

DATE: June 30, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-04302

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated May 26, 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 Robert Robinson Gales issued an unfavorable security clearance decision, dated February 7, 2005.

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 erred by finding Applicant lacked candor over his past drug abuse; (2) whether the Administrative Judge erred by concluding Applicant had failed to demonstrate a clear intent to not use marijuana in the future; and (3) whether Applicant can be granted a security clearance on condition that he undergo random drug testing, submission of future sworn affidavits, or submit to a polygraph examination. 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⁾

1. Whether the Administrative Judge erred by finding Applicant lacked candor over his past drug abuse. The Administrative Judge concluded that Applicant demonstrated a "lack of candor over his past [marijuana] abuse" (Decision at p. 6). On appeal, Applicant challenges that conclusion, contending that the record evidence shows he cooperated with the investigator and disclosed his past marijuana use to the best of his ability.⁽²⁾

Because this case was decided on the basis of a File of Relevant Material, not a hearing, the Administrative Judge's findings about Applicant's credibility and candor had to be based, of necessity, on the written record. The deference owed to a Judge's credibility determinations⁽³⁾ is premised on the well-established legal principle that a Judge who personally observes a witness at the hearing has the opportunity to form impressions about the witness's credibility based on the Judge's assessment of the witness's demeanor while testifying. However, when an applicant waives a hearing and chooses to have his or her case decided by a Judge based on a written record, the Judge has no ability to make a credibility determination based on observation of the applicant's demeanor. Accordingly, a credibility determination based solely on a written record is not entitled to the same deference on appeal as a credibility determination based on observation of a witness's demeanor.⁽⁴⁾

In the decision below, the Administrative Judge identified several inconsistencies in Applicant's statements about his marijuana use history. Apart from those inconsistencies, there is no other discernable basis for the Judge's conclusion that Applicant lacked candor about his past marijuana use. Although the inconsistencies identified by the Judge did not compel the Judge -- as a matter of law or logic -- to conclude that Applicant has not always been candid with the government about the extent of his past marijuana use, they provide a legally permissible basis for the Judge to reach such a conclusion. Applicant's appeal argument to the contrary is not persuasive.

Applicant also challenges the Administrative Judge's statement that Applicant may still be using marijuana (Decision at p. 6). The Judge's conclusion about Applicant's lack of candor does not provide a rational or legally permissible basis for the Judge's statement that "it is also possible the substance abuse has not yet ceased" (Decision at p. 6). A credibility determination is not a substitute for record evidence.⁽⁵⁾ Given the record evidence in this case, the Judge's challenged statement is not sustainable. However, this error does not warrant remand or reversal because the Judge's sustainable findings and conclusions provide a legally sufficient basis for his unfavorable conclusions about Applicant's security eligibility.

2. Whether the Administrative Judge erred by concluding Applicant had failed to demonstrate a clear intent to not use marijuana in the future. The Administrative Judge concluded that Applicant failed to demonstrate a clear intent to not use marijuana in the future. Applicant challenges that conclusion on appeal, arguing that the Judge failed to consider his statements "in the context of my interview."

Given Applicant's admissions and the record evidence about his marijuana use history, the burden shifted to Applicant to present evidence sufficient to refute, explain, extenuate or mitigate the security concerns raised by his history of marijuana use.⁽⁶⁾ Considering the record as a whole, there is sufficient record evidence to allow the Administrative Judge to reasonably question whether Applicant would refrain from future use of marijuana. As the Judge noted in the decision below, Applicant used marijuana in April 2003 after indicating in a December 1999 written statement that he did not intend to use it in the future. Furthermore, as stated earlier in this decision, the Judge identified inconsistencies in Applicant's statements about his marijuana use that were sufficient to allow the Judge to reach an unfavorable conclusion about Applicant's candor concerning his past marijuana use. Accordingly, the Judge articulated a rational basis for his conclusion that Applicant had not demonstrated a clear intent to refrain from marijuana in the future. Given the clearly consistent with the national interest standard, the Judge properly resolved his doubts in favor of the national security.⁽⁷⁾

3. Whether Applicant can be granted a security clearance on condition that he undergo random drug testing, submission of future sworn affidavits, or submit to a polygraph examination. Applicant also states that he is willing to undergo random drug testing, submit sworn affidavits, or undergo a polygraph examination in order to get a security clearance. Under the Directive, there is no authority to grant a conditional security clearance.⁽⁸⁾ Therefore, the Board cannot grant Applicant the kind of relief he requests.

Conclusion

The Board affirms the Administrative Judge's decision because Applicant 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: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. Applicant's appeal brief contains factual assertions that go beyond the record below and seek to supplement the evidence in his case. Such assertions constitute new evidence, which the Board cannot consider. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Applicant waived his opportunity to have a hearing in his case. Furthermore, Applicant had the opportunity to respond to the File of Relevant Material and submit information for the Judge to consider in his case. Applicant cannot fairly challenge the Judge's decision based on a proffer of evidence on appeal that he did not submit for the Judge to consider in his case.

2. As noted earlier in this decision, there is no presumption of error below and the appealing party has the burden of raising claims of error. Because Applicant does not challenge the Administrative Judge's findings about his past marijuana use, the Board need not address or review those unchallenged findings.

3. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1.

4. *See, e.g.*, ISCR Case No. 98-0257 (January 22, 1999) at p. 2; ISCR Case No. 97-0625 (August 17, 1998) at pp. 2-3.

5. *See, e.g.*, ISCR Case No. 02-29403 (December 14, 2004) at pp. 5-6.

6. *See* Directive, Additional Procedural Guidance, Item E3.1.15.

7. Directive, Adjudicative Guidelines, Item E2.2.2. *See also Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

8. *See, e.g.*, ISCR Case No. 02-32842 (November 29, 2004) at p. 4.