

DATE: January 14, 1997

In Re:

SSN: -----

Applicant for Security Clearance

DOHA Case No. 96-0152

**APPEAL BOARD DECISION**

Appearances

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq.

Chief Department Counsel

FOR APPLICANT

*Pro se*

Administrative Judge Robert R. Gales issued a decision, dated September 26, 1996, in which he 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 Applicant had sufficient notice that he could request a hearing; (2) whether Applicant can submit additional information on his behalf; (3) whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law; and (4) whether Applicant can be granted a conditional security clearance.

**Procedural History**

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated March 20, 1996 to Applicant. The SOR was based on Criterion H (Drug Involvement), Criterion E (Personal Conduct), and Criterion J (Criminal Conduct).

Applicant submitted an answer to the SOR in which he indicated he did not wish to have a hearing. Applicant was provided a copy of the File of Relevant Material (FORM) prepared by Department Counsel. Applicant submitted a written response to the FORM and the case was assigned to the Administrative Judge for disposition.

The Administrative Judge issued a written decision in which he made findings about Applicant's drug use and falsifications and concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

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

### Appeal Issues

1. Whether Applicant had sufficient notice that he could request a hearing. On appeal, Applicant states: (a) he would have requested a hearing if he had known how serious the matter was; and (b) he was never advised that he should request a hearing. For the reasons that follow, the Board concludes Applicant received sufficient notice that he could request a hearing in his case.

As a preliminary matter, the Board notes Applicant's appeal brief makes statements about matters that are outside the record in this case. Such statements constitute new evidence, which the Board cannot consider. Directive, Additional Procedural Guidance, Item 29. Moreover, the record contains information that shows Applicant was placed on notice of the seriousness of these proceedings and his right to request a hearing.

The opening paragraph of the SOR sent to Applicant placed him on notice that his access to classified information could be denied or revoked. A copy of the Directive was sent to Applicant with the SOR (FORM, Item 2). Apart from the notice provided to Applicant by the Directive (Additional Procedural Guidance, Items 4, 7 and 8) concerning his right to request a hearing, the March 20, 1996 letter sent to Applicant with the SOR also informed him about his right to request a hearing and explained how the case would be handled if he did not request one. Furthermore, that letter contains the following statement: "***These actions could possibly result in loss of your present employment and have an adverse effect on any future employment requiring access to classified information.***" (FORM, Item 2)(emphasis in original).

In addition, Applicant's answer to the SOR (FORM, Item 3) contains the following statement: "As an employee of a government contractor I am fully aware that my continued employment is dependent on my security clearance and I will make any and all efforts to resolve this matter as quickly and completely as possible." That statement shows Applicant understood the potentially serious consequences that an adverse security clearance decision could have for him.

Considering the record as a whole, Applicant was on reasonable notice of his right to request a hearing in his case and was notified about, and understood, the potentially serious consequences that could result from an adverse security clearance decision. Applicant's appeal claims to the contrary are not supported by the case record.

2. Whether Applicant can submit additional information on his behalf. Applicant's appeal brief indicates he would like an opportunity to provide additional information by himself and through character witnesses for consideration in his case. The Board construes Applicant's statements on this matter as a request that he be given an opportunity to present additional information in his case.

As noted earlier in this decision, the Board cannot consider new evidence on appeal. Moreover, the record shows that Applicant was provided a reasonable opportunity to present information during the proceedings below for consideration by the Administrative Judge. The Additional Procedural Guidance section of the Directive placed Applicant on notice of how his case would be handled with or without a hearing. The March 20, 1996 letter sent to Applicant with the SOR (FORM, Item 2) explained his right to request a hearing and explained how he could present information for consideration in his case at a hearing or without a hearing. Moreover, the FORM sent to Applicant placed him on notice of his right to submit information in rebuttal or in explanation of the information contained in the FORM. In fact, Applicant submitted a written response to the FORM in which he indicated he was submitting certain information and had "no other comments or information to provide."

Considering the record as a whole, the Board concludes Applicant had reasonable notice and an opportunity to present information on his behalf for consideration by the Administrative Judge. It is too late in these proceedings for Applicant to seek an opportunity to submit additional information on his behalf.

3. Whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. The Administrative Judge made factual findings about Applicant's history of drug use and his false statements to the Government about that drug history. The Judge concluded Applicant's overall history of marijuana use (1971-1995) and his false denials to the Government about his drug history in 1990 and 1995 warranted an adverse security clearance decision. [\(1\)](#)

On appeal, Applicant argues: (a) his drug use was intermittent and only recreational in nature, and never occurred on the job; (b) he was never dependent on drugs; (c) his drug use was like drinking alcohol, done only to relax and relieve stress; (d) his false denials of drug use were not motivated to cover up any criminal behavior or to pose any security risk; (e) he considered his drug use to be minor infractions that did not affect his job performance or his ability to protect national security information; (f) he would never falsify information that he considered injurious to the national security; (g) he regrets his past mistakes and has learned from them; and (h) his supervisors and managers feel that he is a valuable employee who made a serious mistake but is worthy of continued employment or trust. The Board construes these arguments as raising the issue of whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law.

The Administrative Judge's findings about Applicant's involvement with marijuana are supported by the record evidence and are not specifically challenged by Applicant. Those findings provide a rational and legally permissible basis for the Judge's 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). Marijuana use raises questions about an applicant's security eligibility. See Directive, Adjudicative Guidelines, Drug Involvement (Criterion H). See also *AFGE Local 1533 v. Cheney*, 944 F.2d 503, 506 n.6 (9th Cir. 1991) (noting several ways that involvement with illegal drugs poses security risk). Regardless of Applicant's personal beliefs about marijuana and his motivation for using that drug, it was not arbitrary or capricious for the Judge to conclude Applicant's use of marijuana with varying frequency over the period 1971-1995 raised serious questions about Applicant's security eligibility. The fact that Applicant did not use marijuana on the job and was not dependent on it do not make the Judge's reasoning or his conclusions arbitrary or capricious.

The Administrative Judge's findings about Applicant's false statements to the Government about his drug history are supported by the record evidence and are sustainable. Applicant's personal beliefs about the security significance of his drug history are irrelevant. The record shows that Applicant understood the questions being asked about drugs and made a conscious decision to conceal his drug history from the Government in April 1990, June 1995, and August 1995. The fact that Applicant eventually disclosed his drug use to the Government in January 1996 does not render his earlier falsifications any less false or deliberate. Accordingly, it was not arbitrary or capricious for the Administrative Judge to find Applicant engaged in knowing and willful falsifications when he sought to conceal his drug history from the Government.

The Administrative Judge's findings about Applicant's falsifications provide a rational and legally permissible basis for the Judge's adverse decision. As noted above, the United States must be able to repose a high degree of trust and confidence in persons granted access to classified information. Security requirements include consideration of a person's honesty. *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961). See also *Harrison v. McNamara*, 228 F.Supp. 406, 408 (D. Conn. 1964) (lying on application for government position requiring a security clearance raises questions as to person's reliability and justifies dismissal), *aff'd per curiam*, 380 U.S. 261 (1965). Applicant's deliberate false statements to the Government in April 1990, June 1995, and August 1995 provide a rational basis for the Judge's adverse conclusions about Applicant's security eligibility.

Apart from a performance appraisal submitted by Applicant in response to the FORM, the opinions of Applicant's supervisors and managers about him are not part of the record before the Administrative Judge in making his decision. The Board cannot find the Judge committed error based on new information offered on appeal. Moreover, even if Applicant had submitted such information for the Judge's consideration, it would not have precluded the Judge from reaching an adverse decision. An employer's opinions about the seriousness of an applicant's conduct are not binding on the Judge. In this case, the Judge's conclusions about the nature and seriousness of Applicant's false statements are not arbitrary, capricious, or contrary to law.

4. Whether Applicant can be granted a conditional security clearance. Applicant contends he will never use illegal drugs again and offers to undergo, at his own expense, random or periodic drug screening and to undergo a drug treatment and rehabilitation program. The Board construes this proffer as raising the issue of whether Applicant can be granted a conditional security clearance.

Under the Directive, there is no authority to grant a conditional or probationary security clearance. See, e.g., ISCR Case

No. 96-0311 (December 12, 1996) at p. 3. Neither an Administrative Judge nor the Board has the authority to grant a security clearance based on an offer to take steps such as those offered by Applicant.

### **Conclusions**

Applicant has failed to meet his burden on appeal of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's September 26, 1996 decision.

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: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

1. The Administrative Judge's favorable conclusions under Criterion H concerning Applicant's use of Tylenol III with codeine are not at issue on appeal.