DATE: January 10, 1997

In Re:

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

Applicant for Security Clearance

ISCR Case No. 96-0083

APPEAL BOARD DECISION

Appearances

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq.

Chief Department Counsel

FOR APPLICANT

Pro se

Administrative Judge Darlene Lokey Anderson issued a decision, dated September 27, 1996, in which she concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed. For the reasons set forth below, the Board affirms the Administrative Judge's decision.

This 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 by finding Applicant's marijuana use constituted drug abuse that posed a security risk; (2) whether the Administrative Judge erred by finding Applicant knowingly and willfully falsified material facts about his history of drug use; and (3) whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated March 19, 1996 to Applicant. The SOR was based on Criterion H (Drug Involvement), Criterion E (Personal Conduct), and Criterion J (Criminal Conduct).

A hearing was held on July 11, 1996. The Administrative Judge subsequently issued a written decision in which she entered formal findings against Applicant under each of the Criteria listed in the SOR and concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

The case is now before the Board on Applicant's appeal from the Administrative Judge's adverse security clearance decision.

Administrative Judge's Findings and Conclusions

Applicant used marijuana use during 1978-1995, with the frequency being weekly use during 1978-1982 and about once every six months after 1982. Applicant purchased marijuana during 1978-1991, and sold it on several occasions to friends in 1978. Applicant indicated he may use marijuana in the future. Applicant used cocaine on at least two occasions in 1978, and purchased and used amphetamines at least once in 1979.

On July 5, 1994, Applicant executed an application for a security clearance. In the application, Applicant stated he used marijuana in high school and college about every six months, and denied he had ever purchased or sold any illegal drug.

Applicant gave a sworn statement to the Defense Investigative Service (DIS) on February 15, 1995. In that statement, Applicant stated he only used marijuana, used it weekly from 1978 to 1983, and purchased it once a month between 1978 and 1981.

During a May 18, 1995 interview with the DIS, Applicant again stated he only used marijuana, that he used it weekly from 1978 to 1983 and bimonthly or less from 1983 to December 1994, and denied any purchase of marijuana since 1981.

Applicant's statements about his drug use history were false and constituted a violation of Section 1001 of Title 18 of the U.S. Code. Applicant falsified his answers about drug use because he was afraid he might lose his job.

The Administrative Judge concluded Applicant's use of cocaine and amphetamines was experimental and dated in nature. However, the Judge concluded Applicant's overall history of marijuana use (including his statements about future use), and his deliberate falsifications about his drug history warranted adverse formal findings under Criteria H, E, and J, and an adverse security clearance decision.

Appeal Issues

1. Whether the Administrative Judge erred by concluding Applicant's marijuana use constituted drug abuse that posed a security risk. Applicant does not challenge the Administrative Judge's findings about his history of drug use. However, he asserts: (a) his amount of marijuana use cannot be considered drug abuse; and (b) his marijuana use has not posed a security risk. Applicant's arguments are unpersuasive.

Applicant's personal belief that his use of marijuana does not constitute drug abuse, however sincere or deeply held, is not dispositive. The use of marijuana can be grounds for denying or revoking a security clearance. *See* Directive, Adjudicative Guidelines, Drug Involvement. *See also AFGE Local 1533 v. Cheney*, 944 F.2d 503, 506 n.6 (9th Cir. 1991)(discussing several ways that involvement with illegal drugs poses security risk). In this case, Applicant's overall history of marijuana use from 1978-1995 and his statements about possible future marijuana use provide a rational and legally permissible basis for the Administrative Judge to conclude Applicant's marijuana use raised serious questions about Applicant's security eligibility.

2. Whether the Administrative Judge erred by finding Applicant knowingly and willfully falsified material facts about his history of drug use. Applicant challenges the Administrative Judge's findings about falsification, arguing: (a) he did not intentionally conceal information about his drug use from the government; (b) he was overwhelmed by the security clearance process; (c) he felt he was being honest with the DIS investigator during the first interview; and (d) he later disclosed his drug use when he was placed at ease with the security clearance process. These arguments fail to demonstrate the Judge committed harmful error.

On appeal, 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 32.a. Even in the face of Applicant's denials of any intent to deceive or mislead the Government, the Judge can consider the evidence as a whole to determine whether Applicant's statements to the Government about his drug use were knowing and deliberate falsifications.

The Administrative Judge erred, in part, by finding that Applicant falsified the July 1994 security clearance application. The Judge found Applicant stated in that form "he had only used marijuana in high school and college, rarely about every six months or so." In fact, the language used by Applicant was: "Used cannabis in high school and college. Have only used cannabis since that time rarely, about every six months of so." Accordingly, the Judge's finding of falsification is in error to the extent it is predicated on her finding that Applicant misstated the extent of his marijuana use while in high school and college. However, the Judge's finding of falsification of the July 1994 form is sustainable to the extent it is based on Applicant's failure to disclose his purchase and sale of marijuana, as well as his experimental use of cocaine and amphetamines in high school.

The Administrative Judge's findings about Applicant's falsifications in the February 1995 statement and May 1995 interview are supported by the record evidence and are sustainable. Those findings of falsification are not affected by the Judge's error with regard to the July 1994 form.

3. Whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. In addition to Applicant's first two arguments, he contends: (a) the Administrative Judge erred by concluding his marijuana use demonstrated a "total disrespect for the law" because he has no criminal record; (b) the evidence presented by Applicant shows he is a loyal and reliable employee and has demonstrated "utmost honesty and trustworthiness"; and (c) there is no information that shows he is a security risk. The Board construes these arguments as raising the issue of whether the Judge's adverse decision is arbitrary, capricious, or contrary to law.

The Administrative Judge's "total disrespect for the law" comment is an unfortunate example of rhetorical excess. Applicant's history of involvement with marijuana indicates a disrespect for the laws prohibiting the purchase, possession, sale or use of marijuana. Nevertheless, the Judge went too far by concluding Applicant's marijuana history demonstrated "total disrespect for the law." This error by the Judge is harmless however. The Judge's overall findings and conclusions about Applicant's involvement with marijuana provide a rational basis for her adverse formal findings and conclusions under Criterion H.

The favorable evidence cited by Applicant on appeal does not demonstrate the Administrative Judge erred by making an adverse security clearance decision. The United States must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). Security clearance decisions are not limited to consideration of an applicant's job performance or his conduct during duty hours. *See, e.g.*, DOHA Case No. 96-0031 (December 30, 1996) at p. 3. Moreover, the Judge was not bound to give great or controlling weight to the favorable character evidence presented by Applicant in light of the record evidence that showed Applicant had sought to conceal material facts from the Government during the security clearance process. *See* ISCR Case No. 94-1109 (January 31, 1996) at p. 4 (favorable reputation for honesty and reliability must be discounted in face of proven acts of falsification).

The Administrative Judge's findings and conclusions about Applicant's history of involvement with marijuana and his falsifications about that history reflect a reasonable, plausible interpretation of the record evidence. They also provide a rational and legally permissible basis for her adverse security clearance decision.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error that warrants remand or reversal. Accordingly, the Board affirms the Administrative Judge's September 27, 1996 decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

See separate opinion

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

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Administrative Judge

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Applicant for Security Clearance

ISCR Case No. 96-0083

SEPARATE OPINION OF ADMINISTRATIVE JUDGE MICHAEL Y. RA'ANAN

I am troubled by the tone of the Administrative Judge's questioning of the *pro se* Applicant in this case. The Board has previously noted that "There is no simple formula or rule that specifies what questions an Administrative Judge may properly ask of a witness" (See DISCR Case No. 89-0821). However, the Judge should be mindful of some generalities in most DOHA cases: Any Applicant but especially a *pro se* Applicant may feel intimidated by the presence of both the Department Counsel and the Judge. The Department Counsel is there to make the Government's case. Usually the Judge can start with a presumption that the parties have statements to make and questions to ask. Then the Judge can inquire about pertinent matters not yet settled. If Department Counsel has already elicited an answer multiple times, the Applicant may feel all the more intimidated by the Judge repeating the Department Counsel's line of questioning and eliciting the same answers. Similarly, questions that are introduced with phrases such as "I assume" may create the impression that the Judge has already decided the case or factual findings. Open ended questions may tend to intimidate less than a statement. The use of adverbs or adjectives such as "totally" may tend to inflame passions or fears.[(1)]

My reading of the transcript leaves me with the impression that this Applicant may well have felt intimidated by the Judge's method of questioning. The Judge's ultimate decision in this case was not error, but the questioning required comment.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

1. The transcript has seven pages of questioning of Applicant by the Department Counsel (pages 46-53) on the subject of Applicant's motivation. In that segment of the transcript, Applicant acknowledges three times that he was afraid his employer would find out (TR. p.46 , p.50, and p.51). On page 53 the Administrative Judge picks up the questioning. Three times on pages 53 and 54 the Administrative Judge opens her question either with "I assume" or "I would assume." The Judge elicits the same acknowledgment two more times in the course of her questioning. At one point (TR. p.59) the Judge asks, "I'm trying to understand you're thinking here. You're just totally disregarding the rules and regulations --" (Applicant interrupts and then) "of the Department of Defense." Also, the Judge asked Applicant some two dozen questions prior to the Department Counsel asking anything.