

DATE: November 16, 1999

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 98-0657

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Michael H. Leonard, Esq., Department Counsel

FOR APPLICANT

Bill V. Wilkinson, Esq.

Administrative Judge John R. Erck issued a decision, dated June 29, 1999, in which he 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 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.

Department Counsel's appeal presents the following issues: (1) whether the Administrative Judge erred by applying Drug Involvement Mitigating Condition 2; and (2) whether the Administrative Judge's favorable 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 October 16, 1998 to Applicant. The SOR was based on Criterion H (Drug Involvement). A hearing was held on April 2, 1999. The Administrative Judge subsequently issued a written decision in which he 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 Issue

1. Whether the Administrative Judge erred by applying Drug Involvement Mitigating Condition 2. The Administrative Judge applied Drug Involvement Mitigating Condition 2 ("[T]he drug involvement was an isolated or infrequent event."). The Judge acknowledged that Applicant's marijuana use was not isolated in terms of its frequency, but characterized it as "isolated because it occurred at a time in his life which was isolated, i.e., set apart from the activities and vocation he had pursued during the remainder of his life." The Judge also characterized Applicant's periods of marijuana use (once on New Years Eve 1996, and daily use for three months in 1998, ending in June 1998) as "brief, isolated and separate from the normal course of Applicant's life." Department Counsel contends the Judge erred by applying Drug Involvement Mitigating Condition 2.

Department Counsel's argument is persuasive. It was untenable for the Administrative Judge to characterize Applicant's overall history of marijuana use as isolated in nature. The extent of Applicant's daily use of marijuana for three months during 1998 clearly precludes application of Drug Involvement Mitigating Condition 2. The Judge did not articulate a rational, defensible basis for deviating from the plain, common sense meaning of Drug Involvement Mitigating Condition 2.

As Applicant correctly notes, the presence of absence of any given Disqualifying or Mitigating Condition of the Adjudicative Guidelines is not solely dispositive of a case. *See, e.g.*, ISCR Case No. 98-0617 (July 14, 1999) at p. 4. A reading of the Administrative Judge's decision persuades the Board that the Judge's application of Drug Involvement Mitigating Condition 2 was not the lynchpin to his favorable conclusions about Applicant's security eligibility. Although the Judge's analysis fails to justify his application of Drug Involvement Mitigating Condition 2, that analysis is permissible under Section F.3. of the Directive. Accordingly, the Board concludes the Judge's error on this point does not warrant remand or reversal.

2. Whether the Administrative Judge's favorable security clearance decision is arbitrary, capricious, or contrary to law. Department Counsel contends the Administrative Judge's favorable security clearance decision is arbitrary, capricious, or contrary to law because: (a) the Judge gave undue weight to Applicant's abstinence from marijuana use earlier in his life; (b) the Judge failed to consider relevant evidence or give it the weight it deserved; and (c) the Judge's decision does not reflect an overall common sense decision under Section F.3. of the Directive. For the reasons that follow, the Board concludes Department Counsel fails to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law.

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 98-0614 (July 12, 1999) at p. 3. In addition, a Judge must consider all the record evidence, both favorable and unfavorable, and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. *See, e.g.*, ISCR Case No. ISCR Case No. 99-0119 (September 13, 1999) at p. 3. Furthermore, absent a showing of arbitrary and capricious action by a Judge, the Board will not disturb a Judge's weighing of the record evidence. *See, e.g.*, ISCR Case No. 98-0435 (September 16, 1999) at p. 3.

Department Counsel argues the Administrative Judge failed to address the security significance of Applicant's acknowledgment that (a) he used marijuana even though he knew he would lose a security clearance if he failed a urinalysis, and (b) he did not take the situation seriously and his use of marijuana under the circumstances showed poor judgment on his part. Department Counsel's argument highlights a troublesome omission by the Judge that rebuts the presumption the Judge considered all the evidence. However, the Board concludes the Judge's failure to discuss this aspect of the case constitutes harmless error because there is not a significant chance that, but for the error, the Judge would have reached a different result. *See, e.g.*, ISCR Case No. 98-0619 (September 10, 1999) at p. 8 (discussing harmless error doctrine).

Department Counsel sets forth a plausible argument for an alternate interpretation of the record evidence. Department Counsel's ability to do so is not enough to demonstrate the Administrative Judge ignored the record evidence or that the Judge's findings and conclusions are arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 98-0743 (October 15, 1999) at p. 2. The Board need not agree with the Judge to conclude that, except for the Judge's harmless errors, the Judge's findings and conclusions reflect a plausible interpretation of the record evidence. Furthermore, those findings and conclusions provide a rational basis for the Judge's favorable security clearance decision.

Conclusion

Department Counsel has failed to meet its burden of demonstrating harmful error below. Accordingly, the Board affirms 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