

DATE: July 15, 1998

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 97-0726

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Joseph Testan issued a decision dated March 23, 1998, 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.

The 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 October 28, 1997 to Applicant. The SOR was based on Criterion H (Drug Involvement).

Applicant submitted an answer to the SOR and requested an adjudication of his case without a hearing. A File of Relevant Material (FORM) was prepared and a copy provided to Applicant. Applicant submitted additional information in response to the FORM.

The case was assigned to Administrative Judge Joseph Testan. The Judge subsequently 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 before the Board on Applicant's appeal from the Judge's adverse decision.

Appeal Issue

Applicant does not explicitly challenge the Administrative Judge's findings of fact although his brief contains two apparent denials that Applicant ever used drugs. Applicant focuses his arguments on his behavior since entering his company's drug program. Applicant asserts that three of the mitigating conditions for drug involvement apply in his case, namely: mitigating condition 2 (the drug involvement was an isolated or infrequent event), mitigating condition 3

(a demonstrated intent not to abuse any drugs in the future) and mitigating condition 4 (satisfactory completion of a drug treatment program prescribed by a credentialed medical professional). The Board construes Applicant's arguments as an assertion that the Administrative Judge decision was arbitrary, capricious and contrary to law.

Applicant asserts that his drug involvement, "if it happened," was an isolated or infrequent event. Applicant's assertion is problematic. He does not actually acknowledge the drug use that the Administrative Judge found occurred but he asks the Board to consider the drug use an isolated or infrequent event. This raises on appeal the same problem that the Administrative Judge noted--Applicant's continued denials (even if only implicit) make it hard to conclude he has reformed and that the drug use will not recur. Applicant has not demonstrated error by the Administrative Judge on this point.

Applicant asserts that he has demonstrated his intent not to use drugs by his participation in his company's drug program and also that the mitigating condition for having completed a drug rehabilitation program should have been applied in his case. The problem is that the Applicant had not completed the program at the time the record closed. Therefore, it would have been premature for the Administrative Judge to draw any significant conclusions from Applicant's participation as of that time. The Board cannot conclude that the Administrative Judge erred by not using current participation in an on-going program as the basis for mitigating Applicant's drug use.

Applicant also argues that his other conduct ought to be considered (*i.e.*, job performance, cooperation with the investigation, lack of criminal conduct). However, there is no indication that the Judge erred in his application of the Directive in this case. None of the conduct cited by Applicant precluded the Judge from making an adverse decision under Criterion H.

Conclusion

Applicant has failed on appeal to demonstrate error by the Administrative Judge. The Administrative Judge's decision is sustained.

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