

DATE: February 24, 1997

In Re:

SSN: -----

Applicant for Security Clearance

DOHA Case No. 96-0316

APPEAL BOARD DECISION AND ORDER FOR REMAND

Appearances

FOR GOVERNMENT

Matthew E. Malone, Esq.

Department Counsel

FOR APPLICANT

Pro se

Administrative Judge Kathryn M. Braeman issued a decision, dated October 25, 1996, in which she concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Department Counsel appealed. The Board remands the case to the Administrative Judge for further processing consistent with the rulings and instructions set forth in this Decision and Order for Remand.

This Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6, dated January 2, 1992, as amended.

Department Counsel's appeal presents the following issues: (1) whether the Administrative Judge misapplied an Appeal Board decision; (2) whether the Administrative Judge misapplied pertinent Adjudicative Guidelines in evaluating Applicant's drug history; and (3) whether the Administrative Judge erred by finding credible Applicant's stated intention to not use drugs in the future.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR), dated May 8, 1996, to Applicant. The SOR was based on Criterion H (Drug Involvement).

A hearing was held on August 8, 1996. The Administrative Judge subsequently issued a written decision in which she concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Department Counsel's appeal from that favorable decision.

Appeal Issues

1. Whether the Administrative Judge misapplied an Appeal Board decision. The Administrative Judge cited the Board decision (and concurring opinion) in DISCR Case No. 88-2297 (December 15, 1992) to support her reasoning that

Applicant's use of marijuana after joining a defense contractor "is aggravating only if an Applicant uses illegal drugs when he knows fully he is risking his job or his clearance but decides to use drugs anyway and takes his chances" Department Counsel contends the Judge misapplied the Board's decision in that case.

Neither the Board decision nor the concurring opinion cited by the Administrative Judge provides any support, direct or indirect, for the Judge's reasoning. The Judge's interpretation of the cited Board decision and concurring opinion is unwarranted and untenable.

2. Whether the Administrative Judge misapplied pertinent Adjudicative Guidelines in evaluating Applicant's drug history. The Administrative Judge applied Drug Involvement Mitigating Guidelines 1⁽¹⁾ and 2⁽²⁾ to Applicant's use of drugs other than marijuana. Department Counsel contends the Judge's application of those Adjudicative Guidelines was erroneous because they could not be applied in light of Applicant's extensive history of marijuana use. Department Counsel's contention has merit.

It was arbitrary and capricious for the Administrative Judge to apply Drug Involvement Mitigating Guidelines 1 and 2 to Applicant's non-marijuana drug abuse despite the simple fact that those Mitigating Guidelines cannot reasonably be applied to the overwhelming majority of Applicant's drug history. The Judge's approach did not reflect a common sense application of those Mitigating Guidelines and was inconsistent with the "whole person" concept required by the Directive. *See* ISCR Case No. 96-0560 (August 16, 1996) at p. 3 (Administrative Judge erred by analyzing applicant's drug abuse in a piecemeal manner instead of in its entirety). The current Drug Involvement Adjudicative Guidelines do not leave room for a drug by drug analysis of an applicant's drug abuse history.

3. Whether the Administrative Judge erred by finding credible Applicant's stated intention to not use drugs in the future. The Administrative Judge found credible Applicant's stated intention to not use drugs in the future. Department Counsel contends the Judge erred because the record does not support her credibility determination. On appeal, Department Counsel cites record evidence that it contends undercuts the Administrative Judge's finding about Applicant's stated intention not to use drugs in the future. Although Department Counsel's argument is a strong one in this case, it falls just short of demonstrating the Judge erred.

It is irrelevant whether the Board would reach the same conclusion about Applicant's credibility if its scope of authority were *de novo* review. Under the Directive, the Board must give deference to an Administrative Judge's credibility determinations. *See* Directive, Additional Procedural Guidance, Item 32.a. That deference does not immunize a Judge's credibility determinations from review, nor does it preclude the Board from finding a credibility determination unsustainable. *See, e.g.*, ISCR Case No. 95-0178 (March 29, 1996) at pp. 2-3. However, an appealing party has a heavy burden of persuasion when challenging a Judge's credibility determination. The Board need not agree with the Judge's credibility determination in this case to conclude the contrary record evidence cited by Department Counsel falls just short of demonstrating the Judge's finding is arbitrary, capricious, or contrary to law.

Conclusion

Department Counsel has met its burden on appeal of demonstrating error that warrants remand. Accordingly, pursuant to Item 33.b. of the Additional Procedural Guidance, the Board remands the case to the Administrative Judge. On remand, after correction of the errors identified in this decision, the Judge must issue a new decision consistent with the requirements of Items 35 and 25 of the Additional Procedural Guidance.

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. "[T]he drug involvement was not recent."
2. "[T]he drug involvement was an isolated or infrequent event."