

DATE: January 22, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0289

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

William S. Fields, Esq., Department Counsel

FOR APPLICANT

Steven J. Silverberg, Esq.

Administrative Judge John R. Erck issued a decision, dated September 19, 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 the Administrative Judge erred by finding Applicant's disclosures about his drug abuse were not voluntary; (2) whether the Administrative Judge erred by concluding that Applicant's falsification was not sufficiently mitigated; (3) whether the Administrative Judge erred by concluding Applicant's drug abuse history was not sufficiently mitigated; and (4) whether the Administrative Judge failed to consider the totality of the record evidence in making his adverse security clearance decision.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated April 29, 1997 to Applicant. The SOR was based on Criterion H (Drug Involvement), Criterion E (Personal Conduct), and Criterion J (Criminal Conduct).

A hearing was held on July 3, 1997. The Administrative Judge subsequently issued a written decision in which he entered a formal finding for Applicant under Criterion J, but formal findings against Applicant under Criteria H and E. The Judge 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⁾

As a preliminary matter, the Board notes Applicant cites several Administrative Judge decisions to support some of his appeal arguments. Applicant's reliance on various Administrative Judge decisions in other cases is misplaced to a degree. Decisions by Administrative Judges may be cited as persuasive authority, but they are not binding on the Board.

See, e.g., ISCR Case No. 95-0622 (April 18, 1997) at p. 2 n.2. In addition, just as the decision of one trial judge in one case is not binding on fellow trial judges in other cases, the Judge in this case is not bound to follow the decisions of other DOHA Judges in other cases.

1. Whether the Administrative Judge erred by finding Applicant's disclosures about his drug abuse were not voluntary. Applicant does not challenge the Administrative Judge's finding that he deliberately falsified a Personnel Security Questionnaire (PSQ) in October 1992 with respect to his drug abuse history. Rather, Applicant challenges the Judge's decision to not apply Personal Conduct Mitigating Guideline 2⁽²⁾ because the Judge found Applicant did not disclose his drug abuse until after he had been denied SCI access, and indicated "[i]nsufficient information is known about the events that transpired during [a May 1996] interview to conclude that Applicant's disclosures in Government Exhibit 3 were voluntary." Applicant argues the Judge erred because the record evidence shows Applicant's disclosures were voluntary and made before he was denied SCI access. Applicant argues, in the alternative, that the Judge impermissibly engaged in speculation that something happened during the May 1996 interview which rendered his disclosures involuntary.

The Administrative Judge erred by analyzing Applicant's disclosures under Personal Conduct Mitigating Guideline 2 because it is not the proper Mitigating Guideline to be considered in light of the particular facts and circumstances of his case. In this case, Applicant's disclosures in 1996 were about his drug abuse history, which was the subject of his falsification of the PSQ in October 1992. When a case involves disclosures by an applicant that are corrections of an earlier falsification, then Personal Conduct Mitigating Guideline 3⁽³⁾ is the proper guideline to consider, not Personal Conduct Mitigating Guideline 2. If Personal Conduct Mitigating Guideline 2 were used in cases involving corrections of earlier falsifications, then Personal Conduct Mitigating Guideline 3 would become, for all practical purposes, a meaningless dead letter. The Board does not accept an approach that would result in Adjudicative Guidelines being considered or construed in isolation, ISCR Case No. 95-0560 (August 16, 1996) at p. 4, or in a manner that would render any Adjudicative Guideline meaningless or superfluous. ISCR Case No. 94-1081 (August 17, 1995) at p. 5. The Board concludes that the "correct information" cited in Personal Conduct Mitigating Guideline 2 means information other than the correction of a falsification.

Because Personal Conduct Mitigating Guideline 3, not Personal Conduct Mitigating Guideline 2, was the proper one to be considered under the particular facts and circumstances of Applicant's case, Applicant suffered no harmful error from the Administrative Judge's conclusions with respect to Personal Conduct Mitigating Guideline 2.

No useful purpose would be served by remanding the case to the Administrative Judge to consider whether to apply Personal Conduct Mitigating Guideline 3. Applicant falsified the PSQ in October 1992 and only made disclosures about his drug abuse history to Agency X in May 1996, approximately three years and seven months later. The Board concludes that Applicant's disclosures in May 1996 were not "prompt" in relation to his October 1992 falsification.

2. Whether the Administrative Judge erred by concluding that Applicant's falsification was not sufficiently mitigated. The Administrative Judge concluded Applicant's PSQ falsification warranted an adverse formal finding under Criterion E. Applicant contends the Judge erred because his falsification was mitigated. In support of this contention, Applicant: (a) cites Administrative Judge decisions in other falsification cases; (b) argues the Judge should have applied Personal Conduct Mitigating Guideline 2 to Applicant's case; (c) asserts he meets the requirements of Personal Conduct Mitigating Guidelines 5⁽⁴⁾ and 7⁽⁵⁾, and (d) points to his job performance as proof that he exhibits good judgment and reliability. For the reasons that follow, the Board concludes Applicant has failed to demonstrate harmful error.

As discussed earlier, Applicant's reliance on various Administrative Judge decisions in other cases is misplaced, and Applicant suffered no harmful error from the Judge's conclusions with respect to Personal Conduct Mitigating Guideline 2.

The Administrative Judge did not find Applicant's conduct increased his vulnerability to coercion, exploitation or pressure (Personal Conduct Disqualifying Guideline 4). Since the Judge did not conclude Applicant's conduct rendered him vulnerable to blackmail or coercion, Personal Conduct Mitigating Guideline 5 is irrelevant to this case. Accordingly, the Judge did not err by not applying that Mitigating Guideline to Applicant's case.

The fact that Applicant severed his ties with people who use marijuana is relevant and material to the security issues under Criterion H (Drug Involvement), but it does not have any relevance to the security issues raised by Applicant's PSQ falsification. Therefore, the Administrative Judge did not act in an arbitrary or capricious manner by not applying Personal Conduct Mitigating Guideline 7 to Applicant's PSQ falsification.

The favorable evidence of Applicant's job performance does not render the Administrative Judge's adverse conclusions under Criterion E arbitrary, capricious, or contrary to law. Security clearance decisions are not limited to consideration of an applicant's job performance. *See, e.g.*, ISCR Case No. 97-0016 (December 31, 1997) at p. 5. The Judge had a rational basis to conclude Applicant's proven misconduct raised serious questions about his judgment and reliability for purposes of holding a security clearance. Considering the record as a whole, the favorable evidence cited by Applicant did not compel the Judge, as a matter of law, to render a favorable security clearance decision.

3. Whether the Administrative Judge erred by concluding Applicant's drug abuse history was not sufficiently mitigated.

The Administrative Judge noted the favorable evidence concerning Applicant's job performance, the passage of time since Applicant's last use of marijuana, and Applicant's testimony about his embarrassment over his marijuana use, but concluded that evidence failed to outweigh the security concerns raised by Applicant's purchase, sale, and use of marijuana after he had been granted a security clearance in February 1993. Applicant contends the Judge should have found his drug abuse mitigated. In support of this contention, Applicant: (a) cites several decisions by Judges in other drug abuse cases; (b) refers to various pieces of evidence that he argues the Judge should have relied on to find his drug abuse mitigated; and (c) argues that the Judge should have applied Drug Involvement Mitigating Guidelines 1⁽⁶⁾ and 2⁽⁷⁾ to his case. For the reasons that follow, the Board concludes Applicant has failed to demonstrate the Judge erred.

As discussed earlier, Applicant's reliance on various Administrative Judge decisions in other cases is largely misplaced.

Applicant's ability to cite portions of the record to support his claim that his drug abuse was mitigated does not demonstrate the Administrative Judge erred. There is a rebuttable presumption that the Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 96-0608 (August 28, 1997) at p. 3. Apart from that presumption, a reading of the decision shows the Judge considered the record evidence, both favorable and unfavorable, when evaluating Applicant's history of drug abuse. Indeed, a reading of the decision shows that some of the matters listed in Applicant's brief to support this appeal contention were, in fact, specifically referred to or discussed by the Judge in his decision.⁽⁸⁾ Merely because the Judge did not find Applicant's favorable evidence sufficient to overcome the negative security implications of his drug abuse history does not demonstrate the Judge did not consider that favorable evidence. *See, e.g.*, ISCR Case 96-0544 (May 12, 1997) at p. 3. Moreover, the fact that Applicant has not committed any security violations does not preclude an adverse decision based on facts and circumstances that raise questions about his security eligibility. *See, e.g.*, ISCR Case No. 96-0461 (December 31, 1997) at pp. 4-5.

The Administrative Judge did not act in an arbitrary or capricious manner by not applying Drug Involvement Mitigating Guidelines 1 and 2 to this case. Since Applicant's last use of marijuana occurred in May 1996, the Judge had a rational basis to characterize Applicant's drug use as "recent" and not warranting application of Drug Involvement Mitigating Guideline 1. Given the Judge's findings about Applicant's overall history of drug abuse (findings which have not been challenged on appeal), the Judge had a rational basis for concluding Applicant's drug abuse was too frequent to warrant application of Drug Involvement Mitigating Guideline 2.

4. Whether the Administrative Judge failed to consider the totality of the record evidence in making his adverse security clearance decision.

Applicant contends the Administrative Judge's decision does not reflect the "whole person" approach required by the Directive. In support of this contention, Applicant cites to various portions of the record and argues the Judge either did not consider the cited evidence or, in the alternative, the Judge failed to give that evidence due weight. The Board does not find Applicant's contention persuasive.

As noted earlier, there is a rebuttable presumption that an Administrative Judge considered all the record evidence. Moreover, there is no requirement that a Judge cite or refer to every piece of record evidence when making a decision, and therefore, error is not demonstrated merely because an appealing party can cite to evidence that was not specifically mentioned or discussed in the Judge's decision. *See, e.g.*, ISCR Case No. 96-0608 (August 28, 1997) at p. 4. Our reading

of the decision persuades us that the Judge considered the record evidence, both favorable and unfavorable, in making his decision.

Nor does the Board find persuasive Applicant's alternative argument. The Administrative Judge must weigh the record evidence and make findings and draw conclusions. Directive, Additional Procedural Guidance, Item 25. Although the Judge has broad discretion in weighing the evidence, that discretion is not unfettered and can be challenged on appeal. *See* Directive, Additional Procedural Guidance, Item 32 ("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 accept as adequate to support a conclusion in light of all the contrary evidence in the same record."). However, a Judge's weighing of the evidence will not be disturbed by the Board unless the appealing party demonstrates the Judge acted in an arbitrary or capricious manner or contrary to law in weighing the evidence. *See, e.g.*, ISCR Case No. 95-0705 (May 16, 1997) at p. 2 ("Absent a showing that the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law, the Board will not disturb the Judge's findings."). Applicant has failed to demonstrate the Judge acted in an arbitrary or capricious manner when weighing the record evidence, both favorable and unfavorable. At most, Applicant's argument shows that there could be an alternate interpretation of the record evidence. However, such an argument is not sufficient, standing alone, to demonstrate the Judge's factual findings and conclusions are unsustainable. *See, e.g.*, ISCR Case No. 96-0457 (December 8, 1997) at p. 3.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's September 19, 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. The Administrative Judge's formal finding for Applicant under Criterion J is not at issue on appeal.
2. "[T]he falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily."
3. "[T]he individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts."
4. "[T]he individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or pressure."

5. "[A]ssociation with persons involved in criminal activities has ceased."

6. "[T]he drug involvement was not recent."

7. "[T]he drug involvement was an isolated or infrequent event."

8. It is frivolous for an appealing party to contend an Administrative Judge did not consider matters that are specifically referred to or discussed in the Judge's decision.