

DATE: May 19, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-09959

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, 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 6, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct), pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended)(Directive). Applicant requested a hearing. On October 21, 2005, after the hearing, Administrative Judge Barry M. Sax granted Applicant's request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Administrative Judge's favorable clearance decision under Guideline F is arbitrary, capricious, or contrary to law; whether the Administrative Judge's favorable clearance decision under Guideline E is arbitrary, capricious, or contrary to law. [\(1\)](#)

Whether the Record Supports the Administrative Judge's Factual Findings

A. Facts

The Administrative Judge made the following findings:

Applicant is a 57-year-old employee of a defense contractor. At the time the SOR was issued, Applicant had eight bad debts totaling approximately \$36,000. A number of the debts had been placed for collection or charged off. Between July 25, 2005 and August 3, 2005, Applicant paid off or settled seven of the debts, some at a reduced amount. Applicant has been making significant payments on the remaining outstanding debt for child support and intends to continue to due so in the future. Applicant has a net remainder of \$665 a month, after payment of his regular monthly expenses, from which to make this payment.

Applicant used marijuana on a daily to twice daily basis from about 1996 to at least 1999, after receiving a security clearance from the Department of Defense in 1996. He has been marijuana free for over six years.

Applicant was taken to a police station in March 2004, for suspicion of Driving While Under the Influence of Alcohol/Drugs (DUI). His blood alcohol content tested at .201 and .218. Applicant was arrested by warrant in April

2004, but according to Applicant, the charge was dismissed because the arresting officer could not "place him in the vehicle." Applicant admitted to drinking, but considered it a one-time mistake. He reported it to his supervisor at work.

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 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, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (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.

Department Counsel challenges the Administrative Judge's finding that: "Applicant used marijuana for a period of three or four years, out of a life of some 57 years." Decision at 5. It is Department Counsel's position that the finding is not supported by the record evidence. Department Counsel's challenge has merit.

At the hearing, Applicant testified that he began using marijuana in the early 1970's, including while he was in the military. He also testified that his frequency of use from 1972 to 1980 was approximately two to three times a year and increased to a couple times a day in the mid 1990s. Transcript at 42-43. In his May 4, 2004, signed, sworn statement, Applicant stated that he used marijuana four to six times a year from 1980 to about 1996, and purchased 1/4 ounce of marijuana a week for about \$30 to \$35 from 1996 to 1999.⁽²⁾ Government Exhibit #6 at 1-2. Accordingly, the Administrative Judge's finding that Applicant used marijuana for a period of only three or four years out of a life of 57 years is erroneous. Applicant also used marijuana with varying frequency from approximately 1972 to 1996--a additional period of approximately 24 years.

The error established by Department Counsel is harmful. Although Department Counsel did not amend the SOR to incorporate Applicant's additional marijuana use as a separate basis for denial under Guideline E, that use was still relevant evidence that the Administrative Judge was obligated to consider in evaluating the seriousness of the conduct alleged in the SOR, the extent to which the alleged conduct was recent, isolated, or aberrational, the extent of Applicant's reform and rehabilitation, the likelihood that the conduct would be repeated in the future, the sufficiency of Applicant's current period of abstinence, and the credibility of Applicant's testimony as to the circumstances of the incidents at issue and his reform and rehabilitation. *See, e.g.* ISCR Case No. 02-23365 at 5 (App. Bd. Mar. 22, 2004).

Department Counsel also challenges the Administrative Judge's finding that: "[Applicant] was clearly intoxicated, even if he was not driving. At the same time, there is no showing that he actually violated any law." Decision at 5. It is Department Counsel's position that the finding is not supported by the record evidence. Department Counsel's challenge has merit.

In his May 4, 2004, signed, sworn statement, Applicant stated: "I had been out at a local bar, and had become mildly intoxicated. I attempted to drive home, and was very tired. I parked in front of what I believed to be my apartment . . ." Government Exhibit #6 at 3. Additionally, at the time of the incident, Applicant told police officers that: ". . . he had been driving the car home . . . and was just a couple of blocks off." Government Exhibit #4 at 7. Applicant's blood alcohol content at the time of the incident was found to be .201 and .218, and he was arrested for Driving While Under the Influence of Alcohol and/or Drugs. Decision at 2 & 4. Applicant stated that the case was dismissed because the arresting officer could not "place him in the vehicle," not because he had not been driving under the influence.⁽³⁾ Accordingly, the Administrative Judge's finding that there is no showing Applicant actually violated any law is erroneous in that it is not supported by substantial evidence and is contrary to the weight of the evidence in the record.

Again, the error established by Department Counsel is harmful, in that it resulted in the Administrative Judge's under weighting the seriousness of Applicant's disqualifying conduct.

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*.

Department Counsel contends that it was arbitrary and capricious for the Administrative Judge to conclude that the security concerns raised by Applicant's history of indebtedness were mitigated by application of Financial Considerations Mitigating Conditions 3⁽⁴⁾ and 6⁽⁵⁾ and a "whole person" analysis. In support of that contention, Department Counsel argues that one of the debts had not been paid off and that Applicant's resolution of the other seven debts occurred shortly before the hearing, well after invocation of the security clearance process, and only after those debts had been delinquent for many years or placed for collection. She also argues that there was no evidence that specifically connected individual debts to Applicant's divorce and unemployment.

The findings that Applicant had successfully mitigated the security concerns under Guideline F reflect permissible interpretations of the record evidence by the Administrative Judge. The fact that Department Counsel can articulate a reasonable alternative interpretation is of no moment. Department Counsel has not met her burden of demonstrating that the Judge's findings do not reflect a reasonable or plausible interpretation of the record evidence.

Department Counsel's argument concerning Guideline F Mitigating Condition 3 is premised on the notion that an Administrative Judge cannot apply that mitigating condition unless the applicant demonstrates that the debts at issue became delinquent as a direct result of the circumstances beyond applicant's control. The Board has previously noted that a Judge is not required to interpret Mitigating Condition 3 so narrowly. Given the wording of that mitigating condition, it is not unreasonable for a Judge to construe it as covering a situation where the record evidence shows that events beyond an applicant's control resulted in, or significantly contributed to the applicant's debts becoming delinquent, or the applicant becoming unable to deal with or otherwise address debts that had become delinquent previously, or the applicant incurring new, unforeseen debts that aggravate or exacerbate the applicant's financial situation. The Board has also previously noted that while it is reasonable to expect applicants to have documentation about the satisfaction of specific debts, it is not so obvious to expect that applicants will necessarily have documentation about how they got into financial difficulties. In such cases, it is not unusual for the applicant's financial difficulties to have begun years earlier, while claims of satisfaction of debts alleged in the SOR involve more recent events. *See* ISCR Case No. 03-17479 at 4 (App. Bd. Nov. 3, 2005). Given the record in this case, Department Counsel has not demonstrated it was arbitrary, capricious, or contrary to law for the Judge to give Applicant some credit for the mitigating evidence he produced under Mitigating Condition 3.

Similarly, given the record evidence in this case, Department Counsel has not demonstrated it was arbitrary, capricious, or contrary to law for the Administrative Judge to give Applicant some credit under Guideline F Mitigating Condition 6 with respect to the mitigating evidence he produced. The Judge made sustainable findings that Applicant had established a plan to resolve his financial problems and taken significant actions to implement that plan. Applicant was not required, as a matter of law, to establish that he had paid-off every debt in its original full amount.

Department Counsel is essentially arguing that the record evidence shows that Applicant was not as diligent about dealing with his financial problems as he could have been. However, the unfavorable record evidence cited by Department Counsel is not sufficient to demonstrate the Administrative Judge's decision is arbitrary, capricious, or contrary to law. As the trier of fact, the Judge had to weigh the evidence as a whole and decide whether the favorable evidence outweighed the unfavorable evidence or *vice versa*. Department Counsel's disagreement with the Judge's weighing of the record evidence is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. In this case, Applicant had arranged for a comprehensive approach for paying-off, settling or otherwise resolving his indebtedness. He had reasonably documented actions he had taken in furtherance of that approach and had demonstrated a not insubstantial improvement to his financial situation. He is now alert to the

security concerns presented by his circumstances and the responsibilities incumbent on him as a result. The Board need not agree with the Judge's decision under Guideline F to conclude that it is sustainable.

With respect to the Guideline E allegations, Department Counsel argues that the Administrative Judge's favorable clearance decision is arbitrary and capricious because the Judge erred in not applying Disqualifying Condition 5⁽⁶⁾ and engaged in a piecemeal analysis of the evidence which failed to consider important aspects of the case. Department Counsel's argument has merit.

In his decision, the Administrative Judge concluded that: "The record does not suggest a history or pattern of dishonesty or rule violation. In effect, no Disqualifying Conditions have been show [sic] to apply." Decision at 5. Department Counsel argues that Applicant's daily illegal use of marijuana for a period of three to four years, at times while holding a security clearance, and his recent incident of severe intoxication while driving a motor vehicle, when considered in conjunction with the other record evidence, including Applicant's additional 24 years of illegal marijuana use, constituted sufficient evidence of a pattern of rule violations to warrant application of Guideline E Disqualifying Condition 5. The Board finds this argument to be persuasive. Given the record evidence in this case, it was arbitrary and capricious for the Judge not to apply Disqualifying Condition 5.

The Board also finds Department Counsel's other argument to be persuasive. In this case, the Administrative Judge made findings of fact that narrowly tracked the individual allegations in the SOR. The Judge's favorable clearance decision under Guideline E is predicated on letters of support from Applicant's supervisors and Applicant's testimony as to the circumstances surrounding his conduct. The Judge made no findings of fact related to reform or rehabilitation. Although Applicant offered substantial, independent evidence relating to his payment of his debts and the improvement of his financial situation, he offered no such independent evidence as to reform, rehabilitation or changes in personal circumstances with respect to his Guideline E conduct. The Judge's decision does not reflect consideration of significant aspects of the case including Applicant's 24 additional years of illegal marijuana use between 1972 and 1996. Moreover, the Judge offered little in the way of explanation or analysis to support his favorable conclusions and did not consider or favorably apply any of the Guideline E itigating Conditions. An Administrative Judge can be arbitrary or capricious if he does not examine relevant evidence, fails to articulate a satisfactory explanation for his conclusions, or fails to consider an important aspect of the case. *See, e.g., Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co., supra* at 43.

The record evidence shows that Applicant has a lengthy history of poor judgements, rule violations or other disqualifying conduct that includes a 27 year period of illegal use of marijuana, at times while holding a security clearance, a recent incident of driving a motor vehicle while seriously intoxicated, and the non payment of lawful debts which was only mitigated subsequent to the issuance of the SOR. A review of the Administrative Judge's decision reveals that he addressed each category of Applicant's misconduct separately and considered the application of various mitigating factors separately without reference to the totality of Applicant's circumstances and the record as a whole. The Judge's analysis of the numerous acts of misconduct in this record failed to reflect a reasonable interpretation of the record evidence as a whole. By analyzing each category of incidents separately, the Judge failed to consider the significance of Applicant's pattern of conduct. *Compare Raffone v. Adams*, 468 F. 2d 860, 866 (2d Cir. 1972)(taken together, separate events may have a significance that is missing when each event is viewed in isolation). In this case, there was evidence of serious, repeated poor judgement and rule violations which spanned more than thirty years and persisted until after the issuance of the SOR.

Under the whole person concept, an Administrative Judge must consider the totality of Applicant's conduct when deciding whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. *See, e.g., ISCR Case No. 98-0350* at 3 (App. Bd. Mar. 31, 1999). The Judge's piecemeal analysis of Applicant's overall conduct did not satisfy the requirement's of ¶ E2.2.1 of the Directive. His favorable clearance decision under Guideline E is contrary to the weight of the evidence.

When an appealing party demonstrates factual or legal error, the Board must consider whether the error is harmful or harmless and whether the nonappealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds. If the Administrative Judge's decision cannot be affirmed, the Board must then consider whether the case should be reversed or remanded. In this case, the Judge's favorable clearance decision under

Guidelines F is sustainable. However, his favorable clearance decision under Guideline E is not sustainable, and the identified errors are unlikely to be remedied by remand. Therefore, that decision must be reversed.

Order

The decision of the Administrative Judge granting Applicant a clearance is REVERSED.

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

Separate Opinion of Administrative Judge Michael Y. Ra'anan

There is an aspect of this case which the majority has not discussed. Applicant was asked at the hearing if he had received any treatment for marijuana at which point he testified that he had slashed his wrist, was hospitalized, advised to obtain counseling, and was counseled for six weeks. There are at least two reasonable ways the Administrative Judge might have handled such testimony (and the consistent evidence elsewhere in the record). However, I believe it was error for the Judge not to address it at all. (Ironically, the Judge could have used this evidence to bolster his decision.)

The majority has identified several errors in the Administrative Judge's decision. I concur in their identification of those errors. I do not favor reversal because the bulk of Applicant's disqualifying conduct is dated.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman (Acting), Appeal Board

1. The Administrative Judge found in favor of the Applicant with respect to SOR subparagraph 2.c. That favorable finding is not at issue on appeal.
2. In the May 4, 2004 statement, Applicant states he used no marijuana or drugs from 1972 to 1980, a statement in conflict with his hearing testimony.
3. In his decision, the Administrative Judge found: "Applicant states that the complaint was dismissed because the arresting officer could not 'place him in the vehicle'." Decision at 4. The Judge does not indicate whether he believed Applicant's testimony and found it credible, or whether Applicant's explanation was the actual reason for the dismissal. Thus, the Judge does not make a sustainable finding as to why the complaint was dismissed.
4. Directive ¶ E2.A6.1.3.3. "The conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation)."

5. Directive ¶ E2.A6.1.3.6. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts."

6. Directive ¶ E2.A5.1.2.5 ("A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency").