

DATE: August 28, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 98-0066

APPEAL BOARD DECISION AND REMAND ORDER

APPEARANCES

FOR GOVERNMENT

Michael H. Leonard, Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Robert R. Gales issued a decision dated May 11, 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 remands 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 and contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated January 16, 1998. The SOR was based on Criterion H (Drug Involvement).

A hearing was held on April 15, 1998. The Administrative Judge subsequently issued a 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 that adverse decision.

Appeal Issue

Whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, and contrary to law. Applicant contends that the Administrative Judge's decision was arbitrary because it (a) improperly required Applicant to complete a rehabilitation program and implicitly implemented a "zero-tolerance" program; (b) was based on decision-making that was outside the Administrative Judge's expertise; (c) relied on Applicant's self-incriminating testimony to his detriment while discounting his mitigating testimony; and (d) improperly found that Applicant was at greater risk of resuming drugs when he pursues post-graduate education because he had been encouraged to use drugs by the university setting.

Applicant argues that the Administrative Judge adjudicated Applicant's conduct according to improper standards, requiring Applicant to complete rehabilitation and implicitly holding Applicant to a "zero-tolerance" standard. The Board finds merit in Applicant's argument regarding the Administrative Judge's specific requirement for rehabilitation. The Administrative Judge said "...I believe that both the successful completion of a drug treatment and rehabilitation program, as well as continued confirmed abstinence for a reasonable period should be required to demonstrate the truly successful transformation from substance abuser to an abstinent, drug-free person, and to provide the basis for a conclusion that such conduct will not continue or recur in the future." (Decision at p. 7) The Administrative Judge erred by imposing on Applicant a standard that goes beyond the requirements of the Directive. Although satisfactory completion of a drug rehabilitation program can be a mitigating condition (Drug Involvement Mitigating Guideline 4), nothing in the Directive makes it an absolute requirement in drug abuse cases. Although a Judge must consider and apply pertinent Adjudicative Guidelines, the mere presence or absence of a disqualifying guideline or a mitigating one is not solely dispositive. *See, e.g.*, ISCR Case No.98-0088 (July 20, 1998) at p. 3. Furthermore, the Judge cannot rely on Section F.3. to impose on an applicant a standard the Judge prefers over the provisions of the Adjudicative Guidelines. *See, e.g.*, ISCR Case No. 96-0869 (September 11, 1997) at pp. 4-5. In the face of Applicant's drug abuse history, the Judge had to consider whether Applicant met his burden of presenting evidence that demonstrates extenuation or mitigation sufficient to warrant a favorable security clearance decision. Directive, Additional Procedural Guidance, Item 15. However, Applicant's failure to present the best possible evidence of extenuation or mitigation did not relieve the Judge of his obligation to consider whether Applicant presented evidence of reform and rehabilitation sufficient to warrant a favorable decision. *Compare* ISCR Case No. 96-0525 (June 17, 1997) at p. 4 n.6 ("Just because Department Counsel did not prove that Applicant engaged in certain forms of sexual misconduct enumerated by the Judge, the Judge was not free to infer or conclude that Department Counsel failed to prove Applicant engaged in *any* sexual misconduct with his granddaughter.")(italics in original).

Applicant's arguments regarding "zero-tolerance" are not persuasive. An applicant with a history of misconduct has a number of ways of demonstrating mitigation. One such way is to show the applicant is developing a track record without misconduct. In this case, the Directive states that one way an Applicant can mitigate Drug Involvement is by showing that "the drug involvement was not recent."

Applicant argues that the Administrative Judge made psychological determinations that are outside his expertise. Although Applicant's argument is slightly off target, it does demonstrate the Judge erred in this case. The Judge is responsible for making findings of fact and drawing conclusions (Directive, Additional Procedural Guidance, Item 25). The Judge need not be a doctor to make findings and reach conclusions about medical matters, nor a psychologist to make findings and reach conclusions about psychological matters. Of course, the Judge must base his or her findings and conclusions on record evidence and reasonable inferences that can be drawn from that evidence. *See, e.g.*, ISCR Case No. 96-0869 (September 11, 1997) at p. 4. In this case, the Judge reached a conclusion about the psychological effects of drug abuse on Applicant without any record evidence to support that conclusion. The Judge erred by doing so.

Applicant argues that the Administrative Judge erred because he employed Applicant's incriminating testimony against him while discounting his mitigating testimony. Weighing the evidence, including Applicant's testimony and credibility are part of the Administrative Judge's responsibility. It is not necessarily error to find some of Applicant's testimony more credible or of greater weight than other testimony from the same Applicant.

Applicant contends the Administrative Judge erred by finding the university setting encouraged Applicant's drug involvement and that Applicant was at risk of returning to drugs when he pursues an advanced university degree. Applicant's contention has mixed merit. There is substantial record evidence supporting the Judge's finding that Applicant's undergraduate environment contributed to his drug abuse. However, there is no record evidence concerning the presence or absence of drug abuse in the graduate school setting and, therefore, the Judge's remark about the risk of drug relapse posed by Applicant seeking an advanced university degree lacks any basis in the record evidence.

Applicant raises some other matters that are beyond the Board's authority. Applicant raises new evidence. The Board is not permitted to consider new evidence on appeal. (Directive, Additional Procedural Guidance, Item 29). Applicant also proposes that he be subject to drug testing. There is no authority for the Administrative Judge or the Board to mandate or administer such testing.

Conclusions

Applicant has met his burden on appeal of demonstrating error which warrants remand. Pursuant to Item 33.b. of the Additional Procedural Guidance, the Board remands the case to the Administrative Judge for correction of the errors identified by the Board and issuance of 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