

DATE: May 16, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-18522

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated March 2, 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 LeRoy F. Foreman issued a favorable security clearance decision, dated December 21, 2004.

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 Drug Involvement Mitigating Condition 1 and Drug Involvement Mitigating Condition 3; (2) whether the Administrative Judge erred by applying Personal Conduct Mitigating Condition 2; and (3) whether the Administrative Judge erred by applying Personal Conduct Mitigating Condition 5. 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 erred by applying Drug Involvement Mitigating Condition 1 and Drug Involvement Mitigating Condition 3. The Administrative Judge found that Applicant: (a) used marijuana during the period 1995-December 2001, with varying degrees of frequency that ranged from occasional or infrequent use to regular use; and (b) used marijuana after he had been granted a security clearance. The Judge concluded that Applicant's last use of marijuana in December 2001 was not recent and warranted application of Drug Involvement Mitigating Condition 1. (1) The Judge also concluded that Applicant had presented sufficient evidence of reform to warrant application of Drug Involvement Mitigating Condition 3. (2) Department Counsel contends it was arbitrary and capricious for the Judge to apply Drug Involvement Mitigating Condition 1 and Drug Involvement Mitigating Condition 3.

The Board does not find persuasive Department Counsel's contention that it was arbitrary and capricious for the Administrative Judge to apply Drug Involvement Mitigating Condition 1. The Judge correctly noted that the Board has not adopted any "bright-line" rule on what constitutes "recent" drug use (Decision at p. 4). The Board need not agree with the Judge to conclude that Department Counsel has failed to demonstrate it was arbitrary or capricious for the Judge to conclude application of Drug Involvement Mitigating Condition 1 was warranted in light of the Judge's finding that Applicant last used marijuana in December 2001, almost three years before the hearing.

The Administrative Judge's conclusion that Applicant had presented sufficient evidence of reform to warrant application of Drug Involvement Mitigating Condition 3 was based, in part, on the Judge's conclusion that Applicant's hearing testimony was credible. The Board must give deference to a Judge's credibility determinations, (3) and the party challenging a Judge's credibility determination has a heavy burden of persuasion. Department Counsel disagrees with the Judge's favorable credibility determination, but Department Counsel fails to demonstrate how that credibility

determination is not sustainable. The Board need not agree with the Judge to conclude that the Judge's finding that Applicant has not used marijuana since December 2001 plus his favorable assessment of Applicant's credibility -- taken together -- provide a sufficient basis for the Judge to apply Drug Involvement Mitigating Condition 3.

2. Whether the Administrative Judge erred by applying Personal Conduct Mitigating Condition 2. The Administrative Judge concluded that Applicant's disclosure of his past marijuana use on a 2002 security clearance application provided a sufficient basis for applying Personal Conduct Mitigating Condition 2. ⁽⁴⁾

Department Counsel contends the Administrative Judge erred by applying Personal Conduct Mitigating Condition 2 because: (a) Applicant's falsification of a security clearance application warranted application of Personal Conduct Disqualifying Condition 2; (b) although the SOR did not allege Applicant falsified a security clearance application, the Judge apparently considered Personal Conduct Disqualifying Condition 2 ⁽⁵⁾ because he found Applicant had previously had concealed his marijuana use; (c) prior Board decisions hold that Personal Conduct Mitigating Condition 2 is not applicable to situations such as Applicant's case; and (d) Applicant's falsification was not an isolated incident.

Department Counsel is correct in noting that the SOR did not allege that Applicant engaged in falsification. Moreover, a review of the case file shows that neither Department Counsel nor the Administrative Judge moved to amend the SOR to include any allegation of falsification. ⁽⁶⁾ Because the SOR did not allege Applicant engaged in falsification, and because the SOR was not amended to include any allegation that Applicant engaged in falsification, the Judge had no legitimate basis for analyzing Applicant's case in terms of falsification. ⁽⁷⁾ The Judge could consider record evidence of conduct not alleged in the SOR for purposes of assessing the credibility of Applicant's hearing testimony. ⁽⁸⁾ However, absent an allegation of falsification (either in the original SOR or in an amendment to the SOR), the Judge could not -- consistent with Applicant's right to adequate notice of the allegations against him and a reasonable opportunity to respond to the allegations being made against him ⁽⁹⁾ -- analyze Applicant's security eligibility in terms of falsification. Because the Judge's discussion of falsification was prejudicial to Applicant, not Department Counsel, Department Counsel cannot fairly seek to benefit on appeal from the Judge's discussion and analysis of a purported falsification that was not alleged in the SOR. ⁽¹⁰⁾ Accordingly, even if the Board were to assume -- solely for purposes of deciding this appeal -- that the Judge's application of Personal Conduct Mitigating Condition 2 was erroneous, Department Counsel was not prejudiced by the Judge's error in any meaningful way, given the particular procedural posture of the case. Moreover, if the Board were to reverse or remand the case based on Department Counsel's arguments concerning falsification not alleged in the SOR, the Board would -- for all practical purposes -- violate Applicant's rights under the Directive to receive adequate notice and a reasonable opportunity to respond.

3. Whether the Administrative Judge erred by applying Personal Conduct Mitigating Condition 5. The Administrative Judge concluded that Applicant's disclosure of his past marijuana use on a 2002 security clearance application provided a sufficient basis for applying Personal Conduct Mitigating Condition 5. ⁽¹¹⁾ Department Counsel contends the Judge erred by applying Personal Conduct Mitigating Condition 5 because: (a) the record evidence is not clear about what Applicant's employer knows about his marijuana use; and (b) in the alternative, even if Personal Conduct Mitigating Condition 5 is applicable, it does not mitigate Applicant's poor judgment, untrustworthiness, and unreliability.

There is some record evidence about what Applicant's employer knows about his history of marijuana use, and there is a rebuttable presumption that the Administrative Judge considered that evidence. ⁽¹²⁾ The Board need not agree with the Judge to conclude that Department Counsel has failed to demonstrate it was arbitrary or capricious for the Judge to apply Personal Conduct Mitigating Condition 5 in light of the record evidence in this case.

Department Counsel's alternative argument is predicated on the premise that the Administrative Judge reached his favorable conclusions under Guideline E based on his application of Personal Conduct Mitigating Condition 5. Reading the decision below in its entirety, the Board concludes the Judge did not base his favorable conclusions under Guideline E solely or primarily on his application of Personal Conduct Mitigating Condition 5. Since the Judge did not rely solely or primarily on Personal Conduct Mitigating Condition 5 to reach his favorable conclusions under Guideline E, Department Counsel's alternative argument loses much of its force.

Conclusion

The Board affirms the Administrative Judge's security clearance decision because Department Counsel has failed to demonstrate harmful 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. "The drug involvement was not recent" (Directive, Adjudicative Guidelines, Item E2.A8.1.3.1).
2. "A demonstrated intent not to abuse any drugs in the future" (Directive, Adjudicative Guidelines, Item E2.A8.1.3.3).
3. Directive, Additional Procedural Guidance, Item E3.1.32.1.
4. "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).
5. "The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities" (Directive, Adjudicative Guidelines, Item E2.A5.1.2.2).
6. An SOR can be amended to conform to the record evidence or for other good cause, and such an amendment can be requested by either party, or be made by the Administrative Judge on his or her own motion. *See* Directive, Additional Procedural Guidance, Item E3.1.17.
7. Although the SOR placed Applicant on notice that his past use of marijuana was at issue, the SOR did not allege that Applicant had concealed, or tried to conceal, his past use of marijuana.
8. *See, e.g.*, ISCR Case No. 02-19479 (June 22, 2004) at p. 4 (in assessing the credibility of a witness, including an applicant, an Administrative Judge is not limited to considering only those matters specifically alleged in the SOR).
9. *See* Directive, Section 4.3; Additional Procedural Guidance, Item E3.1.3.
10. *Compare* ISCR Case No. 02-09907 (March 17, 2004) at p. 8 (because the error identified by the applicant was

prejudicial to Department Counsel, the applicant was not entitled to gain a benefit on appeal from identifying that error).

11. "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).

12. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2.