

DATE: November 18, 1999

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 98-0583

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Arthur A. Elkins, Esq., Department Counsel

FOR APPLICANT

Mark Wilensky, Esq.

Administrative Judge Kathryn M. Braeman issued a decision, dated June 30, 1999, 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 reverses 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's findings are supported by substantial evidence; (2) whether the Administrative Judge misapplied various Adjudicative Guidelines; and (3) whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated August 25, 1998. The SOR was based on Criterion H (Drug Involvement), Criterion E (Personal Conduct), and Criterion J (Criminal Conduct).

A hearing was held on June 17, 1999. 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 the Administrative Judge's favorable security clearance decision.

Appeal Issues

1. Whether the Administrative Judge's findings are supported by substantial evidence. Department Counsel contends various findings by the Administrative Judge are not supported by substantial evidence. Specifically, Department Counsel argues the Judge erred by finding: (a) Applicant did not falsify material facts about his drug abuse history; (b) Applicant successfully completed drug rehabilitation programs prescribed and administered by credentialed medical professionals; and (c) Applicant promptly reported a February 1997 drug-related incident to his employer.

The Board must determine whether "[t]he Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge." Directive, Additional Procedural Guidance, Item 32.a. The presence of conflicting record evidence does not diminish a Judge's fact-finding responsibility. When the record contains conflicting evidence, the Judge must carefully weigh the evidence in a reasonable, common sense manner and make findings that reflect a reasonable interpretation of the evidence that takes into account all the record evidence. *See, e.g.*, ISCR Case No. 98-0507 (May 17, 1999 at p. 6. *See also* ISCR Case No. 97-0727 (August 3, 1998) at p. 3 ("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.").

(a) The Administrative Judge found Applicant did not falsify a Personnel Security Questionnaire (PSQ) in February 1989 or a written statement he gave to a Defense Security Service Special Agent in May 1998. In support of those findings, the Judge made the following predicate findings: Applicant denied the SOR allegations concerning falsification; Applicant testified credibly that he did not use cocaine in 1979; Applicant testified credibly that he did not tell a drug treatment intake officer that he began using cocaine in 1979; Department Counsel failed to establish willful falsification by calling a drug treatment intake officer or a Special Agent to testify; Applicant's drug abuse during the period 1979-1987 was dated and no longer relevant and material; and Applicant had previously disclosed fully his marijuana and cocaine use in a previous PSQ and in a June 1989 written statement. Department Counsel contends the Judge erred in finding Applicant did not engage in falsification because: the record evidence is to the contrary; Applicant's self-serving testimony is not credible; Applicant's drug abuse during the period 1979-1987 was material; and Applicant's earlier disclosures about his drug abuse did not relieve him of a continuing obligation to give complete, truthful answers to the government about his drug abuse history.

Applicant's denials of any intention to falsify his drug abuse history in his February 1989 PSQ and his May 1998 written statement are relevant and material evidence. However, those denials are not conclusive evidence. Rather, Applicant's denials had to be considered in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 98-0620 (June 22, 1999) at p. 2. An intent to falsify can be shown by circumstantial evidence even in the face of denials of any intent to falsify. *See, e.g.*, DISCR Case No. 90-0770 (July 16, 1992) at p. 3. *Cf. Foster v. Dalton*, 71 F.3d 52, 56 (1st Cir. 1995) ("Notwithstanding a person's disclaimers, a contrary state of mind may be inferred from what he does and from a factual mosaic tending to show that he really meant to accomplish what he professes not to have intended.") (quoting earlier decision).

The Board rejects Department Counsel's argument to the extent it is based on the premise that an Administrative Judge must reject an applicant's testimony because it is "self-serving." *See* DISCR Case No. 93-1201 (November 15, 1994) at p. 6 ("The self-serving nature of evidence, like the motive or self-interest of any witness, may affect the weight accorded such evidence. Nevertheless, the fact that evidence is self-serving does not render it *per se* unreliable . . .").

The Administrative Judge's conclusion that Applicant testified credibly about his drug abuse history is critical to the Judge's findings because there is record evidence that clearly runs contrary to Applicant's testimony about his drug abuse history. Specifically, over the years, Applicant has given different statements about the dates and frequency of his marijuana and cocaine use. A simple comparison of Applicant's various statements shows that they cannot easily be reconciled. To the contrary, the inconsistencies among Applicant's various statements raise serious questions about his veracity.

The deference owed to an Administrative Judge's credibility determinations (Directive, Additional Procedural Guidance, Item 32.a.) does not immunize them from review, nor does it preclude the Board from concluding that a challenged credibility determination cannot be sustained. *See, e.g.*, ISCR Case No. 97-0356 (April 21, 1998) at p. 3; ISCR Case No. 95-0178 (March 29, 1996) at pp. 2-3. The record evidence in this case demonstrates the kind of situation the Supreme Court discussed in *Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985):

"[T]he trial judge may [not] insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or

objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable fact-finder would not credit it. Where such factors are present, the court of appeals may well find clear error even on a finding purportedly based on a credibility determination."

Applicant's hearing testimony about his drug abuse history is contradicted by his prior statements and is implausible on its face when viewed in light of the record evidence as a whole. The Judge's favorable credibility assessment cannot be sustained because it fails to take into account record evidence that fairly detracts from it.

The Administrative Judge gave undue weight to the fact that Department Counsel did not call a drug treatment intake officer to testify. As a general proposition, a trier of fact is not justified in drawing an adverse inference from a party's failure to call a potential witness unless that potential witness is peculiarly in the power of the party to produce. *See, e.g., J.C. Penney Co., Inc. v. NLRB*, 123 F.3d 988, 996 n.2 (7th Cir. 1997). The drug treatment intake officer was not under the control of Department Counsel within the meaning of the adverse inference rule. Apart from the inapplicability of the adverse inference rule, the absence of the drug treatment intake officer as a witness did not relieve the Judge of her obligation to consider the other record evidence that was relevant and material to making findings about Applicant's drug abuse history. *See, e.g., ISCR Case No. 94-1055* (May 8, 1996) at p. 3 ("Nothing in the Directive requires Department Counsel to prove its case against an applicant through any specific form of evidence."). Accordingly, the absence of the drug treatment intake officer as a witness for the government could not be relied upon by the Judge to find that Department Counsel failed to meet its burden of proof in this case.

The Special Agent who interviewed Applicant in May 1998 was a witness that may have been within the power of Department Counsel to produce. *See* Executive Order 10865, Section 6.⁽¹⁾ However, Department Counsel's apparent ability to compel the Special Agent to testify does not end the analysis. In this case, the Judge's reasoning is based on the flawed premise that Department Counsel should have presented the Special Agent to testify about Applicant's state of mind during the May 1998 interview, and Department Counsel's failure to do so bolstered the credibility of Applicant's denials of any intent to falsify. The mere fact that Applicant's testimony was not rebutted does not mean that it was conclusive or had to be accepted as true. *See, e.g., ISCR Case No. 98-0265* (March 17, 1999) at p. 4 n.2. Furthermore, the record does not support an assumption that the Special Agent could testify about Applicant's thoughts or mental processes during the May 1998 interview. Therefore, the Judge could not reasonably draw an adverse inference from Department Counsel's decision to not call the Special Agent to rebut Applicant's denials of an intent to falsify his drug abuse history.⁽²⁾

It was arbitrary and capricious for the Administrative Judge to reason that Applicant told the truth in his May 1998 written statement because he would not benefit from minimizing his earlier drug abuse since it was no longer material. There is no logical or legal basis for the Judge to make any inference about Applicant's state of mind in May 1998 based on the Judge's conclusion in 1999 that Applicant's earlier drug abuse was no longer material. Furthermore, as will be discussed in the next paragraph, the Judge erred by finding that Applicant's omissions about his drug abuse history were not material.

The Administrative Judge erred by finding that Applicant's drug abuse during the period 1979-1987 was not material. The Judge's finding is based on a view of materiality that is untenable. In falsification cases, materiality is not limited to consideration of whether the falsification at issue would result in an adverse security clearance adjudication. Materiality also covers information that is relevant to a security clearance investigation. *See, e.g., ISCR Case 95-0818* (January 31, 1997) at pp. 2-3. Furthermore, under the whole person concept, the entire history of Applicant's drug abuse, not merely the most recent period of that drug abuse, must be considered in evaluating Applicant's security eligibility. *See, e.g., ISCR Case No. 98-0350* (March 31, 1999) at p. 3 (noting earlier Board decision that held Administrative Judge must consider the totality of an applicant's drug abuse history and not analyze it in a piecemeal manner). Applicant's entire history of drug abuse was very much relevant and material when he executed the February 1989 PSQ, when the Special Agent interviewed him and obtained a written statement in May 1998, and in the current adjudication of his security eligibility. Because Applicant's earlier drug abuse was material for purposes of both the investigation and adjudication of his security eligibility, the Judge's finding that it was not material is arbitrary, capricious, and contrary to law.

The Administrative Judge gave undue weight to Applicant's earlier disclosures about his drug abuse history. The gravamen of a falsification case is whether an applicant has been less than truthful and candid with the government, not

whether the government was ultimately misled or deceived. *See, e.g., United States v. Johnson*, 139 F.3d 1359, 1364 (11th Cir. 1998)(deliberate false statement is no less false or material if government agent who heard it knew at the time that it was false); *United States v. Rogers*, 118 F.3d 466, 472 (6th Cir. 1997)(same). Furthermore, a prior disclosure of information to the government does not preclude a finding that an applicant sought to conceal or mislead the government about that information at a later time. The government is entitled to receive complete and accurate information from an applicant at all times, not just occasionally. Finally, the Judge erred when she found Applicant "fully revealed" his drug abuse use in a February 1989 PSQ. The Judge's finding on that point is untenable because the Judge found Applicant used marijuana from 1975 to 1987, yet in the February 1989 PSQ, Applicant did not admit any marijuana use before 1980. Applicant's failure to disclose his marijuana use during the period 1975-1979 is inconsistent with full disclosure.

The Administrative Judge's finding that Applicant did not engage in willful falsification is not sustainable because it is based on arbitrary and capricious reasoning and runs contrary to the weight of the record evidence in this case.

(b) There is record evidence that supports the Administrative Judge's finding that Applicant attended a drug rehabilitation program as part of a court-ordered drug diversion program in lieu of being criminally prosecuted for possession of cocaine, and that Applicant participated in a corporate-sponsored drug rehabilitation program. However, there is insufficient record evidence⁽³⁾ to support the Judge's finding that those programs involved credentialed medical professionals. The record evidence on this point is inadequate to support the Judge's finding.⁽⁴⁾

(c) The Administrative Judge erred by finding that Applicant promptly reported a February 1997 crack cocaine incident to his employer. The crack cocaine incident occurred on February 9, 1997. On March 23, 1997, Applicant accompanied his lawyer to receive an arrest warrant in connection with the crack cocaine incident. Applicant appeared in court on May 2, 1997 and had his criminal case handled through a drug diversion program. Applicant told his employer about the crack cocaine incident in the middle of June 1997. The record as a whole does not support the Judge's finding that Applicant reported the incident "promptly" to his employer. *Cf.* ISCR Case No. 99-0201 (October 12, 1999) at pp. 3-4 (discussing what constitutes a prompt, good-faith disclosure under Personal Conduct Mitigating Condition 3).

2. Whether the Administrative Judge misapplied various Adjudicative Guidelines. Department Counsel contends the Administrative Judge erred in her application of various Adjudicative Guidelines. The Board will address each of these assignments of error in turn.

(a) Drug Involvement Mitigating Condition 1.⁽⁵⁾ The Administrative Judge concluded Applicant's drug abuse was not recent because it ended in February 1997. Department Counsel contends the Judge erred because: (i) the Board held it was not arbitrary or capricious for a Judge in another case to hold that drug use that occurred within 14 months was too recent to warrant application of Drug Involvement Mitigating Condition 1; and (ii) the Judge erred because her application of Drug Involvement Mitigating Condition 1 unfairly allows Applicant to benefit from the passage of time that resulted from several continuances during the processing of this case on the hearing level.

(i) Department Counsel's reliance on the cited Board decision is misplaced. The Board has declined to set any "bright line" test or standard for determining what constitutes "recent." *See, e.g.,* ISCR Case No. 98-0394 (June 10, 1999) at pp. 2-3. Department Counsel's argument fails to persuade the Board that it should establish such a "bright line" test or standard in this case.

(ii) The Board rejects Department Counsel's argument concerning the effect of continuances. At the hearing level, if Department Counsel believes that a continuance is not requested in good faith, would prejudice its case, or would give an applicant an unfair advantage, then Department Counsel can oppose the continuance request on those grounds. *Cf.* ISCR Case No. 94-0084 (December 13, 1994) at p. 3 (noting matters that an Administrative Judge should take into consideration when faced with a request for continuance). Department Counsel did not do so in this case. Accordingly, the Judge acted properly when she declined to "take the continuances out" when computing the passage of time since the February 1997 crack cocaine incident.

(b) Drug Involvement Mitigating Condition 3.⁽⁶⁾ The Administrative Judge concluded Applicant had demonstrated an intent not to use illegal drugs again because Applicant had not used illegal drugs since February 1997 and Applicant

satisfactorily completed drug treatment programs prescribed by credentialed medical professionals. Department Counsel contends the Judge erred because: (i) Applicant's drug rehabilitation was mandatory, not voluntary; and (ii) Applicant's prior stated intention not to use drugs in the future were followed by drug abuse several years later.

The mandatory nature of Applicant's drug rehabilitation efforts after the February 1997 crack cocaine incident did not preclude the Administrative Judge from considering whether the record as a whole showed that Applicant demonstrated an intent to not use illegal drugs in the future. Department Counsel's argument to the contrary is not persuasive. The Board declines to conclude that mandatory drug rehabilitation will, as a matter of law, preclude application of Drug Involvement Mitigating Condition 3 in any case.

As discussed earlier, there is insufficient record evidence to support the Administrative Judge's finding that Applicant's completed drug rehabilitation programs were prescribed and administered by credentialed medical professionals.

The Administrative Judge correctly found that Applicant returned to cocaine use in November 1996 after telling the government in 1989 that he did not intend to use illegal drugs again. Having failed to abide by that stated intention, Applicant's return to cocaine abuse in November 1996 raised serious questions whether Applicant is willing or able to abide by his statement about not intending to use illegal drugs again. Furthermore, as discussed earlier in this decision, Applicant's inconsistent statements about his drug abuse history raise a serious question about his candor with the government.

Considering the record as a whole, the Administrative Judge's application of Drug Involvement Mitigation 3 is not sustainable.

(c) Drug Involvement Mitigating Condition 4.⁽⁷⁾ As discussed earlier in this decision, there is insufficient record evidence to support the Administrative Judge's finding that Applicant attended treatment programs that involved credentialed medical professionals. Accordingly, it was arbitrary and capricious for the Judge to apply Drug Involvement Mitigating Condition 4 in this case.

(d) Personal Conduct Mitigating Condition 1.⁽⁸⁾ The Administrative Judge applied Personal Conduct Mitigating Condition 1, apparently based on her finding that the earlier drug abuse that Applicant failed to disclose in the February 1989 PSQ and in his May 1998 written statement was not material. As discussed earlier in this decision, the Judge's finding that the omitted information was not material is unsustainable. Accordingly, there was no rational basis for the Judge to apply Personal Conduct Mitigating Condition 1.

(e) Personal Conduct Mitigating Condition 2.⁽⁹⁾ The Administrative Judge applied Personal Conduct Mitigating Condition 2 even though she acknowledged she was relying on Applicant's *earlier* disclosures about his drug abuse history. Department Counsel contends the Administrative Judge erred by applying this Mitigating Condition because: (i) Applicant's earlier disclosures were not complete and accurate; (ii) Applicant's 1998 falsification occurred just over a year before the hearing; and (iii) application of Personal Conduct Mitigating Condition 2 would be inappropriate in light of Applicant's recent denial (in his answer to the SOR) of marijuana use after 1979.

Personal Conduct Mitigating Condition 3, not Personal Conduct Mitigating Condition 2, must be considered when a case involves the issue of whether an applicant has made disclosures that are corrections of an earlier falsification. *See* ISCR Case No. 97-0595 (May 22, 1998) at p. 4. Furthermore, even the Administrative Judge acknowledged that Personal Conduct Mitigating Condition 2 refers to subsequent disclosures, not earlier ones. The Judge failed to articulate a rational basis for her deviation from the plain language of Personal Conduct Mitigating Condition 2. In addition, as discussed earlier in this decision, Applicant's candor with the government about his drug abuse history is questionable in light of the record evidence of his multiple inconsistent statements about his drug history, including his recent denial (in his answer to the SOR) of marijuana use after 1979. Considering all the circumstances, the Administrative Judge did not have a rational basis for applying Personal Conduct Mitigating Condition 2.

(f) Criminal Conduct Mitigating Condition 1.⁽¹⁰⁾ Department Counsel challenges the Administrative Judge's application of Criminal Conduct Mitigating Condition 1. In support of that challenge, Department Counsel makes a variation of its arguments concerning Drug Involvement Mitigating Condition 1. The Board need not repeat its discussion of those

arguments here.

(g) Criminal Conduct Mitigating Condition 4.⁽¹¹⁾ Department Counsel correctly notes that the Administrative Judge did not specifically state why she applied Criminal Conduct Mitigating Condition 4. However, reading the Judge's decision in its entirety, the Board concludes the Judge's application Criminal Conduct Mitigating 4 appears to be based on the reasons the Judge gave for finding that Applicant had shown clear evidence of successful rehabilitation. As will be discussed next, the record evidence as a whole does not support the Judge's finding of clear evidence of successful rehabilitation. Accordingly, the Board concludes the Judge failed to articulate a rational basis for applying Criminal Condition Mitigating Condition 4.

(h) Criminal Conduct Mitigating Condition 5.⁽¹²⁾ The Administrative Judge applied Criminal Conduct Mitigating Condition 5 based on her favorable conclusions about Applicant's drug rehabilitation and her finding that Applicant did not falsify his February 1989 PSQ or his ay 1998 written statement. Department Counsel contends the record evidence as a whole does not support the Judge's finding of rehabilitation. In support of that contention, Department Counsel reiterates several of its arguments. For the various reasons set forth earlier in this decision, the Board concludes the Judge's finding of clear evidence of successful rehabilitation cannot be sustained because the record evidence as a whole clearly runs counter to it, and the Judge's finding is based on arbitrary and capricious conclusions.

3. Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. In addition to its other appeal arguments, Department Counsel contends the Administrative Judge's decision is arbitrary, capricious, or contrary to law because: (a) the Judge erred by finding Applicant's cocaine use did not begin in 1979; (b) the Judge erred by finding Applicant's drug abuse during the period 1979-1987 was no longer material; (c) the Judge failed to articulate what weight she gave to Applicant's lack of judgment in using crack cocaine when his minor daughter was present in the home; (d) the Judge gave undue weight to her finding that Applicant has ceased to have any contact with a friend who provided him and his cohabitant with cocaine; and (e) the Judge's findings and conclusions reflect a piecemeal analysis that is inconsistent with the whole person concept.

(a) There is conflicting record evidence on when Applicant first used cocaine. As discussed earlier in this decision, the presence of conflicting record evidence does not diminish an Administrative Judge's responsibility to make factual findings. Normally, the Judge's favorable assessment of Applicant's credibility would lead the Board to give deference to the Judge's finding that Applicant did not begin using cocaine in 1979. However, the Judge's favorable assessment of Applicant's credibility is undercut by the errors discussed elsewhere in this decision.

(b) As discussed earlier in this decision, the Administrative Judge erred in finding that Applicant's drug abuse during the period 1979-1987 was no longer material.

(c) Whatever mitigating weight can be placed on Applicant's decision not to use crack cocaine in the actual presence of his minor daughter, it is clear that a parent who uses crack cocaine while responsible for a minor infant demonstrates a clear lack of judgment, reliability, and trustworthiness. The Judge's failure to factor this into her evaluation of Applicant's drug abuse history is inconsistent with her responsibility to evaluate this case in light of the record as a whole and the Section F.3. factors.

(d) Department Counsel fails to make a persuasive argument that the Administrative Judge gave undue weight to her finding that Applicant has ceased to have any contact with a friend who provided her and her cohabitant with cocaine.

(e) The Administrative Judge's favorable findings and conclusions are based on a piecemeal analysis of the record evidence that is inconsistent with the Judge's obligation to evaluate Applicant's security eligibility in light of the whole person concept. Such a piecemeal analysis is arbitrary, capricious, and contrary to pertinent provisions of the Directive.

Conclusion

The Board need not decide whether the various errors made by the Administrative Judge are individually harmful. Considering the record evidence in this case, the Judge's errors, viewed in their totality, are harmful and warrant reversal. Accordingly, pursuant to Item 33.c. of the Directive's Additional Procedural Guidance, the Board reverses the

Administrative Judge's June 29, 1999 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. For purposes of addressing this appeal, the Board need not decide whether an Administrative Judge can draw an adverse inference from a party's failure to call a potential witness without the matter being brought to the attention of the party against whom an adverse inference may be drawn so that the party has an opportunity to give an explanation for the nonproduction of the witness (*e.g.*, death, medical emergency, stipulation between the parties, or other reason for the witness' nonappearance).

2. To the extent that Applicant testified the Special Agent told him he could give approximate dates for his past drug abuse, the Administrative Judge could infer, from the absence of the Special Agent as a witness, that Department Counsel was not challenging Applicant's testimony on that point.

3. Whether there is sufficient record evidence to support an Administrative Judge's findings is a question of law, not a question of fact. *See, e.g.*, ISCR Case No. 98-0419 (April 30, 1999) at p. 3.

4. The record evidence cited by Applicant clearly supports the Administrative Judge's finding that Applicant participated in drug rehabilitation programs. However, that evidence does not show whether the programs were administered by credentialed medical professionals.

5. "[T]he drug involvement was not recent."

6. "[A] demonstrated intent not to abuse any drugs in the future."

7. "[S]atisfactory completion of a drug treatment program prescribed by a credentialed medical professional."

8. "[T]he information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability."

9. "[T]he falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily."

10. "[T]he criminal conduct was not recent."

11. " . . . "the factors leading to the violation are not likely to recur."

12. "[T]here is clear evidence of successful rehabilitation."