

DATE: March 17, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-13934

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

Cathy Steele, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated February 17, 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) and Guideline E (Personal Conduct). Administrative Judge Philip S. Howe issued an unfavorable security clearance decision dated November 9, 2004.

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 issues have been raised on appeal: (1) whether the Administrative Judge's conclusion that Applicant had not mitigated his drug involvement was arbitrary, capricious or contrary to law; (2) whether the Administrative Judge erred in finding that Applicant falsified his Security Clearance Application (SF-86); and (3) whether the Administrative Judge's conclusion that Applicant had not mitigated the falsifications in his SF-86 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 Issues

1. Whether the Administrative Judge's conclusion that Applicant had not mitigated his drug involvement was arbitrary, capricious or contrary to law. Applicant contends that the Judge improperly concluded that Applicant had not mitigated his drug involvement because the Judge misapplied the "whole person" concept (Directive, Adjudicative Guidelines, Item E2.2.1) and did not consider Drug Involvement Mitigating Condition 3. ⁽¹⁾ Applicant argues, among other things, that: (i) his use of marijuana was not extensive, serious or frequent as "mentioned in the Directive"; (ii) he passed all of his drug tests during the years he held a clearance; (iii) his use of marijuana was rare and limited to small quantities; (iv) he last used marijuana three years ago; (v) he demonstrated his intent to rehabilitate himself by disposing of the small quantity of marijuana in his possession and declaring he will never use illegal drugs in the future; and (vi) he voluntarily admitted to his use of marijuana, and discontinued its use, eliminating the potential for coercion or outside pressure. Applicant contends that the Decision was deficient because it did not reflect that: Applicant voluntarily reported his drug use; Applicant exhibited veracity in responding to questions about his drug use; and Applicant demonstrated positive changes in behavior.

Applicant had the burden of presenting evidence to rebut, explain, extenuate or mitigate facts he admitted or which were proven by Department Counsel, and Applicant also has the ultimate burden of persuasion as to obtaining a favorable security clearance decision. *See* Directive, Additional Procedural Guidance, Item E3.1.15. The Judge had to consider the record evidence, both favorable and unfavorable, and decide whether the favorable evidence outweighed the unfavorable evidence, or *vice versa*. Applicant's ability to argue for a more favorable weighing of the record evidence is not sufficient to demonstrate the Judge erred. *See, e.g.*, ISCR Case No. 01-19879 (October 29, 2002) at p. 4.

Applicant's history of marijuana use over a period of many years, and during a period while Applicant held a security clearance, provides a rational basis for the Administrative Judge's adverse conclusions about Applicant's suitability for a

security clearance. None of the favorable evidence cited by Applicant excuses his history of marijuana use. The Judge also considered Applicant's promise not to use illegal drugs in the future, but found that such promises lacked credibility considering Applicant's demeanor at the hearing and the record evidence of earlier lack of trustworthiness and candor (his lengthy use of marijuana during a period he held a security clearance and his failure to disclose this on the SF-86). In such circumstances, the Judge was not required to apply Drug Involvement Mitigating Condition 3, and the Judge did not have to find that Applicant was truthful in responding to questions about his drug use or find that he had demonstrated positive changes in behavior. Moreover, the Judge found that Applicant's use of marijuana was recent at the time he completed the SF-86 (December 2002); therefore, the Judge was not required to find in Applicant's favor as to recency under the "whole person" concept. The record contained evidence from which the Judge could reasonably draw a different conclusion. The Board is not persuaded that the Judge erred because he did not find that Applicant voluntarily reported his drug use.

Applicant argues that Applicant's voluntary admission of his marijuana use and his discontinuance of such use eliminates the potential for coercion. Even if an applicant is not vulnerable to coercion or blackmail, an adverse security decision can be made based on an applicant's conduct that has security significance independent of any coercion or blackmail possibilities. *See, e.g.*, ISCR Case No. 96-0505 (May 2, 1997) at p. 3.

Considering the record as a whole, and giving due deference to the Judge's credibility determinations, the Board concludes that the Judge's negative security clearance determination under Guideline H is sustainable. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1.

2. Whether the Administrative Judge erred in finding that Applicant falsified his Security Clearance Application (SF-86). The SOR states that Applicant falsified his responses to four questions in his December 20, 2002, SF-86 by responding in the negative to each: Question 27, use of illegal drugs in the last seven years; Question 28, use of illegal drugs while occupying a sensitive position, *i.e.*, holding a security clearance; Question 24, charged with or convicted of any offenses related to alcohol or drugs at any time; and Question 26, any other arrest in past seven years (except traffic fines of less than \$150).⁽²⁾ It is undisputed that: (a) Applicant used marijuana within past seven years and while holding a security clearance; (b) that he was charged twice (1981 and 1983) with driving while intoxicated following arrests; and (c) he was arrested and charged with an assault in 1997. However, Applicant disputes that he had any intent to falsify his SF-86 based on: (i) Applicant's belief that all records of his arrests were expunged, thus he was not required to disclose the arrests to anyone; and (ii) Applicant's claim that his omissions were not deliberate because they were the result of depression, anxiety and the side-effects of the medications he was using. Applicant argues that the side-effects include sleeping disorders which can affect thinking. Applicant notes that he reported arrest incidents on previous SF-86s when not suffering from depression.

The Judge had to consider Applicant's testimony that he did not intend to falsify his SF-86, but he was not bound by it. The Judge concluded that the Department Counsel had established a *prima facie* case of falsification, and in his Decision the Judge specifically referenced Applicant's written statement to a Defense Security Service agent that he did not report his marijuana use on the SF-86 because he "was afraid the company would find out, and I feared losing my clearance" (Decision at p. 6; Government Exhibit 2). While Applicant claims that he believed that all of his arrest records would be expunged, he admits in his appeal brief that he did report some arrests on previous SF-86s and inconsistently suggests that he would have done so here if he had not been suffering from depression. Given the record evidence, the Administrative Judge's finding of falsification on the four questions described in the SOR is sustainable.

3. Whether the Administrative Judge's conclusion that Applicant had not mitigated the falsifications in his SF-86 is arbitrary, capricious, or contrary to law. Most of Applicant's appeal brief under Personal Conduct (Guideline E) is directed at mitigating the underlying criminal arrests or charges that Applicant failed to disclose, rather than the falsifications of not disclosing them. Since these underlying offenses are not alleged in the SOR under Guideline E (Personal Conduct), we need not consider them. Applicant also contends that the Judge erred by failing to consider Personal Conduct Mitigating Condition 2⁽³⁾ because he subsequently provided correct information voluntarily and Personal Conduct Mitigating Condition 5⁽⁴⁾ because he had taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation or duress. The Judge also considered Applicant's claim that his falsifications were extenuated or mitigated by depression, anxiety and the side-effects of the medications.

The Judge was not required to apply Personal Conduct Mitigating Condition 2. In this case, Applicant's subsequent disclosures were about matters that were the subject of his falsification of his SF-86. When a case involves disclosures by an applicant that are corrections of earlier falsifications, then Personal Conduct Mitigating Condition 3 is the proper condition to consider, not Personal Conduct Mitigating Condition 2. *See, e.g.*, ISCR Case No. 97-0289 (January 22, 1998) at p. 3. Moreover, it is untenable for Applicant to claim on this record that the Judge had to consider his falsifications to be not recent or isolated, especially when he exhibits a pattern of falsification in his most recent SF-86 (Decision at pp. 6-7). Further, the Judge did not have to give Applicant credit for voluntarily providing correct information as to some of the arrests when Applicant admitted these incidents only after a DSS agent found a discrepancy between the SF-86 and his check of police records concerning Applicant. *See, e.g.*, ISCR Case No. 99-0557 (July 10, 2000) at p. 4.

The Judge was not required to apply Personal Conduct Mitigating Condition 5. Again, as stated earlier, the security concerns raised by an applicant's falsifications are not necessarily mitigated just because they have subsequently been disclosed and no longer provide the basis for vulnerability to coercion.

Finally, the Judge did consider Applicant's claim that his depression, anxiety and/or complications from the effects of medication caused him to omit information from his SF-86; however, the Judge found this claim unpersuasive. The Judge specifically focused on Applicant's education, technical skills and the quality of his work performance around the time that he completed his SF-86 (Decision at p. 7). The Judge's conclusion that Applicant's mental condition did not extenuate or mitigate his conduct in completing the SF-86, is consistent with record evidence and is sustainable.

Conclusion

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

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. "A demonstrated intent not to abuse any drugs in the future" (Directive, Adjudicative Guidelines, Item E2.A8.1.3.3).
2. The Judge also found that Applicant falsified Question 40 by not disclosing his civil actions involving his divorce and a restraining order. Applicant's brief cites error on this point only as to whether Applicant falsified Question 40. Since the falsification of Question 40 is not alleged in the SOR, and the SOR was not amended to include it, the Board does not need to address this.

3. "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).

4. "The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress" (Directive, Adjudicative Guidelines, Item E2.A5.1.3.5).