. Executive Order 10865, Section 3.
4. Directive, Section 4.3 and Additional Procedural Guidance, Item E3.1.3; Item E3.1.7; and Item E3.1.8.
5. Nothing in Directive, Additional Procedural Guidance, Item E3.1.17 indicates or suggests that the Board can amend an SOR on appeal.
6. A motion to amend an SOR under Directive, Additional Procedural Guidance, Item E3.1.17 is not limited to cases involving a hearing, and such a motion can be made in cases where an applicant waives a hearing. *See, e.g.*, ISCR Case No. 02-22163 (March 12, 2004) at p. 4 n.3 (noting earlier Board decision that held motions to amend SOR can be made in cases adjudicated by File of Relevant Material).
7. *See, e.g.*, ISCR Case No. 02-09389 (December 29, 2004) at p. 4; ISCR Case No. 02-32006 (October 28, 2004) at pp. 3-4.
8. *See, e.g.*, ISCR Case No. 02-32254 (May 26, 2004) at p. 4.
9. *See, e.g.*, ISCR Case No. 03-11448 (August 10, 2004) at pp. 3-4; ISCR Case No. 02-11810 (June 5, 2003) at p. 5.
10. *See, e.g.*, ISCR Case No. 02-04786 (June 27, 2003) at p. 4.
11. *See, e.g.*, ISCR Case No. 02-22163 (March 12, 2004) at pp. 6-7; ISCR Case No. 02-11810 (June 5, 2003) at p. 5.
12. *See, e.g.*, ISCR Case No. 03-11293 (March 24, 2005) at p. 4; ISCR Case No. 02-27444 (October 15, 2003) at p. 5.
13. *See, e.g.*, ISCR Case No. 02-09389 (December 29, 2004) at p. 4 (noting the Board has repeatedly rejected Department Counsel's argument that an Administrative Judge cannot render a favorable security clearance in the absence of an applicable Adjudicative Guidelines mitigating condition); ISCR Case No. 01-24358 (April 13, 2004) at p. 7 n. 13 (same).

14. *See, e.g.*, ISCR Case No. 02-22163 (March 12, 2004) at p. 6; ISCR Case No. 01-21243 (September 30, 2003) at pp. 3-4; ISCR Case No. 01-20906 (January 10, 2003) at p. 7.

15. Directive, Section 6.3 and Adjudicative Guidelines, Item E2.2.1. *See also* ISCR Case No. 02-32006 (October 28, 2004) at p. 5 ("[T]he application of Adjudicative Guidelines disqualifying and mitigating conditions must be undertaken in conjunction with the Judge's obligation to evaluate an applicant's case under the general factors of Directive, Section 6.3 and Directive, Adjudicative Guidelines, Item E2.2.1."); ISCR Case No. 02-02195 (April 9, 2004) at p. 4 n.3 (noting application of provisions of the Adjudicative Guidelines must be done in a manner compatible with other pertinent provisions of the Directive).

16. One provision of the Directive should not be interpreted or construed in a manner that make other provisions of the Directive meaningless or superfluous. *See, e.g.*, ISCR Case No. 02-11454 (June 7, 2004) at p. 4. *See also* ISCR Case No. 03-17114 (November 29, 2004) at p. 4 (Administrative Judge must apply Adjudicative Guidelines in a manner that is consistent with other applicable provisions of the Directive).

17. Given the Board's resolution of this appeal argument, the language of Personal Conduct Mitigating Condition 1 and Personal Conduct Mitigating Condition 7 need not be quoted or analyzed.

18. Directive, Adjudicative Guidelines, Item E2.A8.1.2.5 (second sentence).

19. Directive, Section 6.3 and Adjudicative Guidelines, Item E2.2.1.

20. *See, e.g.*, ISCR Case No. 02-28891 (April 22, 2004) at p. 4 ("Although an Administrative Judge must make findings of fact, reach conclusions, and apply pertinent provisions of the Adjudicative Guidelines to each allegation in an SOR, the Judge also must evaluate an applicant's security eligibility under the whole person concept after considering the record evidence as a whole.")(footnotes omitted); ISCR Case No. 00-0628 (February 24, 2003) at pp. 5-6 (Judge's compliance with Directive, Additional Procedural Guidance, Item E3.1.25 does not end the Judge's obligation to evaluate the applicant's security eligibility under the whole person concept and to consider whether the applicant's admitted or proven conduct and circumstances, alleged under different Guidelines, have security significance when viewed together).