

DATE: June 28, 2005

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-25009

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

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

**FOR APPLICANT**

Richard Murray, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of reasons (SOR), dated July 7, 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). Administrative Judge James A. Young issued an unfavorable security clearance decision, dated December 21, 2004.

Applicant appealed the Administrative Judge's decision. The Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant's appeal presents the following issues: (1) whether the Administrative Judge erred in his interpretation and application of 10 U.S.C. §986(c)(2); (2) whether the Administrative Judge failed to properly consider important evidence; and (3) whether the Administrative Judge's adverse conclusions under Guideline H were permissible in light of his findings of fact and the terms of the Adjudicative Guidelines. For the reasons set forth below, the Board affirms the 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 in his interpretation and application of 10 U.S.C. §986(c)(2). Under 10 U.S.C. §986, the Department of Defense cannot grant or renew a security clearance for various categories of persons, including a person who "is an unlawful user of, or is addicted to, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))." [hereinafter "Subsection (c)(2)"]. The Administrative Judge concluded that Applicant was covered by Subsection (c)(2) because:

(a) Applicant had been diagnosed as cocaine dependent in April 2001;

(b) drug dependence is the equivalent of "is addicted to" under Subsection (c)(2);

(c) Applicant admits he is a recovering addict; and

(d) the plain meaning of Subsection (c)(2) suggests that Congress intended persons who had been addicted to, or dependent on, controlled substances in the past to be "forever barred from being granted a clearance even if they have been clean for many years."

Applicant contends the Administrative Judge interpreted and applied Subsection (c)(2) in a manner that is arbitrary and capricious and contrary to the plain meaning of the statute, because:

(i) the language of the statute applies to current unlawful drug use or current addiction, not past unlawful drug use or past addiction;

(ii) the DoD memorandum promulgated to implement 10 U.S.C. §986 uses language that limits the applicability of §986(c)(2) to current drug use or current addiction; and

(iii) the Judge improperly relied on the definition of "dependence" in DSM IV-TR to conclude Applicant is a drug addict.

Applicant's appeal arguments rely on an implicit premise: there is no evidence establishing that he currently is an unlawful user of, or currently is addicted to, cocaine. <sup>(1)</sup>

Applicant correctly notes that Subsection (c)(2) uses the present tense, not the past tense, when referring to unlawful use, or addiction to, controlled substances. As the Board has previously noted, <sup>(2)</sup> Congress has provided guidance for construing federal statutes in 1 U.S.C. §1. That statute states:

"In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . words used in the present tense include the future as well as the present."

1 U.S.C. §1 does not say explicitly or implicitly that words used in the present tense include the past. Moreover, Applicant correctly notes that the June 7, 2001 memorandum issued by the Deputy Secretary of Defense to implement 10 U.S.C. §986 uses the following language: "Anyone who *is currently* an unlawful user of, or addicted to, a controlled substance is not considered eligible for a security clearance." (italics added) Taken together, 1 U.S.C. §1 and pertinent language from the Deputy Secretary of Defense memorandum lead the Board to conclude that the Administrative Judge's interpretation of Subsection (c)(2) is contrary to law.

During the proceedings below, Applicant controverted the SOR allegation that he is covered by Subsection (c)(2). Accordingly, Department Counsel had the burden of presenting evidence to establish that Applicant is covered by Subsection (c)(2). <sup>(3)</sup>

In order to resolve this appeal, the Board does not have to decide whether evidence of drug dependence would be sufficient to satisfy the "is addicted to" language of Subsection (c)(2). Even if the Board were to assume -- solely for purposes of deciding this appeal -- that the record evidence of Applicant's diagnosis of cocaine dependence would be sufficient to support a finding that he was addicted to cocaine at the time the diagnosis was made in April 2001, such a finding would not be sufficient to bring Applicant under Subsection (c)(2). Department Counsel offered no evidence: (a) of a more recent diagnosis, or (b) that a qualified professional <sup>(4)</sup> would consider the April 2001 diagnosis as sufficient to show Applicant is currently cocaine dependent.

Although the Administrative Judge erred by concluding application of Subsection (c)(2) precluded a favorable security clearance decision in this case, that error is harmless. As will be discussed later in this decision, the Judge's sustainable findings and conclusions about Applicant's history of cocaine abuse are sufficient to support his adverse formal findings under Guideline H, independent of any reliance on Subsection (c)(2).

Applicant's appeal brief lists the Administrative Judge's use of the DSM IV-TR as a separate appeal issue. Because the Judge used the DSM IV-TR as part of his interpretation and application of Subsection (c)(2), the Board's resolution of the Subsection (c)(2) issue makes this issue moot.

(2) Whether the Administrative Judge failed to properly consider important evidence. Applicant argues the Administrative Judge's decision fails to take into account important mitigating evidence constituting an important aspect of the case, namely Applicant's participation in a well-regarded recovery program (Alcoholic Anonymous). Applicant's challenge is not persuasive.

There is a rebuttable presumption that the Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. In this case, the Judge specifically cited Applicant's participation in the Alcoholics Anonymous program in his findings of fact (See Decision, p. 3). The Judge also referred to the application of Guideline H, Mitigating Condition 3 ("A demonstrated intent not to abuse any drugs in the future") in his conclusions (See Decision, p. 4). The Board concludes the Judge did consider Applicant's participation in Alcoholics Anonymous.

In addition to arguing that the Administrative Judge erred by not considering crucial evidence of rehabilitation, Applicant also asserts the Judge improperly discounted evidence of his recovery and rehabilitation. Applicant has failed to demonstrate error on the part of the Judge.

Subject to review for action that is arbitrary, capricious, or contrary to law, the weighing of evidence is within a Judge's discretion. The mere fact that a Judge concludes that favorable evidence presented by an applicant is not sufficient to outweigh or overcome the unfavorable evidence does not demonstrate that the Judge disregarded or ignored the favorable evidence or improperly weighed the evidence. <sup>(5)</sup> Other than mere disagreement with the Judge's weighing of the evidence, Applicant does not offer a cogent reason for why the Judge's weighing is arbitrary, capricious, or contrary to law.

(3) Whether the Administrative Judge's adverse conclusions under Guideline H were permissible in light of his findings of fact and the terms of the Adjudicative Guidelines. Applicant challenges the Administrative Judge's adverse conclusions, asserting those conclusions do not rationally follow from the Judge's findings of fact and proper application of the Adjudicative Guidelines. Applicant's challenge is not persuasive.

The Judge made findings of fact which were adverse to Applicant (that he used drugs from 1998 until 2001 and had returned to cocaine use after a treatment program in 2001) and that were favorable to Applicant (that he completed a treatment program in 2002, attends Alcoholics Anonymous meeting five times a week, and that a drug counselor believes he is sustained full remission). Application of the Adjudicative Guidelines is not reducible to a mechanical formula. Rather, an Administrative Judge must apply pertinent provisions of the Adjudicative Guidelines in a manner that reflects the exercise of sound judgment within the parameters set by the Directive. <sup>(6)</sup> The Board need not agree with the Judge's analysis of Applicant's history of drug abuse under the Drug Involvement disqualifying and mitigating conditions to conclude Applicant has not demonstrated the Judge's analysis is arbitrary or capricious. Given the Judge's findings of fact in this case, the Judge was not obliged to reach favorable conclusions under the Directive.

### **Conclusion**

Applicant has not demonstrated harmful error below. Therefore, the Administrative Judge's December 21, 2004 decision is affirmed.

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. Unless the Board accepts such an implicit premise as underlying Applicant's first two arguments, the Board would be faced with a request by Applicant to issue an advisory opinion about the interpretation and application of 10 U.S.C. §986(c)(2) without reference to the particular facts and circumstances of Applicant's case. The Board does not issue advisory opinions. *See, e.g.*, ISCR Case No. 99-0519 (February 23, 2001) at p. 6.

2. ISCR Case No. 02-21060 (August 9, 2004) at p. 5.

3. *See* Directive, Additional Procedural Guidance, Item E3.1.14.

4. In general, the Directive does not require a party prove its case by presenting a particular kind of evidence. However, the Drug Involvement disqualifying conditions and mitigating conditions refer to diagnosis, evaluation, and prognosis of drug abuse or drug dependence by "a credentialed medical professional (e.g., physician, clinical psychologist, or psychiatrist)" or "a licensed clinical worker who is a staff member of a recognized drug treatment program." The language directing that the diagnosis, evaluation, and prognosis of drug abuse or drug dependence must be proven by evidence showing a diagnosis, evaluation, or prognosis was made by a qualified individual is not ambiguous.

5. *See, e.g.*, ISCR Case No. 00-0587 (May 28, 2002) at p. 2.

6. *See, e.g.*, ISCR Case No. 02-00602 (March 3, 2004) at p. 5.