

DATE: December 20, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-03143

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 12, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline H (Drug Involvement) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision based on the written record. On May 31, 2006, after considering the record, 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. [\(1\)](#)

Applicant raised the following issues on appeal: whether Applicant was denied due process; whether the Chief Administrative Judge's material findings are supported by substantial evidence; whether the Administrative Judge's overall adverse security clearance decision under Guideline H is arbitrary, capricious, or contrary to law.

(1) Applicant requests that his case be remanded to the Administrative Judge for a hearing. In support of this request, Applicant argues that the Judge's decision based upon the written record was "one-sided and unfair" in that: (a) the Judge "nitpicked details of [Applicant's] statement"; (b) reached an adverse credibility determination about Applicant based upon minor inconsistencies in the written record; (c) failed to give Applicant credit for the fact that he had self-reported his drug use; and (d) made findings that are logically inconsistent and are a pejorative characterization of the record evidence. In support of this argument, Applicant offers new evidence in the form of additional details about his prior drug use. Applicant's argument in this regard lacks merit.

The Board may not consider Applicant's new evidence on appeal. *See* Directive ¶ E3.1.29. Its submission does not demonstrate error on the part of the Administrative Judge. *See, e.g.*, ISCR Case No. 02-12789 at 3 (App. Bd. May 13, 2005).

There is a rebuttable presumption that federal officials and employees carry out their duties in good faith. *See, e.g.*, ISCR Case No. 00-0030 at 5 (App. Bd. Sept. 20, 2001). A party seeking to rebut that presumption has a heavy burden of persuasion on appeal. Applicant has not met that heavy burden. *See, e.g.*, ISCR Case No. 03-21329 at 2 (App. Bd. Sep. 25, 2006).

The Board does not review a Judge's decision against a standard of perfection. *See, e.g.*, ISCR Case No. 95-0319 at 3

(App. Bd. Mar. 18, 1996); DISCR Case No. 91-0109 at 7 (App. Bd. July 1, 1993). It reviews a decision as a whole, rather than focusing on isolated sentences or passages in it, to discern what the Judge meant. *See, e.g.*, DISCR Case No. 90-1874 at 4 (App. Bd. July 30, 1993). There is a rebuttable presumption that the Administrative Judge considered all the record evidence unless he specifically states otherwise. *See, e.g.*, DOHA Case No. 96-0228 at 3 (App. Bd. Apr. 3, 1997); DISCR Case No. 93-1186 at 5 (App. Bd. Jan. 5, 1995). Moreover, the Judge is not required to cite or discuss every piece of record evidence. *See, e.g.*, DISCR Case No. 90-1596 at 5 (App. Bd. Sep. 18, 1992). Close cases should be resolved in the favor of national security, rather than in the favor of the Applicant. *See, e.g.* DISCR Case No. 93-1390 at 8 (Jan. 27, 1995).

A review of the record indicates Applicant was provided with the procedural rights set forth in Executive Order 10865 and the Directive. Applicant requested that his case be decided on the written record. He was provided with a copy of the government's file of relevant material (FORM), which contained the evidentiary exhibits upon which the Judge based his decision. He was given an opportunity to object to those exhibits and provide his own evidence to rebut the government's allegations. Applicant failed to object to the exhibits in the government's FORM or offer any evidence in his own behalf.

Although *pro se* applicants cannot be expected to act like lawyers, they are expected to take timely, reasonable steps to protect their rights under the Directive. *See, e.g.*, ISCR Case No. 00-0593 at 4 (App. Bd. May 14, 2001). If they fail to take timely, reasonable steps to protect their rights, that failure to act does not constitute a denial of their rights. *See, e.g.*, ISCR Case No. 02-19896 at 6 (App. Bd. Dec. 29, 2003). Because Applicant did not object to the government's exhibits or provide his own evidence with respect to the matters at issue, he has no valid claim for denial of due process under the Directive or Executive Order.

An Administrative Judge's credibility determination is not immune from review, but the party challenging that determination has a heavy burden on appeal. *See* ISCR Case No. 04-00225 at 2 (App. Bd. Nov. 9, 2006). After reviewing the record, the Board concludes Applicant has not met that burden. In this case, the Judge's adverse credibility determination is sustainable based upon the limited record that was before him.

The Board's review of an Administrative Judge's findings 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, (1966). The bulk of the findings which Applicant complains about are permissible characterizations of the record evidence on the part of the Judge. The Judge's material findings with respect Applicant's conduct of security concern reflect a plausible interpretation of the record evidence. The Board does not review a case *de novo*. Considering the record evidence as a whole, Judge's material findings of security concern are sustainable. *See, e.g.*, ISCR Case No. 96-0461 at 3 (App. Bd. Dec. 31, 1997). As noted earlier, the Board does not review a Judge's decision against a standard of perfection.

(2) Applicant argues that the Chief Administrative Judge should have concluded that the security concerns raised under Guideline H had been mitigated, as a matter of law, because Applicant's drug use was not recent, Applicant has demonstrated that he would not use drugs in the future, and Applicant provided clear evidence of rehabilitation. In support of this argument, Applicant cites to a number of DOHA Hearing Office decisions in which applicants in ostensibly similar circumstances were granted clearances. The Board does not find Applicant's arguments persuasive.

The decision in another DOHA Hearing Office case does not demonstrate error by the Judge in this case. A decision by a Hearing Office Judge is not legally binding precedent on that Judge's colleagues or the Board. *See* ISCR Case No. 01-22606 at 3-5 (App. Bd. Jun. 30, 2003).

The application of disqualifying and mitigating conditions does not turn simply on a finding that one or more of them applies to the particular facts of a case. *See, e.g.*, ISCR Case No. 01-14740 at 7 (App. Bd. Jan.15, 2003). Thus, the presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence

outweighs the unfavorable evidence, or *vice versa*. An applicant's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law.

In this case, the Chief Administrative Judge specifically considered the recency of Applicant's drug abuse and the extent of his rehabilitation. He made sustainable findings as to a lengthy and serious history of improper or illegal drug use by a 47-year-old Applicant who was familiar with the security clearance process. That history included illegal marijuana use in excess of 150 times between 1982 and 2002, and illegal use of methamphetamine one time and cocaine four times, between 1982 and 1988. It also included illegal use while holding a security clearance granted by the Department of Defense. Most importantly, the Judge noted Applicant's false statement in 2004, that his drug use was in the period 1982-1988. The Directive does not define "recent," and there is no "bright-line" definition of what constitutes "recent" conduct. ISCR Case No. 03- 02374 at 4 (App. Bd. Jan. 26, 2006). The Judge is required to evaluate the record evidence as a whole and reach a reasonable conclusion as to the recency of an applicant's conduct. ISCR Case No. 03- 02374 at 4 (App. Bd. Jan. 26, 2006). Accordingly, given the record in this case, it was not arbitrary, capricious or unlawful for the Chief Judge to conclude that Applicant's methamphetamine and cocaine use was mitigated because it was not recent, but that his marijuana use was not similarly mitigated. *See generally, e.g.* ISCR Case No. 03-22912 at 2 (App. Bd. Dec. 30, 2005). The Judge considered the totality of Applicant's circumstances. The Judge weighed the mitigating evidence offered by Applicant against other record evidence including the length and seriousness of the disqualifying conduct and considered the possible application of relevant mitigating conditions. The Judge found in favor of the Applicant with respect to two of the allegations. However, the Judge plausibly explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome all of the government's security concerns. Given the record that was before him, the Judge's ultimate unfavorable clearance decision under Guidelines H is not arbitrary, capricious or contrary to law. *See, e.g.,* ISCR Case No. 04-12548 at 2-3 (App. Bd. Sep. 18, 2006).

Order

The decision of the Administrative Judge denying 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: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge found in favor of Applicant with respect to SOR paragraphs 1.b and 1.c. Those favorable findings are not at issue on appeal.