

DATE: June 3, 1999

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 98-0611

APPEAL BOARD DECISION AND REMAND ORDER

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Chief Department Counsel

Michael H. Leonard, Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Kathryn Moen Braeman issued a decision, dated December 30, 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. The Board remands the case to the Administrative Judge for further processing consistent with the rulings and instructions set forth in this Decision and Remand Order.

The Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6, dated January 2, 1992, as amended.

Department Counsel's appeal presents the following issues: 1. Whether the Administrative Judge's application of Drug Involvement Mitigating Condition 3 was supported by the record evidence; 2. Whether the Administrative Judge's factual findings were supported by the record evidence; and 3. Whether the Administrative Judge's decision was arbitrary, capricious and contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR), dated September 3, 1998. The SOR was based on Criterion H (Drug Involvement). A hearing was held on November 17, 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 appeal from the favorable decision.

Appeal Issues

1. Whether the Administrative Judge's application of Drug Involvement Mitigating Condition 3 was supported by the record evidence? Department Counsel argues that the Administrative Judge erred by apply Mitigating Condition 3 ("a demonstrated intent not to abuse any drugs in the future"). Department Counsel asserts that Applicant stated such an intent but he had not demonstrated that intent. Department Counsel's argument has merit.

In a sworn statement given to an agent of the Defense Investigative Service (DIS) ⁽¹⁾ on August 7, 1998 Applicant addressed the subject of his future intentions regarding marijuana use by stating: "Future intent would depend on job restriction or testing, even then, not sure about future participation." Not until he offered testimony at his hearing did Applicant express a desire to refrain from using drugs. (Tr. at pp. 16-17, p. 26). At one point in his hearing testimony, Applicant's desire to forgo marijuana was couched only in terms of what his security clearance would require. (Tr. at p. 16). These statements of intent, together with other record evidence (a modest nine month period of abstinence) provide *some* evidence of a commitment to reform. The record evidence falls short, however, of a *demonstrated* intent not use any drugs in the future. Administrative Judges have considerable latitude when applying disqualifying and mitigating conditions under the Directive. Nevertheless, their discretion is not unlimited, and given the record in this case it was error for the Judge to apply Mitigating Condition 3.

2. Whether the Administrative Judge's factual findings were supported by the record evidence? Department Counsel argues that the Administrative Judge made a factual finding, which although technically correct in a narrow sense is incomplete and misleading. The finding in question reads as follows: "Contractor #1 does have a Drug-Free Workplace policy which prohibits employees from any illegal drug use, possession, or sale on company property or while otherwise performing duties on behalf of the contractor or from having any illegal substances in their systems while at work. Also the contractor requires all applicants for a position to successfully pass a drug test [...]." Department Counsel's argument here is persuasive.

The Administrative Judge never refers to a portion of the Contractor's policy which covers drug involvement off-duty: "Off-Duty Conduct. The off-duty purchase, distribution, dispensement, possession, use, sale or purchase of mind-altering substances may reflect unfavorably on [Contractor] and is also prohibited." A complete reading of the Administrative Judge's decision suggests that she concluded that Applicant did not violate his company's policy, was unaware of said policy and in any case was not aware of the seriousness with which the government views involvement with illegal drugs. That analysis which stems in part from her failure to refer to the pertinent segment of the Contractor's policy is not sustainable. The record shows that Applicant is a native of the United States and has some college education. Applicant has worked in the security area since 1995. It defies common sense to conclude that such an individual could be entirely oblivious to the significance of involvement with illegal drugs for a security professional or someone dealing with the government which criminalized the drug involvement. Thus, the Administrative Judge's decision contained harmful error on these points.

The Administrative Judge's findings and analysis regarding Applicant's awareness of the significance of his drug involvement must be corrected and replaced with material that takes into account the issues cited in the previous paragraph.

3. Whether the Administrative Judge's decision is arbitrary capricious or contrary to law? Department Counsel reworks the arguments discussed above into a third issue. The Board has already addressed those arguments and no useful purpose would be served by repeating them.

Conclusion

Department Counsel has demonstrated harmful error on the issues raised. The Board remands the case to the Administrative Judge for further processing pursuant to items 35 and 25 of the Directive's Additional Procedural Guidance, in accordance with the Board's rulings and instructions.

See dissenting 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

Dissenting Opinion by Chairman Emilio Jaksetic

The Administrative Judge based her favorable security clearance decision on the following: (1) her conclusion that Applicant's drug abuse was not recent; (2) application of Drug Involvement Mitigating Condition 3; (3) her findings about the scope of the drug policy of Applicant's employer; (4) her finding that Applicant lacked awareness of his employer's drug policy; and (5) Applicant's favorable job performance. I concur with my colleagues' conclusion that the Judge erred by applying Drug Involvement Mitigating Condition 3. I also concur with my colleagues' conclusion that the Judge erred by failing to consider pertinent record evidence on the drug policy of Applicant's employer and Applicant's awareness of that policy, evidence that clearly undercuts the Judge's findings.

What remains to support the Administrative Judge's favorable decision are: (1) a dubious conclusion by the Administrative Judge that Applicant's drug use (which last occurred about nine months before the hearing) was not recent; and (2) Applicant's favorable job performance, which is insufficient to provide a legally sustainable basis for a favorable security clearance decision. Considering the record as a whole, correction of the errors identified by the Board warrants reversal, not remand. Accordingly, I dissent from my colleagues' decision to remand the case.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

1. The Defense Investigative Service is now designated the Defense Security Service (DSS).