DATE: December 20, 2006

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 04-09239

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) declined to grant Applicant a security clearance. On July 19, 2005, DOHA issued a statement of reasons (SOR) 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 May 12, 2006, after the hearing, Chief Administrative Judge Robert Robinson Gales denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Chief Administrative Judge's unfavorable security clearance decision under Guideline H is arbitrary, capricious, and contrary to law. The Board reverses the case.

Whether the Record Supports the Administrative Judge's Factual Findings

A. The Chief Administrative Judge made the following findings of fact:

Applicant is a 45-year-old employee of a defense contractor. He is seeking to obtain a Top Secret security clearance, and was previously granted a Secret security clearance in October 1990. Applicant has been employed by the same government contractor since August 1990, was promoted on several occasions, and currently serves in the staff category of associate staff member. His immediate supervisor and a work colleague both support his application and characterize Applicant as hardworking, trustworthy, and responsible. The overall assessment of his work performance is "excellent."

Applicant received a B.A. degree in English in 1982, and an M.S. degree in computer science in 1997.[(1)] He was married in 1987, had two children, born in 1989 and 1998, respectively, separated in 2000, and was divorced due to irreconcilable differences in 2002.[(2)] His ex-wife considers him to be honest, trustworthy, and responsible. She was unaware of any substance abuse by Applicant.

Applicant was a substance abuser whose choice of substances was marijuana. He started using it in the late 1970's, when he was a teenager, for unspecified reasons, and continued using it on an infrequent basis until he graduated from undergraduate school in 1982. Applicant contends he abstained from 1982 until 1995, and there is no evidence to rebut his contention.

At some point in 1995, while experiencing the initial stages of marital turmoil, Applicant was reintroduced to marijuana by his brother-in-law--his wife's brother--who had moved into Applicant's residence on a temporary basis while attending a local university. His resumption of marijuana abuse occurred one night when he and his brother-in-law were "hanging out" in the family residence and they started using the substance. Thereafter, until about September 2001 or November 2001,[(3)] on about 10 occasions, while attending concerts as well as during social events and parties at friends' homes and in his neighborhood, Applicant abused marijuana. He smoked it in both cigarette form and in a pipe. Applicant purchased marijuana, for his own use, on a few occasions, but only one of those purchases took place after 1995.

Applicant used marijuana for a variety of reasons. In January 2004, he claimed he was initially influenced by curiosity and the social setting in which he found himself, and because marijuana induced a mellow contemplative feeling. Applicant's therapist opined:

Contributing factors were his social anxiety and lack of confidence in social

situations, difficulty managing painful affects and interpersonal conflict,

and a wish to participate in social interaction in a more relaxed manner; these

factors were exacerbated by his distress over his marital situation and his

wife's decision to seek a separation and divorce.

During the hearing Applicant stated his initial use was motivated because of social pressure and because he believed marijuana would make him feel better in certain situations. His subsequent use was to ease some social anxiety or maybe even depression over the state of his marriage, and to feel better.

Applicant asserts he ceased abusing marijuana because of the lifestyle changes which occurred as a result of his divorce. He is now active in church, family, and fitness activities, and vows to abstain from future marijuana abuse.

Applicant recognized that marijuana abuse was illegal, and he hid his use from his wife and children. He also knew marijuana abuse while holding a security clearance was contrary to government policy, and kept his substance abuse from his employer. Applicant denied knowing that marijuana abuse was contrary to corporate policy.

Although he became a teaching fellow at a university, Applicant hid the fact of his substance abuse from the university because such information would have adversely affected his reputation within the university. Likewise, he did not volunteer his drug use when completing his employment application for his employer. Applicant did, however, volunteer his history of substance abuse on his SF 86 in August 2002.

In July 2000, Applicant underwent marital counseling and therapy to deal with his deteriorating marital relationship as well as social anxiety. That professional relationship eventually included issues related to his substance abuse, but that was not the primary reason for the therapy. No evaluation or diagnosis related to substance abuse was made. Applicant has never participated in any therapeutic or rehabilitative substance abuse program, and the collateral exposure to the topic of substance abuse while participating in marital therapy does not qualify as such.

B. Discussion

The Judge's findings of fact will be discussed in the context of the issues raised 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.*

Applicant contends that the Judge's unfavorable security clearance decision under Guideline H is arbitrary, capricious, and contrary to law. In support of that contention, Applicant argues that the Judge erred in his application of Guideline B Disqualifying Condition 5[(4)] and Mitigating Conditions 1[(5)] and 2.[(6)] He also argues that the Judge was biased and failed to consider relevant mitigating evidence. Applicant's arguments have mixed merit.

(1) Applicant argues the Chief Administrative Judge erred in applying Guideline H Disqualifying Condition 5 under the facts of his case. He also argues that the Judge's misapplication of that Disqualifying Condition is harmful error because it has the practical effect of subjecting Applicant to a higher standard of mitigation, given the Disqualifying Condition's expression of a strong presumption in favor of denial. Applicant's argument has merit.

In his decision, the Administrative Judge stated: "[Applicant's] actions fall within DI DC E2.A8.1.2.5."[(7)] The Judge's conclusion appears to be based solely upon the second sentence of the Disqualifying Condition ("*Recent* drug involvement, especially following the granting of a security clearance, or an expressed intent not discontinue use, will *almost invariably* result in an unfavorable determination"). However, that sentence appears in a context which is clearly articulated in the first sentence of the Disqualifying Condition ("Failure to successfully complete a drug treatment program prescribed by a credentialed medical professional"). No such context is present in this case. According to the Judge's own findings, Applicant was never the subject of any prescribed drug treatment program, and thus never failed to successfully complete such a program: "Applicant has never participated in any therapeutic or rehabilitative substance abuse program." Decision at 6. Moreover, the Government did not argue for the application of Disqualifying Condition 5. Given the record in this case, the Judge did not articulate a basis for applying one sentence from the Disqualifying Condition outside the context of a failed drug program. Accordingly, the Judge erred in applying Disqualifying Condition 5 in Applicant's case. *See* ISCR Case No. 02-24452 at 3-4 (App. Bd. Aug. 4, 2004).

(2) Applicant argues the Chief Administrative Judge erred in concluding that the security concerns raised by his prior marijuana use had not been mitigated under Mitigating Condition 1 because Applicant's last use of marijuana, which occurred five years ago in 2001, was not recent.

The Directive is silent on what constitutes a sufficient period of reform and rehabilitation. However, such silence does not means an Administrative Judge has unfettered discretion in deciding what period of time is sufficient to demonstrate reform and rehabilitation.[(8)]

The sufficiency or insufficiency of an applicant's period of conduct without recurrence of past misconduct does not turn on any bright-line rules concerning the length of time needed to demonstrate reform and rehabilitation, but rather on a reasoned analysis of the facts and circumstances of an applicant's case based on a careful evaluation of the totality of the evidence record within the parameters set by the Directive.[(9)]

The Board has previously noted that where an applicant had extensive marijuana use and renewed marijuana use after periods of abstinence, a Judge may articulate a rational basis for doubts about whether the most recent period of abstinence was sufficient to conclude the applicant had put marijuana use behind them. *See e.g.* ISCR Case No. 02-08032 at 8 (App. Bd. May 14, 2004). However, the Board has repeatedly held that if the record evidence shows that a significant period of time has passed without evidence of misconduct by an applicant, then the Judge must articulate a rational basis for concluding why that significant period of time does not demonstrate changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation. *See, e.g.,* ISCR Case No. 98-0394 at 4 (App. Bd. Jun. 10, 1999).[(10)]

In this case, the record indicated Applicant had not used marijuana for five years, had self reported his past misconduct, had engaged in extensive psychotherapy, group therapy, and/or counseling, had exhibited a number of positive lifestyle

changes involving church, family, and fitness activities, and had excellent work and professional references. Yet the Judge merely stated without explanation: "In this instance, I consider Applicant's marijuana use in 2001 to be recent" [(11)]--and proceeded in a new paragraph to discuss Mitigating Condition 2. The Judge did not articulate a sustainable rationale for discounting the mitigative effect of Mitigating Condition 1. Such a failure was harmful error. *See* ISCR Case No. 02-24452 at 5-6 (App. Bd. Aug. 4, 2004).

(3) Applicant argues the Chief Administrative Judge erred in concluding that the security concerns raised by his prior marijuana use had not been mitigated under Mitigating Condition 2 because Applicant's marijuana use was an isolated incident. Given the record in this case, the Judge's conclusion that Applicant's marijuana use was not isolated is sustainable.

(4) Applicant argues that the Chief Administrative Judge's decision contains multiple statements that "are terse, cryptic, inflammatory, and conclusory, and show clear prejudice and bias by the Judge." [(12)] In support of this argument, Applicant specifically identifies these statements [(13)] in his brief:

"He destroyed his fiduciary relationship with the government over

his zeal for marijuana and placed his own drug-induced pleasures

above those fiduciary responsibilities . . ."

"That substance abuse was illegal and against government policy . . .

was of no concern to him"

"It was more important to him that concerts, parties with friends,

and other social events be enjoyed while abusing marijuana.

Marijuana was his crutch in confronting certain emotional issues" [(14)]

Applicant also argues that the Judge ignored record evidence inconsistent with his "prejudicial views," misrepresenting the type and quality of psychotherapy Applicant underwent to rehabilitate himself. In that regard, Applicant notes that the Judge found Applicant had engaged in "some psychotherapy, primarily related to marital issues," [(15)] but failed to consider that he had engaged in more the five years of psychotherapy, one year of group therapy, and EAP counseling, and that alternatives to marijuana to combat anxiety were discussed promoted, and embraced by the Applicant in all three of those venues. [(16)] Finally, Applicant notes that the Judge did not allow into evidence the psychologist's opinion regarding the likelihood Applicant would engage in drug use again, [(17)] framing it as an "agreement" between the parties. In that regard, Applicant argues that as a *pro se* applicant he was at a distinct disadvantage, a circumstance that allowed the Judge to prevail upon him to withhold crucial evidence. [(18)]

The Board has previously noted that the use of intemperate language by an Administrative Judge can give rise to a question of bias. *See, e.g.,* ISCR Case No. 03-26176 at 3-4 (App. Bd. Oct. 14, 2005); DISCR Case No. 94-0282 at 5 (App. Bd. Feb. 21, 1995). However, there is a rebuttable presumption that a Judge is impartial and unbiased, and a party seeking to rebut that presumption has a heavy burden of persuasion. *See, e.g.,* ISCR Case No. 02-08032 at 4 (App. Bd. May 14, 2004). The issue is not whether Applicant personally believes the Judge was biased or prejudiced against Applicant. Rather, the issue is whether the record contains any indication the Judge acted in a manner that would lead a reasonable person to question the fairness and impartiality of the Judge. *See, e.g.,* ISCR Case No. 01-04713 at 3 (App. Bd. Mar. 27, 2003). Bias is not demonstrated merely because the Judge made adverse findings or reached unfavorable conclusions. *See, e.g.,* ISCR Case No. 94-0954 at 4 (App. Bd. Oct. 16, 1995). Moreover, even if an appealing party demonstrates error by the Judge, proof of such error, standing alone, does not demonstrate the Judge was biased. *See, e.g.,* ISCR Case No. 98-0515 at 5 (App. Bd. Mar. 23, 1999).

In this case, the Administrative Judge's findings about Applicant's conduct, credibility, and motives, that the Applicant takes issue with, went beyond what was reasonably supported by the record evidence. *See*, *e.g.,* ISCR Case No. 02-24452 at 4-5 (App. Bd. Aug. 4, 2004). However, because the Applicant has identified these and other errors sufficient to warrant reversal, the Board need not reach the issue of whether the circumstances presented in the case constitute a sufficient basis for a reasonable person to question the fairness or impartiality of the Judge.

(5) Applicant has met his burden of demonstrating several errors which cumulatively were harmful to his case. No argument has been presented to sustain the decision on other grounds, and the Board has considered the precedent in other cases. *See, e.g.,* ISCR Case No. 02-24452 (App. Bd. Aug. 4, 2004). Accordingly, the Chief Administrative Judge's adverse security clearance decision must be reversed.

Order

The Chief Administrative Judge's unfavorable security clearance decision is REVERSED.

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: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. Applicant Exhibit D.

2. Applicant Exhibit B.

3. Applicant's memory as to the last time he remembers using marijuana is such that on two occasions, when he completed his SF 86 in August 2002, and when he furnished his sworn statement in January 2004, he stated his last use occurred in November 2001. In his Response to SOR in August 2005, and during the hearing in February 2006, he contended the date was September 2001.

4. Directive ¶ E2.A8.1.3.5 ("Failure to successfully complete a drug treatment program prescribed by a credentialed medical professional. *Recent* drug involvement, especially following the granting of a security clearance, or an express intent not discontinue use, will *almost invariably* result in an unfavorable determination").

5. Directive ¶ E2.A8.1.3.1 ("The drug involvement was not recent").

6. Directive ¶ E2.A8.1.3.2. ("The drug involvement was an isolated or *aberrational* event).

7. Decision at 9.

8. The silence of the Directive with respect to specific time periods (in the general factors of Directive, Section 6.3 and Enclosure 2, ¶ E2.2.1, and in the Adjudicative Guidelines) does not relieve an Administrative Judge of the obligation to construe and apply pertinent provisions of the Directive in a reasonable, common sense way. *See, e.g.*, ISCR Case No. 02-11810 at 4 (App. Bd. June 5, 2003); ISCR Case No. 98-0394 at 2-3 (App. Bd. June 10, 1999). Cf ISCR Case No. 98-0611 at 2-3 (App. Bd. Nov. 1, 1999)(Administrative Judge must consider the record evidence as a whole in assessing the significance to be accorded to the passage of time since the applicant's last act of misconduct).

9. *See, e.g.*, ISCR Case No. 02-05110 at 4-5 (App. Bd. Mar. 22, 2004)(discussing reasons why security clearance adjudications are not reduced to mechanical, formula adjudication, nor left to the unfettered discretion of security clearance adjudicators).

10. *Compare* ISCR Case No. 98-0394 (June 10, 1999) at p. 4 (although the passage of three years since the applicant's last act of misconduct did not, standing alone, compel the Administrative Judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) with ISCR Case No. 01-02860 (May 7, 2002) at p. 3 ("The Administrative Judge articulated a rational basis for why she had doubts about the sufficiency of Applicant's efforts at alcohol rehabilitation.").

11. Decision at 9.

12. Applicant's Brief at 6.

13. *Id* at 6-7.

14. Decision at 9.

15. *Id*

16. Applicant's Brief at 7.

17. App. Ex. C. This document was a report on Applicant's treatment from his Licensed Psychologist. The part to which Applicant refers states: "With regard to the question of whether [Applicant] is likely to resume any type of drug use, it is my professional opinion that he is highly unlikely to do so. First of all, his limited use did not constitute a pattern typical of habitual drug users. Second, he has developed an understanding of the reasons he had used marijuana, and has worked diligently to address his social and emotional vulnerabilities. Third, he has demonstrated a consistent pattern of responsibility, integrity and trustworthiness in his work, family and religious life. He has developed strong problem solving tools, and shows good judgment in managing conflicts as they arise in his life. In addition, he has developed a strong social system, which he utilizes as needed to cope with situational stressors." And ". . . his ongoing treatment in psychotherapy addressed the underlying issues contributing to his intermittent marijuana use, and met general criteria for relapse prevention and rehabilitation."

18. *Id* at 7, note 17.