

DATE: July 9, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0769

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Administrative Judge Jerome H. Silber issued a decision, dated April 21, 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 issues of (1) whether the Administrative Judge made incorrect findings; and (2) 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 November 24, 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 did not submit a response to the FORM.

The case was assigned to Administrative Judge Jerome H. Silber. 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 Issues

Applicant asserts on appeal that (1) the Administrative Judge erred by finding Applicant abused the drug Ritalin; (2) the Judge erred by finding Applicant used marijuana "about five times a month;" and (3) Applicant has been drug-free for one year, is more mature, and is leading a more responsible life. The Board construes Applicant's first two assertions as contending the Judge made incorrect findings, and Applicant's last assertion as contending that the Judge's decision was

arbitrary, capricious, or contrary to law.

(1) The Administrative Judge's finding on Applicant's use of Ritalin is based on record evidence (FORM, Item 4). Applicant challenges the Judge's finding that he abused Ritalin by submitting new evidence on appeal. The Board cannot consider new evidence on appeal. Directive, Additional Procedural Guidance, Item 29. Applicant was provided a copy of the FORM and had an opportunity to respond to it, but did not do so. Having failed to respond to the FORM, Applicant cannot now fairly complain that the Judge erred by making a finding based on information contained in the FORM.

(2) Applicant argues that his marijuana use did not average five times a month, as found by the Administrative Judge. The record evidence shows Applicant admitted to using marijuana from two to three times a month (FORM, Item 4) and from one to five times (FORM, Item 5). Given the totality of the record evidence, there is no apparent basis for the Judge to decide that Applicant's marijuana use averaged five times a month. If the Judge had a reason for deciding that Applicant's average marijuana use was at the upper limit of Applicant's admissions, then the Judge should have stated that reason. Absent such an explanation, the Judge's finding about Applicant's average marijuana use suggests the Judge made an arbitrary and capricious choice instead of engaging in reasoned fact-finding.

Notwithstanding the Administrative Judge's error on this point, there is a sufficient basis in the record evidence for the Judge to conclude that Applicant was more than an experimental user of marijuana during the period Spring 1994-May 1997, and that Applicant failed to successfully mitigate the government's case against him under Criterion H. Accordingly, the Judge's factual error was harmless.

(3) Applicant argues that he has been drug-free for one year (with use only once in the last 15 months), he has matured, and that he is now living more responsibly. Applicant's argument is based on the inclusion of several months of abstinence since the record closed. The record in this case closed on February 12, 1998, a date approximately nine months after Applicant's last use of marijuana. Factual findings by an Administrative Judge are evaluated in light of the record evidence before the Judge. A Judge cannot fairly be found to have erred for not considering events that might occur after the close of the record evidence. *See, e.g.*, DISCR Case No. 93-0241 (October 7, 1994) at pp. 3-4. In addition, Applicant's claim of abstinence after the close of the record constitutes new evidence, which the Board cannot consider.

The Administrative Judge weighed the seriousness of Applicant's marijuana use against all applicable mitigating evidence before reaching his adverse conclusions under Criterion H. The Board finds the Judge's conclusions are rationally based on the record evidence, and concludes his adverse decision is not arbitrary, capricious, or contrary to law.

Conclusion

Applicant has failed to demonstrate error that warrants remand or reversal. Accordingly, the Board affirms the Administrative Judge's April 21, 1998 decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

See separate opinion

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Separate opinion of Administrative Judge Michael Y. Ra'anan

I disagree with my colleagues on the matter of Applicant's frequency of marijuana use. As the majority notes, the record contains two admissions by applicant regarding marijuana use. One admission estimates the use at two to three times a month, the other estimates it at one to five times a month. Since it is reasonable to assume, given human nature, that any error or discrepancy in someone's admissions of misconduct is going to tend to minimize the significance of one's own misconduct, it was not unreasonable for the Judge accept the high end of Applicant's own admissions as being the most accurate description of the drug use. It need not have been necessary for the Administrative Judge to explain why he was accepting the most severe admission of misconduct as fact. It is not uncommon for the law to move burdens based on an admission (see, e.g., Federal Rules of Evidence, Rule 801 (d) (2) and Rule 804 (b) (3)). Therefore, I respectfully dissent from their analysis and conclusion on this matter.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board