

DATE: October 29, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 98-0223

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Chief Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

Administrative Judge Richard A. Cefola issued a decision, dated July 31, 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 issues of (1) whether the Judge failed to consider Drug Involvement Mitigating Guidelines 1, 3 and 4; and (2) whether the Administrative Judge's decision was arbitrary, capricious or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated March 19, 1998 to Applicant. The SOR was based on Criterion H (Drug Involvement).

At the time he provided an answer to the SOR, Applicant elected to have his case determined on a written record instead of a hearing. The government submitted a File of Relevant Material (FORM) to the Applicant on June 16, 1998. Applicant submitted a reply to the FORM. The Administrative Judge subsequently issued a written decision, dated July 31, 1998. The Judge found that Applicant had a history of drug involvement and that the involvement was recent. The Judge concluded that Applicant's pronouncements of future abstinence were insufficient to overcome the government's case. The Judge entered formal findings against Applicant under Criterion H, and concluded that 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 Administrative Judge's adverse clearance decision.

Appeal Issues⁽¹⁾

1. Whether the Administrative Judge failed to consider Drug Involvement Mitigating Guidelines 1, 3, and 4. Applicant argues, in essence, that Mitigating Guidelines 1, 3, and 4 operate to mitigate the government's case against him. For the reasons given below, Applicant's contention lacks merit.

Applicant contends that the Judge failed to consider Drug Involvement Mitigating Guideline 1 when the Judge evaluated Applicant's drug use.⁽²⁾ Applicant's argument is not persuasive. The Judge clearly considered the issue of recency of Applicant's drug use in his decision. (Decision at pp. 4-5). The evidence supports the Judge's finding that Applicant last used drugs in November 1997, approximately eight months prior to the close of the record in this case. Applicant had a ten-year history of periodic use of a number of illegal substances. Given these facts, it was reasonable for the Judge to conclude that Applicant's drug use was "fairly recent" (Decision at p. 5) and it was reasonable for him not to apply itigating Guideline 1 in the Applicant's favor.

In a related argument, Applicant maintains that his use of cocaine, LSD and psilocybin mushrooms was mitigated under Drug Involvement Mitigating Guideline 1 because he was under 21 years of age at the time and the usage took place more than five years ago.⁽³⁾ Applicant views these components of his drug use in isolation without reference to the totality of his involvement with illegal substances. Such an analysis cannot be squared with the requirement that the Administrative Judge consider all of the Applicant's drug use and evaluate it as a whole. *See, e.g.*, ISCR Case No. 95-0560 (August 16, 1996) at p. 3 (under "whole person" concept, Administrative Judge must consider an applicant's history of drug abuse in its entirety, not in piecemeal manner). The Administrative Judge properly evaluated the totality of Applicant's disqualifying behavior in this case.

Applicant claims as mitigating his stated intention not to use drugs in the future.⁽⁴⁾ The Judge clearly considered this stated intent in his decision. The Judge concluded that, given the recency and nature of Applicant's drug involvement, Applicant's assertions that he would abstain from future drug involvement did not dispel the Judge's concerns about the possibility of Applicant's future drug use. By evaluating both the favorable and unfavorable evidence to determine which should be accorded the greater weight, the Judge properly performed the duty required of him under Section F.3. of the Directive. After considering the record in this case, the Board concludes that the Judge acted reasonably when he concluded that Applicant's stated future intentions did not provide mitigation sufficient to overcome the government's case.

Applicant maintains on appeal that he successfully completed drug rehabilitation and that this fact should have been considered by the Judge and used to mitigate his case.⁽⁵⁾ Applicant's contention lacks merit. There is no mention in the Judge's decision of the fact that Applicant embarked upon an alcohol/drug education program and counseling after a drug-related June 1997 conviction. Given the fact that Applicant had embarked upon such a program, some discussion on the subject by the Judge would have been useful. Nevertheless, Administrative Judge's decisions are not measured against a standard of perfection and there is no requirement that the Judge mention each and every piece of evidence in his decision. *See, e.g.*, DISCR Case No. 90-1596 (September 18, 1992) at p. 5. Under the particular facts of this case there was no reason for the Judge to apply Drug Involvement Mitigating Guideline 4 since, at the close of the record in this case, Applicant had participated in, but not completed, his court-ordered counseling despite his assertions on appeal.⁽⁶⁾ Additionally, the Judge properly noted the fact that Applicant used drugs after the court disposition of his case in June 1997. Such use was in violation of his court-ordered probation and undercuts any claim of rehabilitation.

2. Whether the Administrative Judge's decision was arbitrary, capricious or contrary to law. Applicant asserts that (a) the Judge failed to consider Applicant's age and maturity at the time of his drug use; (b) the Judge did not consider the presence of rehabilitation and other pertinent behavioral changes; (c) the Judge did not reflect upon the motivation for the conduct; (d) the Judge did not consider the potential for pressure, coercion, exploitation or duress; (e) the Judge failed to consider the likelihood of continuation or recurrence; and (f) the Judge did not credit Applicant for Applicant's candor with the government and the fact that the government's case derived exclusively from Applicant's voluntary admissions. The Board construes these various arguments as raising the issue of whether the Judge's decision was arbitrary, capricious or contrary to law.

The factors mentioned by Applicant in assertions (a) through (e) above are taken from the Adjudicative Process section of the Adjudicative Guidelines. *See* Directive, Enclosure 2. These are general factors that the Administrative Judge must

consider when deciding a case. Although different in terms of the specific language they contain, the factors are conceptually identical to the various factors listed at Section F.3. of the Directive.

On appeal Applicant has the burden of establishing error on the part of the Administrative Judge. Here, Applicant has failed to demonstrate that the Judge failed to consider all pertinent general and specific guidelines when deciding the case. The Judge indicates in his decision that he did take into consideration the Section F.3. factors and there is nothing in the record or the Judge's decision that would lead the Board to conclude otherwise. Moreover, the Judge specifically addressed the issue of likelihood of continuation or recurrence of the disqualifying conduct. The Judge's conclusion that there was insufficient evidence of reform to overcome his doubts about Applicant's returning to drugs had a rational basis in the record evidence and was sufficient to support his ultimate conclusion that Applicant should not receive a security clearance.

Applicant asserts that the Judge failed to consider that Applicant's own admissions provided the government with its case and that these admissions demonstrate his honesty, integrity and trustworthiness. He fails to demonstrate that the Judge erred. Honesty and candor with the government do not immunize admitted misconduct from being considered for its security significance. *See, e.g.*, ISCR Case No. 97-0176 (January 22, 1998) at p. 2. Applicant's ten-year history of illegal substance abuse is not extenuated or mitigated by the fact that he admitted it to the government. While the Judge could have concluded that Applicant's disclosure of his past problems provided *some* evidence of reform, it was not error for the Judge to conclude that the disclosures were not a determining factor in this case in light of the record evidence as a whole.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error. Accordingly, the Board affirms the Administrative Judge's July 31, 1998 decision.

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

1. Applicant's appeal brief contains a number of statements that go beyond the record evidence. Such statements constitute new evidence, which the Board cannot consider. Directive, Additional Procedural Guidance, Item 29.

2. The text of Drug Involvement Mitigating Guideline 1 reads "the drug involvement was not recent."

3. The record evidence indicates that Applicant last used LSD and psilocybin mushrooms in 1992. He last used cocaine

in 1993. His post-1993 drug involvements included crystal methamphetamine (speed) and marijuana which he used until 1995 and 1997 respectively.

4. The text of Drug Involvement Mitigating Guideline 3 reads "a demonstrated intent not to use drugs in the future."

5. The text of Drug Involvement Mitigating Guideline 4 reads "satisfactory completion of a drug treatment program prescribed by a credentialed medical professional."

6. Applicant's alcohol/drug program consisted of two phases. The first phase was an education course requiring attendance at 9 classes. The second phase consisted of 40 hours of counseling/therapy. At the time of the close of the record in this case, Applicant had completed the first phase but not the second.