

DATE: November 1, 1999

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 98-0611

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Michael H. Leonard, Department Counsel

Peregrine D. Russell-Hunter, Chief Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Kathryn Moen Braeman issued a remand decision, dated July 9, 1999, in which she concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Department Counsel has appealed that decision. For the reasons set forth below, the Board affirms the decision of the Administrative Judge.

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 1 was supported by the record evidence; 2. Whether the Administrative Judge complied with the Board's remand instructions when making findings and conclusions concerning the state of Applicant's knowledge of his company's drug policy; and 3. Whether the Administrative Judge's favorable clearance decision is arbitrary, capricious and contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) to Applicant 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.

Department Counsel appealed the decision of the Administrative Judge. On June 3, 1999 the Board issued an Appeal Board Decision and Remand Order. In that decision the Board held that the Administrative Judge erred by applying Drug Involvement Mitigating Condition 3 to the case. The Board also noted the Administrative Judge's failure to acknowledge the fact that Applicant's company had a policy prohibiting off-duty drug use. The Board remanded the case with an instruction for the Judge to reconsider the state of Applicant's knowledge of his company's policy in light of all the record evidence concerning that policy and in light of the fact that the Judge's earlier finding that Applicant had no knowledge of such a policy was not a common sense evaluation of the record evidence.

On July 9, 1999 the Administrative Judge issued a remand decision wherein she again concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. the case is again before the Board on Department Counsel's appeal of that favorable decision.

Appeal Issues

1. Whether the Administrative Judge erred by applying Drug Involvement Mitigating Condition 1 in Applicant's favor. Drug Involvement Mitigating Condition 1 (the drug involvement was not recent) was applied by the Administrative Judge in this case and provides part of the support for her favorable clearance decision. Department Counsel asserts that this favorable application was error because it is not supported by the record and it is contrary to Appeal Board case law.

The record evidence indicates that Applicant last used marijuana nine months before the close of the record in this case. Although it acknowledges that the Board has not articulated a "bright-line rule regarding the recency of drug involvement, Department Counsel suggests that the case law indicates the Board generally has viewed drug use within a year of the close of the record as precluding the application of Mitigating Condition 1. The Board does not endorse any suggestion that drug involvement less than a year prior to the close of the record automatically precludes the favorable application of Mitigating Condition 1. Similarly, the Board rejects Department Counsel's suggestion that the Board's favorable view of an administrative Judge's failure to apply mitigating Condition 1 in an earlier case where the drug involvement was eight months old mandates the Board's disapproval here.

The correct application of a mitigating condition like Drug Involvement Mitigating Condition 1 can depend upon a number of factors in addition to the simple passage of time. All the record evidence must be considered in determining the appropriateness of a particular mitigating condition, and administrative judges have some latitude in their treatment of the various disqualifying and mitigating conditions. Given the whole of the record in this case, it was not error for the Administrative Judge to conclude that Mitigating Condition 1 applied to the benefit of Applicant.

In support of its position on Mitigating Condition 1, Department Counsel makes reference in its brief to concessions by Applicant during closing argument and the views of the dissenting Board member during the first appeal of this case. These references are misplaced. Neither Applicant concessions nor a dissenting opinion are pertinent to the resolution of this issue.

2. Whether the Judge failed to comply with the Board's Decision and Remand Order. At the time of the initial appeal, Department Counsel assigned as error the Administrative Judge's failure to mention the fact that Applicant's employer had a drug-prohibition policy that covered off-duty drug involvement. Department Counsel complained that this omission led to the Judge's erroneous conclusion that Applicant's marijuana use did not violate the company drug policy. In its remand order, the Board directed the Judge to take into consideration the whole of the company drug policy. It also directed that the Judge re-analyze Applicant's awareness of the significance of his drug involvement in light of the evidence and in light of the fact that it defies common sense to conclude that Applicant could be entirely oblivious to the significance of his drug involvement. Upon examination of the record and the judge's remand decision, the Board concludes that the Judge complied with the Board's remand order.

In her remand decision the Judge acknowledged the evidence of the employer's off-duty drug policy and this recognition had an impact upon her conclusions. The remand decision does not contain any assertion that Applicant did not violate his company's drug policy.

Department Counsel's chief complaint on its second appeal is that the Administrative judge did not comply with the Board's instructions regarding analysis of Applicant's awareness of the significance of his drug use. Department Counsel asserts that in a footnote the Judge holds Applicant to knowledge of his company's drug policy in compliance with the Board's remand order but that the Judge makes findings and conclusions elsewhere that are inconsistent with the Board's directions.

The Administrative Judge's findings on this point are not a model of clarity. Nevertheless, a comparison of the two decisions indicates that the Judge did modify her conclusions concerning Applicant's awareness of the security significance of drug use and that those modifications are sufficient to comply with the Board's remand order.

Administrative Judges' decisions are not measured against a standard of perfection. In this case, the Board's direction on remand contained the statement that it defied common sense to conclude that a person in Applicant's position could be "entirely oblivious to the significance of involvement with illegal drugs." On remand, the Administrative Judge found that Applicant had a level of awareness concerning illegal drug use. The Judge has adequately addressed the concerns expressed by the Board in its remand order.

3. Whether the Administrative Judge's decision is arbitrary, capricious or contrary to law. Department Counsel asserts that the Administrative Judge's decision is arbitrary, capricious and contrary to law. In support of this assertion Department Counsel argues that the Judge unlawfully relied on statements made by Applicant during his closing argument when concluding that Applicant had a genuine commitment to refrain from all drug use in the future. Department Counsel also argues that given the Applicant's record of drug use, it was arbitrary and capricious for the Administrative Judge to conclude that the case had been mitigated.

The *pro se* Applicant made references to a solid commitment to refrain from using drugs in the future in his closing argument. One of these references was quoted by the Judge in her decision. Department Counsel is technically correct in stating that matters stated in closing arguments are not evidence. The Judge erred in treating the closing argument statements as evidence. Nevertheless, such error is deemed harmless in this case. A review of the record evidence reveals numerous points during testimony where Applicant made similar disclaimers concerning his future involvement with drugs. The Judge's findings and conclusions on this point are reasonably supported by the evidence of record.

The Judge's mitigation of the case against the Applicant is reasonably supported by the record evidence. The Board need not agree with the Judge's ultimate disposition of the case to conclude that it is sustainable based on the whole of the evidentiary record. Here, the Judge took into consideration the nature of the drug use, including its duration, frequency and overall pattern as well as other factors relating to the Applicant. Department Counsel has failed to demonstrate error.

Conclusion

Department Counsel has failed to demonstrate harmful error on the part of the Administrative Judge or that the Judge failed to comply with the Board's remand order. Accordingly, the Judge's July 9, 1999 Remand Decision is affirmed.

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 of Chairman Emilio Jaksetic

On the first appeal of this case, I dissented from the decision to remand and gave reasons why the Administrative Judge's December 30, 1998 decision should be reversed. However, for purposes of this appeal, I am constrained by the law of the case as expressed by the Board's June 3, 1999 Decision and Remand Order. *See* ISCR Case 96-0710 (October 10, 1997)(Jaksetic, concurring).

I respectfully disagree with my colleagues' disposition of Department Counsel's challenge to the Administrative Judge's application of Drug Involvement Mitigating Condition 1. The Board need not articulate a "bright line" rule concerning the recency of drug involvement to decide whether the Judge's application of Mitigating Condition 1 in this case was arbitrary or capricious in this case. If viewed in isolation, the Judge's application of Mitigating Condition 1 might be considered to be sustainable. However, such a piecemeal analysis of the Judge's decision misses the arbitrary and capricious nature of the Judge's July 9, 1999 Remand Decision when viewed in its entirety. *Cf.* ISCR Case No. 98-0614 (July 12, 1999) at p. 4 ("The Board views a Judge's decision in its entirety, not just isolated sentences in the Judge's decision, to discern what the Judge found and concluded.")

I respectfully disagree with my colleagues' conclusion that the Administrative Judge complied with the law of the case as set by the Board's June 3, 1999 Decision and Remand Order. The Judge made a passing reference to the Board's ruling on the issue of Applicant's knowledge about his employer's drug policy. The Judge then proceeded to explain why she found Applicant did not fully understand or appreciate the existence and scope of his employer's drug policy. The Judge's explanation does not reflect a reasonable, common sense interpretation of the record evidence in this case and is little more than a variation of the analysis that the Board found unsustainable on the first appeal in this case. The Judge's analysis is no more sustainable now than it was on the first appeal.

When viewed in isolation, the Administrative Judge's reliance on Applicant's statements in closing argument might be considered harmless error. However, as with the Judge's application of Drug Involvement Mitigating Condition 1, this error shows the arbitrary and capricious nature of the Judge's Remand Decision.

The Administrative Judge failed to comply with the law of the case as set forth in the Board's June 3, 1999 Decision and Remand Order. The Judge's findings and conclusions do not reflect a reasonable, common sense interpretation of the record evidence in this case. The Judge's Remand Decision is based on arbitrary and capricious reasoning. Considering the record as a whole, the totality of the Judge's errors on remand warrant reversal. Accordingly, I dissent from my colleagues' decision to affirm the Judge's July 9, 1999 Remand Decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board