

DATE: December 22, 1997

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0351

APPEAL BOARD DECISION AND ORDER FOR REMAND

APPEARANCES

FOR GOVERNMENT

William S. Fields, Esq., Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Kathryn M. Braeman issued a decision, dated September 5, 1997, in which she 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 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 (Directive), dated January 2, 1992, as amended.

Applicant's appeal presents the issue of whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated May 14, 1997 to Applicant. The SOR was based on Criterion J (Criminal Conduct) and Criterion H (Drug Involvement).

Applicant submitted an answer to the SOR, indicating he wanted "to have a decision without a hearing." A File of Relevant Material (FORM) was prepared and a copy provided to Applicant. After Applicant's response to the FORM was received, the case was assigned to the Administrative Judge for determination.

The Administrative Judge issued a written decision in which she entered a formal finding for Applicant under Criterion J, but formal findings against him under Criterion H. 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 Issue

Applicant challenges the Administrative Judge's adverse decision based on several arguments: (1) he did not conceal the full extent of his drug abuse history; (2) the written statement he gave to an investigator was incorrect when it indicated

he used psilocybin mushrooms from 5 to 6 times a years, because he only used them 3 times a year; (3) he viewed his marijuana use as not being abuse because he was never addicted to it, did not use it daily, and did not use it in large quantities; (4) the Judge should have applied Drug Involvement Mitigating Guidelines 1⁽¹⁾ and 3⁽²⁾; (5) the Judge erred with respect to her findings about the frequency of his use of hashish, psilocybin mushrooms, and LSD; (6) his statements to an investigator about the quantities of drugs he used were guesses and probably too high; (7) the Judge erred by finding that Applicant purchased all the drugs he used, and all his purchases were for small quantities; (8) the Judge erred by finding he was at risk for returning to drug abuse; and (9) Applicant's past drug abuse does not indicate he poses any security risk today.⁽³⁾ For the reasons that follow, the Board concludes Applicant has demonstrated the Judge committed errors that warrant remand.

In a narrow sense, the Administrative Judge did not err by finding that Applicant did not disclose the full extent of his drug abuse when he completed the Standard Form 86 (FORM Item 3). However, that finding is incomplete and somewhat unfair to Applicant. In the drug portion of Standard Form 86, Question 24a begins "Since the age of 16 or in the last 7 years, whichever is shorter," Since Applicant executed that form on January 2, 1997, he was not required by Question 24a to disclose any of his drug abuse that occurred prior to January 1990. Accordingly, Applicant's failure to disclose his pre-1990 drug abuse was not deceptive or misleading.

The Administrative Judge did not err by relying on Applicant's written statement (FORM, Item 4) to make her factual findings. Applicant did not challenge the accuracy of FORM Item 4 when he responded to the FORM, nor did he try to explain or clarify any part of that document. Accordingly, it was not arbitrary, capricious, or contrary to law for the Judge to rely on that document when making her findings about his history of drug abuse.

Given Applicant's admissions in FORM Item 4, it was not arbitrary, capricious, or contrary to law for the Administrative Judge to find Applicant "consistently" used hashish, psilocybin mushrooms, and LSD over a 6-year period. The Judge's finding reflects a plausible interpretation of the record evidence.

The Administrative Judge erred by finding that Applicant purchased all the drugs he used. There is no record evidence that he purchased the cocaine he used twice in 1987 or the prescription pain killers that he used without a prescription. Accordingly, this finding cannot be sustained.

Applicant contends the Administrative Judge reached inconsistent conclusions about the likelihood he might repeat his drug abuse. Specifically, Applicant notes the Judge made a formal finding in his favor under Criterion J based, in part, on her findings that (1) Applicant has stopped all purchase and use of drugs and is not likely to repeat his drug-related criminal conduct, and (2) Applicant has demonstrated successful rehabilitation. Applicant argues those findings are inconsistent with the Judge's conclusion under Criterion H that it is too soon to conclude Applicant has demonstrated an intent to not use drugs in the future. Applicant's contention is persuasive. It was arbitrary and capricious for the Administrative Judge to make one finding under Criterion H about Applicant's likelihood of repeating drug abuse and another, inconsistent finding under Criterion J about that same matter. Two such inconsistent findings cannot reasonably exist in the same decision.

The Board does not measure an Administrative Judge's decision against a standard of perfection. *See, e.g.*, ISCR Case No. 96-0608 (August 28, 1997) at p. 4. Moreover, the Board will not reverse or remand a case if the errors identified on appeal are harmless. *Id.* However, taken in their totality, the errors identified by Applicant cannot be said to be harmless. Accordingly, the Board cannot affirm the Administrative Judge's September 5, 1997 decision.

Conclusion

Applicant has met his 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, 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. "[A] demonstrated intent not to abuse any drugs in the future."

3. Applicant's appeal brief contains various statements that go beyond the record evidence. The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item 29.