

DATE: May 1, 1997

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 96-0522

APPEAL BOARD DECISION

Appearances

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq.

Chief Department Counsel

FOR APPLICANT

Pro se

Administrative Judge Michael Kirkpatrick issued a decision, dated December 31, 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 issue of whether the Administrative Judge made three errors in his findings and conclusions that warrant remand or reversal.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated July 30, 1996 to Applicant. The SOR was based on Criterion H (Drug Involvement).

Applicant submitted an answer to the SOR, in which he indicated he wanted a decision made in his case without a hearing. A File of Relevant Material (FORM) was prepared, and a copy given to Applicant. After Applicant submitted a response to the FORM, the case was assigned to the Administrative Judge for handling.

The Administrative Judge subsequently issued a decision in which he 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 that adverse decision.

Appeal Issue

Applicant contends the Administrative Judge made careless errors in his findings and conclusions that deprived him of a

fair and just decision. Specifically, Applicant asserts: (1) the Judge erred by failing to explain why he dismissed that portion of Applicant's answer to the SOR in which Applicant made a sworn commitment to not use illegal drugs in the future; (2) the Judge erred by concluding that Applicant's evidence of drug testing would be more persuasive if it had been conducted randomly, without prior warning or knowledge; and (3) the Judge erred by finding that Applicant was employed by a defense contractor in a specific position. For the reasons that follow, the Board concludes Applicant has failed to demonstrate the Judge committed error that warrants remand or reversal.

(1) The Administrative Judge discussed the record evidence concerning Applicant's statements in June 1985 (FORM, Item 4) and January 1986 (FORM, Item 5) about his future intentions with respect to marijuana use and noted that Applicant continued to use marijuana for several years (up to January 1996) after making those statements. The Judge also noted Applicant's June 1996 written statement (FORM, Item 7) about his intentions with respect to future marijuana use. Citing to two of these items and referring to the third, the Judge later concluded Applicant failed to demonstrate "an unequivocal and sincere expression of intent to never use marijuana again, especially in the context of Applicant's 'track record.'" Applicant correctly notes that the Administrative Judge's decision does not specifically cite or discuss his statement (contained in Applicant's answer to the SOR) in which he makes a firm commitment to not use illegal drugs in the future. The Judge's failure to cite or discuss that piece of evidence is not sufficient to demonstrate the Judge committed harmful error in this case.

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 (April 3, 1997) at p. 3; DISCR Case No. 93-1186 (January 5, 1995) at p. 5. Moreover, the Judge is not required to cite or discuss every piece of record evidence. *See, e.g.*, DISCR Case No. 90-1596 (September 18, 1992) at p. 5. In this case, it would have been preferable if the Judge had specifically noted and discussed the piece of evidence cited by Applicant on appeal. However, the Board does not review a Judge's decision against a standard of perfection. *See, e.g.*, ISCR Case No. 95-0319 (March 18, 1996) at p. 3 ("The Administrative Judge's findings about Applicant's marijuana use are not a model of clarity. However, the Board does not measure a Judge's decision against a standard of perfection."); DISCR Case No. 91-0109 (July 1, 1993) at p. 7 ("Although the Judge's discussion of the felony policy could have been clearer, we will not find error by measuring the Determination against a standard of perfection."). If there had been other pieces of evidence in the record (similar to that cited by Applicant on appeal) that the Judge did not discuss in connection with the issue of Applicant's intentions concerning future use of marijuana, then there might have been grounds to question the thoroughness of the Judge's findings sufficient to warrant a remand. Here, the absence of any discussion by the Judge of the specific piece of evidence cited by Applicant is not fatal when considering the Judge's analysis as a whole. *See, e.g.*, DISCR Case No. 90-1874 (July 30, 1993) at p. 4 ("Furthermore, the Board will review a determination as a whole, rather than focus on isolated sentences or passages in it, to discern what the Judge meant.").

(2) Applicant contends the Administrative Judge erred by concluding that Applicant's evidence of drug testing would be more persuasive if it had been conducted randomly, without prior warning or knowledge. In support of this contention, Applicant cites to an August 3, 1996 letter from a doctor (part of FORM, Item 3) in which the doctor stated Applicant underwent "random drug tests on dates selected by my office without advance notice to him."

The Administrative Judge found (and the record evidence shows) that Applicant arranged to undergo nine drug screening tests during the period February 26, 1996 - May 29, 1996. Although the doctor's letter cited by Applicant shows that Applicant was unaware of what dates the drug tests would be administered, it is clear from the record evidence that Applicant was aware that drug testing would be conducted during a short, specific period of time known to him. Therefore, although the specific dates for the drug tests were not known to Applicant, he knew that he would be facing drug tests in the immediate, foreseeable future. Therefore, it was not arbitrary, capricious, or contrary to law for the Judge to conclude Applicant had prior warning and knowledge of the impending drug tests.

Applicant's ability to argue for an alternative interpretation of the record evidence does not demonstrate the Administrative Judge erred. *See, e.g.*, DISCR Case No. 96-0376 (March 6, 1997) at p. 2. Because the Judge's challenged conclusion reflects a reasonable, plausible interpretation of the record evidence, the Board will not disturb it.

(3) The Administrative Judge clearly erred by finding that Applicant was employed by a defense contractor in a specific position. There is **no** evidence to support that finding. Indeed, the only record evidence on that point shows that the

defense contractor made Applicant a contingent offer of the position and Applicant was not able to take the position. Although the Administrative Judge committed clear error with respect to this finding, it does not warrant remand or reversal. *Cf. N.L.R.B. v. American Geri-Care, Inc.*, 697 F.2d 56, 64 (2d Cir. 1982)(remand required only where there is a significant chance that, but for the error, a different result might have been reached), *cert. denied*, 461 U.S. 906 (1983). Because Applicant's employment status was not relevant or material to the Judge's analysis of Applicant's drug abuse history, the Judge's erroneous finding about it is not harmful error.

Conclusion

Applicant has failed to demonstrate error that warrants remand or reversal. Accordingly, the Board affirms the Administrative Judge's December 31, 1996 decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

See dissenting opinion

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

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Applicant for Security Clearance

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DISSENTING OPINION OF ADMINISTRATIVE JUDGE MICHAEL Y. RA'ANAN

Applicant's appeal presents the issue of whether the Administrative Judge's findings of fact are supported by the record evidence. Applicant cites three findings (two actually appear in the Conclusion section) by the Judge which are

contradicted by record evidence. In each of these cases the Judge failed to acknowledge the contradictory evidence.

Applicant cites his notarized unconditional commitment to forswear drugs forever, while the Administrative Judge focuses on the equivocal nature of an earlier commitment by Applicant. The Administrative Judge never acknowledges or refers to the existence of the most recent commitment on the subject of drug use: the unequivocal oath. The majority's opinion never addresses the fact that the unequivocal oath is the most recent of Applicant's commitment on the subject and that therefor the Administrative Judge's failure to address it while he does address the earlier (and less pertinent) commitments is at best odd and at worst an indicator that he failed to reasonably consider all the record evidence. The majority does say that the Judge's failure to cite or discuss that piece of evidence is "not sufficient to demonstrate error in this case." I disagree. It is plain to me that consideration of prior evidence without consideration of the most recent evidence is a problem. The problem is exacerbated by the failure to explain or document why the most recent evidence on point is not considered.

Applicant cites the Administrative Judge's comment that Applicant's drug test results would be of more probative value if the tests had been conducted randomly and without prior warning. Applicant notes that his Doctor's letter said the tests were "random" and "without advance notice" to Applicant. The majority excuses the Judge's failure to cite record evidence that flatly contradicts his conclusion with a tidy explanation of the fact that since Applicant arranged the drug tests himself he was aware of the general time frame they would be conducted in. If the Administrative Judge had said that then that would be one thing. However, the majority is supposing that their explanation is the Administrative Judge's explanation. I disagree. The Administrative Judge's failure to cite evidence that flatly contradicts his conclusion on an important point should not be written off so easily.

Finally, Applicant notes that the record is clear that he is unemployed and has been selected for a position pending approval of his security clearance. The Judge described Applicant as being employed in the position.

The first two matters cited by Applicant are both serious discrepancies which could have a significant impact on the Administrative Judge's analysis of Applicant's case. It is possible, that either one of them individually would have constituted harmful error. Taken together, the two discrepancies demonstrate to me that the Judge gave inadequate consideration to the record evidence to reach a fair decision in this case. The third error, on its own would have been harmless. However, in the context of the other two discrepancies, it adds considerable weight to Applicant's argument that his case was not adequately considered. The Board ought to find, in accordance with Item 32.a. of the Directive that the Administrative Judge's findings of fact were not supported by such relevant evidence as a reasonable mind might accept as adequate to support his conclusions in light of all the contrary evidence in the record.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board