

DATE: June 19, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0803

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Michael H. Leonard, Esq., Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Elizabeth M. Matchinski issued a decision, dated March 18, 1998, in which she concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Department Counsel 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.

Department Counsel's appeal presents the following issues: (1) whether the Administrative Judge erred by not applying Drug Involvement Disqualifying Guideline 3; and (2) whether the Administrative Judge's favorable decision is arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated December 4, 1997 to Applicant. The SOR was based on Criterion H (Drug Involvement).

A hearing was held on February 25, 1998. The Administrative Judge subsequently issued a written decision in which she concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Department Counsel's appeal from that unfavorable decision.

Appeal Issues

1. Whether the Administrative Judge erred by not applying Drug Involvement Disqualifying Guideline 3. The Administrative Judge did not apply Drug Involvement Disqualifying Guideline 3. [\(U\)](#) Department Counsel contends the Judge erred because: (a) the record evidence shows Applicant continued to use marijuana after he had received a security clearance in 1989, with the most recent use being Memorial Day weekend 1997; (b) the record evidence shows Applicant continued to use marijuana even though he was aware such use was illegal, violated his employer's drug policy, and was inconsistent with holding a security clearance; and (c) Section F.3 required the Judge to apply pertinent Adjudicative Guidelines. While Department Counsel's recitation of the facts is accurate and while Department Counsel

is correct in stating that Section F.3 of the Directive requires the application of pertinent Adjudicative Guidelines, Department Counsel's contention that the record mandates application of Disqualifying Guideline 3 is not persuasive.

An Administrative Judge does not have unfettered discretion in applying the Adjudicative Guidelines. *See, e.g.*, ISCR Case No. 95-0817 (February 21, 1997) at p. 4. Where the record evidence supports application of a particular Adjudicative Guideline, the Judge must apply it or provide an adequate explanation why deviating from that guideline is warranted under the particular facts of the case. ISCR Case No. 95-0622 (April 18, 1997) at p. 3. Disqualifying Guideline 3 encompasses situations like the instant case where an applicant uses marijuana after the granting of a security clearance. However, another clearly stated component of the guideline is the requirement that the use be current. The record evidence in this case does not require application of the guideline as there is no evidence of current use.

2. Whether the Administrative Judge's favorable decision is arbitrary, capricious, or contrary to law. Department Counsel contends the Administrative Judge's decision is arbitrary, capricious or contrary to law because: (a) the record evidence does not support the Judge's finding that there is "no reason to doubt the sincerity of [Applicant's] commitment to remain drug free"; and (b) in light of the record evidence as a whole, the Judge's favorable decision is not a common sense one that is consistent with the national security. For the reasons that follow, the Board concludes Department Counsel has failed to demonstrate error by the Judge.

As the trier of fact, the Administrative Judge has the primary responsibility for making findings of fact. Directive, Additional Procedural Guidance, Item 25. On appeal, the Board must consider not only whether there is evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings. Directive, Additional Procedural Guidance, Item 32.a. *See, e.g.*, ISCR Case No. 97-0191 (April 28, 1998) at p. 4. Whether there is sufficient evidence to support a Judge's findings is a question of law, not one of fact. *See, e.g.*, ISCR Case No. 97-0356 (April 21, 1998) at p. 4 n.7. Here, there is record evidence that arguably detracts from the Judge's finding that Applicant has demonstrated reform sufficient to warrant a favorable security clearance decision. However, there is also ample record evidence that supports the Judge's finding that Applicant has made a genuine commitment to remain drug free.

The Administrative Judge found that Applicant had a 24-year history of marijuana use with a frequency that lessened considerably (from multiple uses per month to about five times a year) starting in about 1990. She found that Applicant used the drug during the period of his military service and after being granted a security clearance in 1989. The Judge also found that Applicant had demonstrated a nonchalant attitude in the past toward illegal drugs as demonstrated by his use of marijuana in violation of the policy of his employer and the Department of Defense against drug use.

Notwithstanding the above findings, the Judge made additional findings that are supported by the record evidence and that, taken together, provide sufficient basis for her conclusion that Drug Involvement Mitigating Guideline 3⁽²⁾ has applicability to the case. That evidence also supports her conclusion that Applicant has sufficiently mitigated the government's case. The Judge found: (1) at the end of June 1997 Applicant failed a urinalysis test for drugs and his continued employment was formally conditioned on follow-up tests and compliance with random drug testing for a year; (2) Applicant has abstained from marijuana use for nine months; (3) his last drug involvement in May 1997 was his only involvement in 1997; (4) he has affirmatively stated his intention to abstain from drugs and has made this representation to his employer in writing; (5) Applicant is committed to his work and his future employment with his company is contingent upon abstinence; (6) Applicant has spoken to the people that once used marijuana with him and told them that he no longer partakes; (7) he was given a drug test by his employer in August 1997 and passed; (8) personnel at Applicant's Employee Assistance Program determined that Applicant's problem with marijuana was resolved and required no counseling beyond his intake interview; and (9) Applicant has been completely candid with the government concerning his drug use.

The Judge found that the illegality of drug use and the anti-drug policies of his company and Department of Defense failed in the past to dissuade Applicant from marijuana use. However, she also found that the failed drug test and the contingent nature of his employment provided additional incentives against drug use sufficient to prevent Applicant from using drugs in the future. These additional incentives together with the findings listed in the preceding paragraph provide a sufficient basis for her ultimate conclusion that the security concerns raised by Applicant's history of drug use

have been overcome.

The Board need not agree with the Administrative Judge's findings and conclusions in order to conclude that Department Counsel has failed to demonstrate the Judge's favorable security clearance decision is arbitrary, capricious, or contrary to law. The fact that Department Counsel demonstrated Applicant had a 24-year history of marijuana use and had a casual attitude about that use in the past was not dispositive of the case. The Judge clearly evaluated that negative evidence in light of the record evidence as a whole (Directive, Section F.3.) and pertinent Adjudicative Guidelines and concluded Applicant had presented sufficient evidence in extenuation and mitigation to warrant a favorable security clearance decision. The Board need not agree with the Judge to conclude her analysis reflects a plausible, reasonable interpretation of the record evidence and is consistent with pertinent provisions of the Directive.

Conclusion

Department Counsel has failed to meet its burden on appeal of demonstrating error that warrants remand or reversal. Accordingly, the Board affirms the Administrative Judge's March 18, 1998 decision.

See separate opinion

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

Separate Opinion of Administrative Judge Emilio Jaksetic,

Concurring in part and dissenting in part

I fully concur with the majority's statement of the case and the appeal issues, and its discussion and resolution of the first appeal issue. However, I respectfully dissent from the majority's decision to affirm the Administrative Judge's favorable decision. For the reasons that follow, I conclude Department Counsel has demonstrated harmful error by the Judge that warrants reversal.

I fully concur with the majority's discussion about the Administrative Judge's responsibility for making findings of fact, and the Board's scope of review when those factual findings are challenged on appeal. However, unlike the majority, I conclude there is record evidence that clearly detracts from and fatally undermines the Judge's finding that Applicant has demonstrated reform sufficient to warrant a favorable security clearance decision.

The Administrative Judge found that Applicant had a 24-year history of marijuana use (spanning almost all of his adult life), with varying frequency: 1 to 3 times a month during 1973-1975; abstinence from October 1975 to August 1976; 1

to 3 times a month during August 1976-February 1979; 2 to 3 times a month after February 1979 until November 1985; reduced use (unspecified frequency) after November 1985; about 5 times a year during 1990-1996; and once during Memorial Day weekend 1997. The Judge also found Applicant's marijuana use occurred during his military service (October 1975-October 1979) and after he was granted a security clearance in May 1989, despite his knowledge that marijuana use was illegal and inconsistent with holding a security clearance. Although the Judge found Applicant demonstrated a "nonchalant attitude" about the illegality and impropriety of his marijuana use, the Judge concluded that Applicant's "desire to continue his employment with [a defense contractor] serves as a deterrent to any future drug abuse on his part." For the reasons that follow, I find persuasive Department Counsel's argument that the Judge's finding does not reflect a reasonable interpretation of the record evidence as a whole.

Applicant used marijuana for several years while in the U.S. military despite the fact such drug use was illegal and could result in disciplinary action (up to and including court martial) and dismissal from military service. Applicant used marijuana for several years after he was granted a security clearance in 1989 despite the fact he knew it was illegal and inconsistent with holding a security clearance. Furthermore, the record evidence supports the Administrative Judge's finding that Applicant had a "nonchalant attitude" about marijuana use. The totality of the record evidence shows Applicant was not deterred from using marijuana for many years despite its illegality, its potential for disciplinary action (including court martial) and possible dismissal from military service, and its potential for disciplinary action by his company (a defense contractor). Balanced against Applicant's long history of a demonstrated "nonchalant attitude" about marijuana use despite its illegality and the potentially serious adverse consequences associated with such drug use, there is Applicant's assertion -- made after he was caught by a positive drug screen in July 1997 -- that he now realizes that he should not use marijuana and will not do so in the future. The Judge failed to provide a rational explanation why she found that Applicant --- who was not deterred from many years of marijuana use despite its potential for serious adverse consequences during his military service, despite its illegality, and despite its potential for adverse employment consequences prior to his positive drug screen in July 1997 --- would suddenly be deterred from using marijuana solely because of his currently expressed desire to keep his job. Nor does the Judge explain how Applicant's currently-stated interest in keeping his job (expressed only after he was caught by a positive drug test result) overcomes the strong evidence of Applicant's long history of demonstrated indifference to his obligations as a military member, his legal obligations as a citizen, and his fiduciary duties as a holder of a security clearance since 1989. Given Applicant's 24-year history of drug use that demonstrates poor judgment, unreliability, and indifference to his obligations and responsibilities, Applicant's statement that he will not use marijuana again because he wants to keep his current job is entitled to little weight. *See* Directive, Additional Procedural Guidance, Item 32.a. The Judge's finding of reform does not logically follow from her other findings about Applicant's overall history of conduct and runs contrary to the clear weight of the record evidence.

Department Counsel also contends the Administrative Judge's favorable decision is arbitrary, capricious, and contrary to law because it is not supported by the record evidence as a whole, and it is based on erroneous reasoning. I find Department Counsel's contention persuasive.

An Administrative Judge's decision can be arbitrary and capricious if: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983). *Accord* ISCR Case No. 97-0184 (June 16, 1998) at p. 5 n.3; ISCR Case No. 95-0600 (May 16, 1996) at p. 4. Under this standard, the Administrative Judge's decision is arbitrary and capricious.

Despite the Administrative Judge's largely negative findings about Applicant's 24-year history of marijuana use, and the Judge's recognition that most of the Drug Involvement Mitigating Guidelines did not apply, the Judge tried to justify her favorable decision solely on Drug Involvement Mitigating Guideline 3⁽³⁾ (Decision at p. 6). The Judge's analysis was flawed. The mere presence or absence of an Adjudicative Guideline, whether disqualifying or mitigating, is not solely dispositive of a case. *See, e.g.*, ISCR Case No. 96-0869 (September 11, 1997) at p. 4. Nor can a Judge consider any given Adjudicative Guideline in isolation and without regard to record evidence that fairly detracts from the weight to which an applicable guideline may be reasonably entitled. *See, e.g.*, ISCR Case No. 97-0356 (April 21, 1998) at pp. 5-6

(Adjudicative Guidelines cannot be considered in isolation, but rather must be considered in light of all the facts and circumstances of the case).

Furthermore, the Administrative Judge's decision fails to articulate a satisfactory explanation for its favorable conclusion (including a rational connection between the Judge's findings and her ultimate favorable clearance decision), and it runs contrary to the weight of the record evidence. The Judge's reliance on Drug Involvement Mitigating Guideline 3 to conclude that Applicant has demonstrated sufficient evidence of reform to warrant a favorable decision does not follow logically from the Judge's findings about Applicant's 24-year history of marijuana use and his casual attitude about such drug use. The Judge found Applicant's currently-stated intention not to use marijuana in the future to be sincere. However, that credibility determination is not a substitute for record evidence of demonstrated reform. *See, e.g.*, ISCR Case No. 97-0356 (April 21, 1998) at p. 3 ("However, credibility determinations, whether positive or negative, are not a substitute for record evidence."); DISCR Case No. 94-0215 (April 13, 1995) at p. 5 (a favorable credibility determination is not a substitute for record evidence of reform and rehabilitation). Indeed, Drug Involvement Mitigating Guideline 3 requires more than merely a statement of intent not to use drugs in the future. It calls for a *demonstrated* intent not to use drugs in the future. The Administrative Judge's finding of reform does not adequately take into account the brevity of Applicant's nine-month period of abstinence relative to his 24-year history of marijuana use. *See, e.g.*, ISCR Case No. 94-0964 (July 3, 1996) at p. 6 ("The more serious or long-term an applicant's conduct is, the stronger the evidence of rehabilitation needs to be for the Judge to find the applicant has overcome the negative security implications of that conduct."). Nor does the Judge's finding of reform appear to adequately take into account that, at the time of the hearing, Applicant was still under a form of company probation that was scheduled to continue for approximately 4-5 months after the hearing.

The decision below fails to provide a rational explanation, based on the totality of the record evidence, for the Administrative Judge's favorable security clearance decision. As such, it ought not be sustained. Moreover, absent a sustainable finding of reform, the Judge's overall findings about Applicant's 24-year history of marijuana use militate in favor of an adverse security clearance decision. Therefore, I would reverse the Judge's decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

1. The first sentence of Disqualifying Guideline 3 involves failed drug treatment and has no applicability to this case. The second sentence reads "Current drug involvement, especially following the granting of a security clearance, or an expressed intent not to discontinue use, will normally result in an unfavorable determination."
2. "[A] demonstrated intent not to abuse any drugs in the future."
3. "[A] demonstrated intent not to abuse any drugs in the future."