

DATE: August 17, 1999

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 98-0803

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Michael H. Leonard, Esq., Department Counsel

FOR APPLICANT

Tobe Lev, Esq.

Administrative Judge Robert R. Gales issued a decision dated May 4, 1999 in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed this decision. 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 issue of whether the Administrative Judge failed to properly apply pertinent provisions of the Adjudicative Guidelines.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated December 11, 1998 to Applicant. The SOR was based on Criterion H (Drug Involvement), Criterion E (Personal Conduct) and Criterion J (Criminal Conduct).⁽¹⁾

A hearing was held on March 15, 1999. The Administrative Judge subsequently issued a written decision. The Judge concluded 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 Judge's adverse decision.

Administrative Judge's Findings and Conclusions⁽²⁾

Applicant began using marijuana in about 1979 while he was in junior high school or high school and continued to use it occasionally in social settings until at least May 1998. He also used cocaine on at least one occasion while in high school. His three most recent involvements with marijuana came in early 1998 during a period of depression and when he was on vacation. Applicant failed a drug test administered by his employer in June 1998 and subsequently attended a substance abuse treatment program, which he completed. Applicant professes to be opposed to illegal drugs but sees nothing wrong with marijuana. He has declared a willingness to forgo using marijuana in the future while working at his current facility. He continues to associate with marijuana abusers and attends parties where marijuana is smoked.

Applicant is strongly supported for a position of trust by friends, colleagues, and co-workers.

The Government established its case regarding drug involvement. Applicant continued his irregular, occasional abuse of marijuana for 19 years and his use ceased about 10 months before the closing of the record. The recency and frequency of the use negates the applicability of Drug Involvement Mitigating Conditions 1⁽³⁾ and 2⁽⁴⁾. Applicant declined to state flatly and unconditionally that he would not use marijuana in the future and he continues to associate with known substance abusers. Thus Mitigating Condition 3⁽⁵⁾ does not apply. Applicant's completion of the drug treatment program supports the applicability of Mitigating Condition 4⁽⁶⁾ but an unconditional avowal against future use of illegal substances as well as a longer period of abstinence is required. Applicant's brief experimentation with cocaine is mitigated.

Appeal Issues

Whether the Administrative Judge failed to apply pertinent provisions of the Adjudicative Guidelines. The Administrative Judge concluded that Drug Involvement Mitigating Condition (MC) 2 and MC 3 did not apply to Applicant's marijuana use. The Judge applied MC 4 to the case but concluded that the record evidence in support of that mitigating condition was of insufficient magnitude to overcome the Government's case. Applicant contends the Judge erred because the record supports mitigation of the Government's case through the application of MC 2, MC 3, and MC 4. Applicant's argument is not persuasive.

Drug Involvement Mitigating Condition 2. This mitigating condition does not give any definition of, or guidance about, the meaning of the words "isolated" or "infrequent." Since the Directive requires a common sense decision (Section F.3.), an Administrative Judge must apply undefined terms such as "isolated" and "infrequent" in a reasonable, common sense way after careful consideration of all the evidence, including that which relates to length, frequency, and pattern of drug use. *Cf.* ISCR Case No. 98-0394 (June 10, 1999) at pp. 2-3 (Administrative Judge must apply undefined terms in Directive in a reasonable, common sense way). In this case the Judge cited the "recency" and "frequency" of Applicant's marijuana use as a reason for not applying MC 2. The Judge made the statement in conjunction with his observation that Applicant occasionally used marijuana over a time span of 19 years, ending about 10 months before the record closed. Given the length and pattern of Applicant's marijuana involvement, the Judge's decision not to apply MC 2 was reasonable.

Drug Involvement Mitigating Condition 3. In a sworn statement given to an agent of the Defense Investigative Service (DIS)⁽⁷⁾ in October 1998 Applicant stated the following regarding his feelings about marijuana and his future use of it: "I am totally against illegal drugs such as crack and cocaine but I don't think there is anything wrong with marijuana. I intend to refrain from smoking marijuana in the future because as a licensed electrician, I realize that by using marijuana, I could kill myself on the job. I do not intend to use marijuana especially while working at [site] because I like my job and do not want to risk losing it." At the hearing Applicant was more unequivocal concerning his desire to abstain, but his hearing testimony does not render erroneous the Judge's conclusions concerning future intent. Therefore, the Judge was not unreasonable in concluding Applicant's statements do not express an unconditional desire to abstain from using marijuana in the future. Moreover, MC 3 requires a *demonstrated* intent not to use any drugs in the future. Applicant's statements of intent at the hearing, together with other record evidence (completion of a treatment program, a modest ten month period of abstinence) provide *some* evidence of a commitment to remain drug free. However, the Judge noted the existence of countervailing evidence (Applicant's earlier conditional statement and his continuing association with marijuana users at social functions) when considering MC 3. Administrative Judges have some discretion when applying disqualifying and mitigating conditions under the Directive. In this instance Applicant falls short of demonstrating that the Judge erred by not finding his marijuana use mitigated through the vehicle of MC 3.

Drug Involvement Mitigating Condition 4. In his appeal brief, Applicant makes only passing reference to MC 4. While the requirements of MC 4 are arguably satisfied in this case, the mere presence or absence of a disqualifying or mitigating condition is not solely dispositive of a case. Even when a disqualifying or mitigating condition is applicable, the Judge should not consider it in isolation and without regard to the record evidence as a whole. *See, e.g.*, ISCR Case No. 97-0825 (January 7, 1999) at p. 3. Considering the record as a whole, the Board concludes the Judge gave a rational explanation for concluding Applicant's history of marijuana use was not mitigated by his successful completion of a

drug treatment program.

Conclusion

Applicant has failed to meet his burden of demonstrating error. Accordingly, the Board affirms the Administrative Judge's May 4, 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. The Administrative Judge's formal findings under Criterion E and Criterion J were in favor of Applicant and are not at issue on appeal.
2. This synopsis includes only the Administrative Judge's findings and conclusions concerning drug use, since the other aspects of the case are not at issue on appeal.
3. "[T]he drug involvement was not recent"
4. "[T]he drug involvement was an isolated or infrequent event"
5. "[A] demonstrated intent not to abuse any drugs in the future"
6. "[S]atisfactory completion of a drug treatment program prescribed by a credentialed medical professional"
7. The Defense Investigative Service is now designated the Defense Security Service (DSS).