

DATE: August 28, 1997

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 96-0608

APPEAL BOARD DECISION

Appearances

FOR GOVERNMENT

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FOR APPLICANT

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Administrative Judge John R. Erck issued a decision, dated March 31, 1997, 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 was denied due process because the Administrative Judge's conclusions were based on matters not alleged in the Statement of Reasons issued to Applicant or raised during the hearing; and (2) whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated October 10, 1996 to Applicant. The SOR was based on Criterion H (Drug Involvement).

A hearing was held on February 12, 1997. 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 Issues

1. Whether Applicant was denied due process because the Administrative Judge's conclusions were based on matters not alleged in the Statement of Reasons issued to Applicant or raised during the hearing. Applicant contends he was denied due process and deprived of his right to a fair hearing because the Administrative Judge's conclusions were based on

matters that were neither alleged in the SOR nor raised during the hearing. Specifically, Applicant argues the Judge erred by basing the decision on the Judge's conclusions that Applicant made inconsistent statements about his history of marijuana use and his inconsistent statements left unanswered questions about the true extent of his marijuana history. Applicant argues he was not placed on notice that there was an issue about "inconsistent statements or unanswered questions" about his marijuana history and that the Judge's conclusions on this point violated Applicant's rights under Executive Order 10865 and the Directive. Appellant further argues that the Judge's credibility determinations "are the functional equivalent of amending the SOR to include additional drug involvement with allegations of falsification" For the reasons that follow, the Board concludes Applicant's contentions lack merit. ⁽¹⁾

Applicant correctly notes he has the right to receive notice of the allegations against him and the opportunity to present evidence to address those allegations. *See* Executive Order 10865, Sections 3 and 4; Directive, Section D.3. Moreover, Applicant has the right to not have an adverse clearance decision made in his case based on uncharged conduct. *See, e.g.*, ISCR Case No. 94-1159 (December 4, 1995) at p. 5. And, Applicant has the right to reasonable notice and an opportunity to respond before an SOR can be amended. *See, e.g.*, ISCR Case No. 94-0729 (May 31, 1995) at pp. 4-6. However, the Administrative Judge's challenged conclusions did not deprive Applicant of those rights in this case.

The Administrative Judge, as trier of fact, is entitled to weigh the evidence and make credibility determinations about witnesses (including applicants). Even in the absence of any SOR allegation concerning falsification, the Judge can assess an applicant's credibility when deciding what weight to give to an applicant's written and testimonial statements. The right to due process does not preclude a Judge from making credibility determinations about applicants. Moreover, it is untenable for Applicant to argue that he should have been put on notice that the Administrative Judge might consider inconsistencies among his various statements, written and testimonial, before the Judge could evaluate those inconsistencies when assessing Applicant's credibility.

Because of the Administrative Judge's ability to personally observe the demeanor of witnesses, the Judge's credibility determinations are entitled to deference on appeal. *See* Directive, Additional Procedural Guidance, Item 32. Although credibility determinations are not immune from review, an appealing party has a heavy burden to meet before the Board will disturb or overturn a Judge's credibility determination. *See, e.g.*, DOHA Case No. 96-0316 (February 24, 1997) at p. 3.

The record evidence shows Applicant made differing statements about his marijuana history, and he used marijuana after making statements to the government in October 1981, April 1984, and August 1994 that he would not use marijuana in the future. Given that record evidence, the Administrative Judge's negative assessment of Applicant's credibility is not arbitrary, capricious, or contrary to law. This conclusion does not end our analysis, however. Given the Judge's extensive and repeated discussion of his negative assessment of Applicant's credibility, Applicant's concerns on appeal about the manner in which the Administrative Judge used his negative determinations in this case are neither trivial nor frivolous.

An Administrative Judge cannot use a credibility determination as a substitute for record evidence. *See, e.g.*, DISCR Case No. 93-1234 (May 19, 1995) at p. 5. Moreover, although a Judge may consider uncharged acts in deciding whether an applicant is a credible witness, ISCR Case No. 95-0178 (March 29, 1996) at p. 6, a Judge cannot rely on a negative credibility determination to base an adverse decision on conduct not charged in the SOR. *See, e.g.*, DISCR Case No. 93-0519 (April 14, 1994) at pp. 5-6. In this case, the Judge's emphatic discussion of Applicant's credibility raises a question whether the Judge used his negative assessment of Applicant's credibility in an impermissible manner. However, reading the decision as a whole, the Board concludes Applicant falls short of demonstrating the Judge used his negative credibility determination in an impermissible manner.

2. Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. Applicant makes several arguments to support his contention that the Judge's adverse decision is arbitrary, capricious, or contrary to law: (a) the Judge based his decision on inferences predicated on speculation; (b) the Judge ignored record evidence favorable to Applicant; (c) the Judge ignored pertinent provisions of the Adjudicative Guidelines; and (d) the Judge's decision is not a common sense one as required by Section F.3. For the reasons that follow, the Board concludes Applicant's arguments either lack merit or fail to demonstrate harmful error.

(a) Applicant cites several specific sentences from the decision and argues that those sentences demonstrate the Administrative Judge based his adverse clearance decision on speculation. Viewed in isolation, the particular sentences cited by Applicant on appeal are somewhat problematic. However, the Board does not review a Judge's decision against a standard of perfection. Rather, the Board reviews the decision as a whole to discern the Judge's findings and conclusions, and to consider whether the Judge's ultimate clearance decision is sustainable. *See, e.g.*, ISCR Case No. 95-0705 (May 16, 1997) at p. 2; ISCR Case No. 95-0319 (March 18, 1996) at p. 3.

Considering the entirety of the Administrative Judge's decision, the Board concludes the sentences cited by Applicant do not fatally undermine the Judge's adverse clearance decision. At most, those sentences demonstrate harmless error that does not warrant remand or reversal. *See, e.g.*, *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).

(b) There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 96-0547 (August 12, 1997) at p. 2. Applicant fails to rebut that presumption on appeal. As the trier of fact, the Judge must consider the record as a whole (Directive, Section F.3) and weigh that evidence to make his findings and conclusions. *See, e.g.*, ISCR Case No. 96-0371 (June 3, 1997) at p. 5 ("When considering the record evidence, the Judge has to decide whether the favorable evidence outweighs the unfavorable evidence, or vice versa."); ISCR Case No. 96-0544 (May 12, 1997) at p. 3 ("The ability of Applicant to cite to favorable record evidence does not demonstrate the Judge erred. The mere presence of favorable evidence does not mandate a favorable security clearance decision. Rather, the Judge must weigh the evidence and decide whether the favorable evidence outweighs the unfavorable evidence."). Error is not demonstrated by the fact that the Judge did not specifically cite or refer to those pieces of evidence that Applicant cites on appeal. *See, e.g.*, ISCR Case No. 96-0522 (May 1, 1997) at p. 2 ("Moreover, the Judge is not required to cite or discuss every piece of record evidence.").

There can be situations where an Administrative Judge's failure to discuss or refer to significant evidence (whether favorable or unfavorable in nature) could rebut the presumption that the Judge considered all the record evidence because the failure demonstrates the Judge ignored evidence that ran contrary to his findings and conclusions.⁽²⁾ *Compare* ISCR Case No. 94-1109 (January 31, 1996) at pp. 3-4 (Board refused to sustain factual findings by Judge because there was clear record evidence that ran contrary to the Judge's findings) *with* ISCR Case No. 96-0522 (May 1, 1997) at p. 3 ("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."). However, this case does not present such a situation.

(c) Applicant contends the Administrative Judge ignored or failed to apply properly the following provisions of the Adjudicative Guidelines:

"When information of security concern becomes known about an individual who is currently eligible for access to classified information, the adjudicator should consider whether the person: (1) voluntarily reported the information . . ."
(Adjudicative Guidelines, Enclosure 2 at page 2-3);

"[T]he drug involvement was not recent" (Drug Involvement Mitigating Guideline 1); and

"[T]he drug involvement was an isolated or infrequent event" (Drug Involvement Mitigating Guideline 2).

For the reasons that follow, the Board concludes Applicant's contention fails to demonstrate harmful error.

An Administrative Judge must consider and apply pertinent provisions of the Adjudicative Guidelines. *See* Directive, Section F.3. However, the mere presence or absence of a Disqualifying or Mitigating Guideline is not solely determinative of the outcome of a case. *See, e.g.*, ISCR Case No. 96-0764 (June 5, 1997) at p. 3.

The fact that an applicant voluntarily discloses adverse information to the government does not immunize the applicant from an adverse security clearance decision. Adjudicators still can evaluate the security significance of voluntarily disclosed information and decide whether, in light of the record as a whole, a favorable or unfavorable security clearance decision is warranted. Nothing in the provision of the Adjudicative Guidelines cited by Applicant precluded the Judge from deciding an adverse decision was warranted based on Applicant's overall history of marijuana use.

The Administrative Judge erred by not applying Drug Involvement Mitigating Guideline 1 in light of the Judge's own finding that Applicant last used marijuana in August 1995, more than a year before the hearing. However, that error does not warrant remand or reversal. As noted above, the mere presence of a Mitigating Guideline is not solely determinative of a case. As the Judge noted in his decision, Applicant used marijuana again after making statements to the government in October 1981, April 1984, and August 1994 that he would not use marijuana again. Given Applicant's repeated failure to abide by those commitments, the Judge had a rational basis for doubting Applicant's ability or willingness to remain drug-free despite the passage of more than a year since Applicant's last use of marijuana.

Applicant notes the Administrative Judge cited Drug Involvement Mitigating Guideline 2, but argues the decision shows the Judge believed Applicant engaged in more drug use than was alleged in the SOR, and therefore, the Judge did not properly consider Mitigating Guideline 2. As discussed earlier, the Judge had a rational basis to question the credibility of Applicant's statements concerning his marijuana history. Given those doubts about the credibility of Applicant's statements, the Judge was not required to give great or controlling weight to itigating Guideline 2.

(d) Applicant argues that the Administrative Judge's decision is not a common sense one as required by Section F.3. of the Directive because: (1) there is no nexus between his history of marijuana use and his ability to safeguard classified information; (2) Applicant has never violated security practices or procedures; and (3) the Judge's decision does not reflect a "whole person" analysis required by Section F.3. These arguments fail to demonstrate the Judge erred.

Security clearance decisions are not an exact science, but rather are predictive judgments about a person's security suitability in light of that person's past conduct and present circumstances. *Department of Navy v. Egan*, 484 U.S. 518, 528-29 (1988). Direct or objective evidence of nexus is not required before the government can deny or revoke access to classified information. *Gayer v. Schlesinger*, 490 F.2d 740, 750 (D.C. Cir. 1983). Furthermore, the government need not wait until a person mishandles or fails to properly safeguard classified information before it can deny or revoke access to classified information. *See Adams v. Laird*, 420 F.2d 230, 238-39 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). All that is required is proof of facts and circumstances that indicate a particular applicant is at risk for mishandling classified information, or does not demonstrate the high degree of judgment, reliability, and trustworthiness required of persons granted access to classified information. Accordingly, the absence of any security violations by Applicant does not preclude an adverse security clearance decision in his case.

In addition, security clearance decisions are not limited to consideration of an applicant's conduct during work or duty hours. Therefore, any admitted or proven conduct that has security significance, whether it occurs during duty hours or not, may be considered by the Administrative Judge in deciding an applicant's security eligibility. *See, e.g.*, ISCR Case No. 96-0371 (June 3, 1997) at p. 4. Applicant's history of off-duty marijuana use provides a rational basis for the Administrative Judge to question Applicant's security suitability. *See, e.g.*, *AFGE Local 1533 v. Cheney*, 944 F.2d 503, 506 n.6 (9th Cir. 1991)(noting various ways that drug use could pose security risk). Moreover, as discussed earlier, the Judge noted Applicant used marijuana after making statements to the government in October 1981, April 1984, and August 1994 that he would not use marijuana again. Given Applicant's repeated failure to abide by those commitments, the Judge had a rational basis for doubting Applicant's ability or willingness to remain drug-free despite the passage of more than a year since Applicant's last use of marijuana. Given those doubts, the Judge properly resolved them in favor of the national security. *Department of Navy v. Egan, supra*, 484 U.S. at 531.

As noted earlier, the Administrative Judge's decision is not perfect. However, our reading of the decision persuades us that the Judge's decision contains sustainable factual findings and reasonable conclusions sufficient to support his overall adverse security clearance decision. Despite its flaws, the decision is, overall, a common sense decision that satisfies the requirements of Section F.3 and other pertinent provisions of the Directive.

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 March 31, 1997 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. In support of the claim that Applicant was prejudiced by the Administrative Judge's conclusions, Applicant cites the following sentence from the decision below: "Ironically, Applicant's marijuana use in the late 1970's and 1980's would not be a relevant concern if he had provided a consistent credible account of these events." Applicant's reliance on that sentence is misplaced. The Board has specifically rejected the kind of piecemeal analysis of an applicant's drug abuse history that is demonstrated by the cited sentence. *See* ISCR Case No. 95-0560 (August 16, 1996) at p. 3 (Board noting that piecemeal analysis of an applicant's drug abuse history is not consistent with the "whole person" concept).

2. *See* Directive, Additional Procedural Guidance, Item 32.a ("The Appeal Board shall . . . determine whether or not: (a) The Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might find adequate to support a conclusion *in light of all the contrary evidence in the same record.*" (Emphasis added)