

DATE: July 20, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 98-0088

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Administrative Judge Roger C. Wesley issued a decision, dated May 15, 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.

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 January 26, 1998 to Applicant. The SOR was based on Criterion H (Drug Involvement).

A hearing was held on March 26, 1998. The Administrative 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 that adverse decision.

Appeal Issue

The Administrative Judge made findings about Applicant's history of drug abuse (which included frequent marijuana use during the period 1987-March 1996, frequent cocaine use during the period May 1995-March 1996, and a failed drug treatment program in 1995). The Judge considered the favorable evidence submitted by Applicant concerning changes in his life and concluded that evidence was not sufficient to overcome the negative implications of Applicant's long history of regular drug abuse and his 1995 failed drug treatment.

Applicant does not challenge the Administrative Judge's findings about his drug abuse history. However, Applicant contends: (a) his drug use was due to youthful immaturity and aimlessness; (b) he has matured, changed his life, and put

illegal drugs behind him; (c) he accepts full responsibility for his past misconduct; (d) he now has a stable family lifestyle; and (e) he has changed himself for the better through Christian beliefs, the positive influence of his wife, and his acceptance of Jesus Christ as his Savior. The Board construes Applicant's arguments contentions as raising the issue of whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. For the reasons that follow, the Board concludes Applicant has failed to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law.

The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. A history of drug abuse raises questions about an applicant's suitability for access to classified information. *See, e.g., AFGF Local 1533 v. Cheney*, 944 F.2d 503, 506 n.6 (9th Cir. 1991)(noting various ways that drug use could pose security risk). Accordingly, Applicant's long history of regular drug abuse provided a rational basis for the Judge's concerns about Applicant's suitability for a security clearance.

Applicant's appeal brief argues for an alternate interpretation of the record evidence that is favorable to him. However, Applicant's arguments fail to demonstrate the Administrative Judge's decision is arbitrary, capricious, or contrary to law. A reading of the decision below shows the Judge considered the record evidence, both favorable and unfavorable, as he was required to do under the Directive. In weighing the record evidence, the Judge had to decide whether the favorable evidence outweighed the unfavorable evidence, or *vice versa*. *See, e.g., ISCR Case No. 96-0871* (January 29, 1998) at p. 3. Absent a showing that the Judge weighed the evidence in an arbitrary and capricious manner, Applicant's ability to cite favorable record evidence does not demonstrate the Judge committed error. The Board does not have to agree with the Judge's weighing of the record evidence in this case to conclude he acted within the scope of his discretion when evaluating the record evidence concerning Applicant.

Applicant's appeal brief refers to his two-year period of abstinence as of the time of the hearing. We construe Applicant's argument as raising the issue of whether the Administrative Judge erred by not giving him the benefit of Drug Involvement Mitigating Guideline 1 ("[T]he drug involvement was not recent"). Applicant's argument is not frivolous because two years of abstinence suggests that he is entitled to application of Mitigating Guideline 1. The Judge must apply pertinent Adjudicative Guidelines. *See, e.g., ISCR Case No. 96-0608* (August 28, 1997) at p. 5. However, the Judge is not required to apply pertinent Adjudicative Guidelines in isolation without regard to the record evidence as a whole. *See, e.g., ISCR Case No. 97-0356* (April 21, 1998) at p. 6. In this case, the Judge's analysis of Applicant's drug abuse history specifically discussed a variety of factors (Decision at pp. 4-5), including Applicant's two years of abstinence. The Judge's consideration of all those factors was proper under Section F.3. and reflects a reasonable analysis of the record evidence as a whole. Accordingly, the Judge was not required, as a matter of law, to render a favorable decision based on Applicant's two years of abstinence. *See, e.g., ISCR Case No. 96-0608* (August 28, 1997) at p. 5 ("[T]he mere presence or absence of a Disqualifying or Mitigating Guideline is not solely determinative of the outcome of a case.").

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's May 15, 1998 decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

See dissenting opinion

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Dissenting Opinion of Administrative Judge Michael Y. Ra'anan

The majority correctly notes the applicability of Drug Involvement Mitigating Guideline 1 ("the drug involvement was not recent") which was never specifically applied by the Administrative Judge. With that in mind, I disagree with the majority that the Administrative Judge's analysis under F.3. reflects a reasonable analysis of the record evidence as a whole.

Applicant was charged with only one area of misconduct: drug involvement. Applicant has been free of drugs for two years. Applicant appeared to be "credible" and "sincere" according to the Administrative Judge who heard Applicant say that he does not use drugs and has no desire to use drugs anymore. Applicant has a two year track record of abstaining from drugs and is credible and sincere in his intent to continue to abstain. Since Applicant has no other area of misconduct, I fail to see how a "whole person" analysis can reasonably conclude that Applicant should be denied a security clearance.

While I agree that the mere presence or absence of Disqualifying or Mitigating Guideline is not necessarily dispositive in the abstract, in this case Mitigating Guideline 1 should have been applied and should have determined the outcome.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board