

DATE: February 21, 2007

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-21045

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Julie R. Edmunds, Esq, Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On December 7, 2005, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline H (Drug Involvement), Guideline J (Criminal Conduct), Guideline G (Alcohol Consumption), and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On May 25, 2006, Administrative Judge Carol G. Ricciardello denied Applicant's request for a security clearance. Applicant submitted a timely appeal pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

The Board has considered Applicant's brief and interprets it as raising the following issues: (1) that the Administrative Judge erred in finding that Applicant intended to mislead when he failed to list a 1979 arrest for possession of hashish; (2) that the Administrative Judge's conclusion that Applicant had failed to mitigate the disqualifying conditions arising under the four guidelines in question was arbitrary, capricious, and contrary to law; and (3) that Applicant had received ineffective assistance of counsel during his hearing. We affirm the decision of the Administrative Judge.

Whether the Record Supports the Administrative Judge's Findings of Fact

A. Facts

The Administrative Judge found the following:

Applicant is a research engineer for a federal contractor. On July 18, 2003, while holding a security clearance, Applicant used marijuana at a party celebrating his 50th birthday. He was under the influence of alcohol at the time he used the drug. The marijuana was provided to him by some college student friends.

Applicant had been arrested twice for drug involvement. The first time was in 1979, when he was arrested and charged with possession of hashish. After successfully completing a period of probation, the charge was set aside. Following this, he received a letter from his lawyer advising that "the verdict of guilty has been set aside and the [indictment] has been dismissed, thereby releasing you from all penalties and disabilities resulting from the offense of which you were convicted. However, proof of this conviction may be made known to the Court should you again be convicted of any criminal offense." Applicant did not list the 1979 arrest in responding to question 21 of the SF 86 concerning whether he

had been charged or convicted of any felony offense, regardless of expungement.

Applicant was arrested and charged with possession of marijuana in 1992. He successfully completed a program of pretrial diversion. Applicant did not list this arrest in responding to question 24 concerning prior drug to alcohol charges. Applicant had made numerous contradictory statements about the nature and extent of his drug use.

Applicant had been arrested three times for driving under the influence of alcohol. After the first offense, his license was suspended. Nevertheless, he continued to drive. Applicant made numerous false and contradictory statements about the nature and extent of his alcohol consumption. These statements constituted an effort to minimize "how much and how often he was drinking." Applicant told the interviewer "that he had not been charged with any crimes during his life, which was obviously false." Applicant "admitted lying because he wanted a good evaluation." In addition to court ordered substance abuse counseling, Applicant enrolled in an alcohol program which began two days after the conclusion of his hearing in this case.

B. Discussion

The Appeal Board's review of the Administrative Judge's findings of fact is limited to determining if they are supported by substantial evidence—such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record." Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620-21 (1966). In evaluating the Administrative Judge's findings, we are required to give deference to the Administrative Judge's credibility determinations. Directive ¶ E3.1.32.1. We have examined the Administrative Judge's challenged finding of fact and conclude that it is supported by substantial evidence.

Whether the Record Supports the Administrative Judge's Ultimate Conclusion

An Administrative Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision, "including a 'rational connection between facts found and the choices made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto Ins. Co.* 463 U.S. 29, 43 (1983), (quoting *Burlington Truck Lines, Inc. V. United States*, 371 U.S. 156, 168 (1962)). The Appeal Board may reverse the Administrative Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. Our scope of review under this standard is narrow and we may not substitute our judgment for that of the Administrative Judge. We may not set aside an Administrative Judge's decision "that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency..." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42. We review matters of law de novo.

We have already addressed the sufficiency of the Judge's challenged finding of fact. As to the second allegation of error, we note that the application of disqualifying and mitigating conditions requires the exercise of sound discretion in light of the record evidence as a whole. An applicant's disagreement with the Judge's weighing of the evidence is not sufficient to demonstrate that the Judge committed error. In this case, our review of the record leads us to the conclusion that the Judge articulated a rational basis for not favorably applying any mitigating conditions. Given the record before her, the Judge's ultimate unfavorable clearance decision is not arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 03-18534 at 2 (App. Bd. June 15, 2006). To the extent that Applicant relies on state law to buttress his assertions, DOHA proceedings are not bound by state law, either for purposes of determining the scope of fact-finding or for legal analysis. *See, e.g.*, ISCR Case No. 04-05712 at 9-10 (App. Bd. Oct. 31, 2006).

Concerning the claim of ineffective assistance of counsel, DOHA proceedings are civil in nature and the doctrine in question does not apply to them. Even assuming for the sake of argument that Applicant's appeal assertions are correct, Applicant's remedy would be in another forum. *See, e.g.*, ISCR Case No. 02-22404 at 3-4 (App. Bd. May 5, 2005).

Order

The decision of the Administrative Judge denying Applicant a clearance is AFFIRMED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: James E. Moody

James E. Moody

Administrative Judge

Member, Appeal Board