

DATE: January 29, 2007

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-23483

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Candace Le'i, Esq., Department Counsel

FOR APPLICANT

R. Scott Cornelius, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 9, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline H (Drug Involvement), pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On April 20, 2006, after the hearing, Administrative Judge Barry M. Sax granted Applicant's request for a security clearance. Department Counsel submitted a timely appeal pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: that the Administrative Judge's clearance decision is arbitrary, capricious, and contrary to law and not supported by record evidence. We affirm the Administrative Judge's decision to grant the clearance.

Whether the Record Supports the Administrative Judge's Factual Findings

A. Facts

The Administrative Judge's findings, which incorporated admissions by Applicant in his response to the SOR, were substantially as follows: Applicant is an engineer employed by a defense contractor. In December 2002 he submitted a urine sample as part of a random drug screen required by his employer. The test yielded a positive result for marijuana.

At the time of the drug test, Applicant had SCI access as part of his official duties. As a result of the test, Applicant's access to SCI was revoked.

Applicant's employer provided him with some drug abuse counseling and then referred him to extensive outpatient counseling through CHS, a local 12- step drug treatment program. Applicant satisfactorily completed this program. In his Conclusion, the Judge states that Applicant has a "favorable prognosis by a credentialed medical professional." We note that the evidence supplied by the Department Counsel includes a letter from Applicant's "Primary Therapist" at CHS, acknowledging Applicant's successful completion of the program. Attached to his letter is a form submitted by a registered nurse describing Applicant's treatment at CHS, characterizing his prognosis as "good." This official goes on to say that, if Applicant continues in a personal treatment program, his "risk of relapse is slim."

Applicant admitted that he had used cocaine on six occasions while in college. He also admitted to extensive marijuana use, beginning in 1975 and ending in 1989. Applicant returned to the use of marijuana April 2002 and continued until his urinalysis the following December, which marked his last known instance of illegal drug use.

B. Discussion

The Appeal Board's review of the Administrative Judge's finding of facts 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 finding, we are required to give deference to the Administrative Judge's credibility determinations. Directive ¶ E3.1.32.1.

In her brief, Department counsel stated that she "agrees with and adopts [the Administrative Judge's] findings of fact for purposes of this appeal . . ." Therefore, those findings are not challenged on appeal.

Whether the Record Supports the Administrative Judge's Ultimate Conclusions.

An Administrative Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision, "including a 'rational connection between the facts found and the choice 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 examined the Administrative Judge's final decision in light of his findings of fact and the record as a whole. Reading it in its entirety, the Board construes the opinion as applying mitigating Conditions 1, 3, and 4. ⁽¹⁾ We will focus on the last of these Mitigating Conditions, specifically on the question of the sufficiency of the Judge's conclusions as to rehabilitation. ⁽²⁾

The record depends in large measure upon the testimony of Applicant as to the extent of his rehabilitation. During his presentation, Applicant stated that certain external factors, such as anxiety, marital problems, and the death of his father, contributed to his drug abuse. He testified on cross examination as follows:

Department Counsel: . . . Do you still experience anxiety today?

A: Occasionally. I have learned to deal with it.

Q: How?

A: Through group counseling, talking about the problems . . . and exploring it. . .

Q: Now, at [CHS] you attended group counseling for 20 sessions?

A: Over 10 weeks, yes.

Q: Okay, and you also joined a - and this was for conditioned diagnosis - cannabis dependence, correct?

A: Correct.

Q: And you also joined a 12-step recovery program?

A: Correct.

Q: And that was recommended by [CHS]?

A: Correct.

Q: And do you still - you testified that you still attend this group today?

A: Correct.

Q: How often do you attend?

A: Once or twice a month . . .

Q: So are you concerned that you may relapse?

A: I am on guard against it. I am not concerned that it will happen. I am concerned that I must maintain my guard . . . It is a lifetime process. ⁽³⁾

Given the implications for his continued employment associated with failing a drug test while holding a high level security clearance, it is not fanciful to believe that Applicant would make a concerted effort to get control of his drug problem. Additionally, Applicant's denial of any drug use subsequent to the December 2002 urine test is at least consistent with his own documentary evidence as well as that supplied by the Department Counsel. In light of this, we conclude that the Administrative Judge did not abuse his discretion in finding that Applicant had been rehabilitated, with no recurrence of his drug abuse. Though we acknowledge that there is much in the record that would have supported a different decision, given the constraints which the Directive imposes upon our exercise of appellate review, we find no error in the Administrative Judge's conclusion that Applicant had met his burden of persuasion as to MC 4, and his overall clearance decision is sustainable on the basis of that conclusion. In light of this, we do not need to address Department Counsel's objections to the Judge's analysis of the remaining Mitigating Conditions. ⁽⁴⁾

Order

The judgment of the Administrative Judge granting Applicant a clearance is AFFIRMED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: James E. Moody

James E. Moody

Administrative Judge

Member, Appeal Board

1. MC 1 (Directive ¶E2.A8.1.3.1): "The drug involvement was not recent;" MC 3 (Directive ¶E2.A8.1.3.3): "A demonstrated intent not to abuse any drugs in the future;" and MC 4 (Directive ¶E2.A8.1.3.4): "Satisfactory completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a credentialed medical professional."
2. Given that Department Counsel did not challenge the qualifications of the mental health providers mentioned in the record, we conclude that Applicant has met his burden as to the final clause of C 4 (see footnote 1 above).
3. Transcript at 54 *et seq.*
4. The fact that Applicant last used marijuana over three years prior to the hearing is consistent with the Judge's application of MC 1. *See*, ISCR Case No. 03-18522 (App. Bd. May 16, 2005) ("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 . . . 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 . . . almost three years before the hearing.")