

DATE: June 5, 1997

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 96-0764

APPEAL BOARD DECISION

Appearances

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq.

Chief Department Counsel

FOR APPLICANT

Pro se

Administrative Judge Richard A. Cefola issued a decision, dated February 25, 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 issue of whether the Administrative Judge's security clearance decision was arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated October 24, 1996 to Applicant. The SOR was based on Criterion H (Drug Involvement).

Applicant submitted an answer to the SOR, in which he asked that a decision be made 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 consideration.

The Administrative Judge issued a written 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 now before the Board on Applicant's appeal from that adverse decision.

Appeal Issue

The Administrative Judge made factual findings concerning Applicant's history of drug abuse, which included: almost

daily use of marijuana from 1968 to July 1995; frequent, often daily use, of cocaine (including crack cocaine) from July 1993 to July 1995; and use of various other drugs in the 1970s and 1980s. The Judge also made findings about the adverse effects Applicant's drug abuse had on his finances and work situation, Applicant's inpatient drug rehabilitation treatment in July 1995, and the favorable evidence submitted by Applicant.

Applicant does not challenge the Administrative Judge's findings of fact. However, Applicant argues that the Judge's adverse decision should not be affirmed because: (a) Applicant satisfies Drug Involvement Mitigating Guidelines 1, [\(1\)](#) 3, [\(2\)](#) and 4, [\(3\)](#) and (b) the favorable evidence Applicant submitted warrants a favorable decision in his case. The Board construes Applicant's arguments as raising the issue of whether the Judge's adverse decision is arbitrary, capricious, or contrary to law. For the reasons that follow, the Board does not find Applicant's arguments to be persuasive.

Approximately 19 months passed between Applicant's last use of drugs (early July 1995) and the close of the record with Applicant's response to the FORM (dated January 16, 1997). Given that fact, and the overall length and severity of Applicant's drug abuse history, it was not arbitrary, capricious, or contrary to law for the Judge to conclude Applicant's drug abuse was too recent to warrant application of Drug Involvement Mitigating Guideline 1.

The Administrative Judge specifically noted that Drug Involvement Mitigating Guidelines 3 and 4 applied to Applicant's case. However, the presence of those favorable Adjudicative Guidelines

did not preclude the Judge from making his adverse decision. *See, e.g.*, ISCR Case No. 94-1185 (September 13, 1995) at p. 5 ("The Board has repeatedly noted that the mere presence or absence of Adjudication Policy factors for or against clearance is not solely dispositive of the outcome of a case."). The Judge must consider all the available information, favorable and unfavorable, and must apply pertinent Adjudicative Guidelines (Directive, Section F.3.). In doing so, the Judge must weigh any applicable mitigating factors in light of the seriousness of an applicant's conduct. *Cf. Carosella v. U.S. Postal Service*, 816 F.2d 638, 643 (Fed. Cir. 1987)(agency has discretion to balance seriousness of employee's conduct against applicable mitigating factors). Nothing in Applicant's appeal brief persuades the Board that the Judge acted in an arbitrary or capricious manner or abused his discretion in applying the Adjudicative Guidelines to Applicant's case.

The Administrative Judge considered the favorable evidence submitted by Applicant (including his drug rehabilitation efforts), but concluded it was not sufficient to overcome the negative implications of Applicant's long history of drug abuse, which included cocaine addiction as recently as 1995. The Judge's evaluation of the evidence, both favorable and unfavorable, reflects a reasonable interpretation of the record as a whole and is not arbitrary, capricious, or contrary to law.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's February 25, 1997 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

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Administrative Judge

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DISSENT OF ADMINISTRATIVE JUDGE MICHAEL Y. RA'ANAN

This case is disturbing. Applicant has been drug-free since July 1995. Applicant has successfully completed a drug rehabilitation program. I believe Applicant has demonstrated an intent not to use drugs in the future. The Administrative Judge wrote two paragraphs of conclusions. Most of the first paragraph describes the depth of Applicant's pre-July 1995 drug use and addiction. He then says "Although it now appears that the Applicant is on the road to recovery, it is too soon to say that his fairly recent addiction is not of present security significance." The second paragraph appears to be "boilerplate."

I do not believe that the Administrative Judge has done a sufficient job of explaining why he has concluded that Applicant is not eligible for a security clearance when at least two, and arguably three mitigating conditions apply to the only disqualifying conduct: drug use.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

1. "[T]he drug involvement was not recent."
2. "[A] demonstrated intent not to abuse any drugs in the future."
3. "[S]atisfactory completion of a drug treatment program prescribed by a credentialed medical professional."