

DATE: November 22, 1999

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 99-0019

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Arthur A. Elkins, Esq., Department Counsel

FOR APPLICANT

James R. Klimaski, Esq.

Administrative Judge Jerome H. Silber issued a decision, dated July 19, 1999, [\(1\)](#) 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 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 record evidence; (2) whether the Administrative Judge erred in applying Drug Involvement Mitigating Conditions 1 and 3; and (3) whether the Administrative Judge's security clearance 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 January 20, 1999. The SOR was based on Criterion H (Drug Involvement).

A hearing was held on May 21, 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 decision.

Appeal Issues

1. Whether the Administrative Judge's findings are supported by substantial record evidence. Department Counsel contends the record evidence does not support the Administrative Judge's findings that: (a) Applicant's marijuana use was not recent; (b) Applicant demonstrated an intent not to use marijuana in the future; (c) Applicant's marijuana use was "relatively minor"; and (d) Applicant did not use marijuana during the 1984-1988 period when he held a security clearance.

(a/b) Department Counsel's arguments about the first two challenged findings overlap with its arguments about the Administrative Judge's application of Drug Involvement Mitigating Conditions 1 and 3. Those arguments will be addressed later in this decision.

(c) The Administrative Judge characterized Applicant's overall history of marijuana use as "relatively minor." The Judge's characterization of Applicant's occasional use of marijuana over a period of 18 years as "relatively minor" does not reflect a reasonable interpretation of the record evidence. The Board will not affirm factual findings that do not reflect a reasonable, plausible interpretation of the record evidence as a whole. *See, e.g.*, ISCR Case No. 99-0201 (October 12, 1999) at p. 4.

(d) There is conflicting record evidence on whether Applicant used marijuana during the 1984-1988 period when he held a security clearance. The Board need not agree with the Administrative Judge to conclude Department Counsel's argument fails to demonstrate the Judge's finding on this point is unsustainable.

2. Whether the Administrative Judge erred in applying Drug Involvement Mitigating Conditions 1 and 3. The Administrative Judge indicated that Applicant's last use of marijuana "was fairly recent and makes problematic mitigation based exclusively upon [Drug Involvement Mitigating Condition] #1 . . . [Applicant] has, however, demonstrated his intent to never abuse drugs, including marijuana, in the future. This falls squarely within [Drug Involvement Mitigating Condition] #3." Department Counsel contends the record evidence does not warrant the Judge's application of those Drug Involvement Mitigating Conditions.

Drug Involvement Mitigating Condition 1. ⁽²⁾ The Administrative Judge's discussion of Drug Involvement Mitigating Condition 1 demonstrates the Judge analyzed Applicant's marijuana use in an arbitrary and capricious manner. Given the record evidence that Applicant last used marijuana within 12 months of the hearing, it was reasonable for the Judge to find Applicant's last use of marijuana was "fairly recent." Once the Judge concluded Applicant's last use of marijuana was "fairly recent," it was arbitrary and capricious for the Judge to rely on Drug Involvement Mitigating Condition 1. Drug use that is "fairly recent" cannot reasonably be considered "not recent" within the meaning of Drug Involvement Mitigating Condition 1.

Drug Involvement Mitigating Condition 3. ⁽³⁾ In support of applying Drug Involvement Mitigating Condition 3, the Administrative Judge relied on his findings that (a) Applicant refrained from using marijuana during the 1984-1988 period he had a security clearance; (b) by the time of the hearing, Applicant had refrained from marijuana use for approximately a year; and (c) Applicant realized his occasional use of marijuana in social situations was unwise because such use might compromise his girl friend's petition (last year) for child custody. For the reasons that follow, the Board concludes the Judge's application of Drug Involvement Mitigating Condition 3 is not sustainable.

As discussed earlier in this decision, the Board need not agree with the Administrative Judge to sustain his finding that Applicant did not use marijuana during the 1984-1988 period he had a security clearance. Furthermore, Department Counsel does not challenge the Judge's finding that Applicant last used marijuana around June 1998. And, the Judge's finding about Applicant's concern about the potential adverse effects his use of marijuana might have on his girl friend has support in the record evidence. However, the Judge's application of Drug Involvement Mitigating Condition 3 in this case is problematic.

The fact that there is record evidence to support an Administrative Judge's findings does not end the analysis. The Board must consider whether: (a) there is record evidence that fairly detracts from a Judge's factual findings (Directive, Additional Procedural Guidance, Item 32.a); and (b) whether the inferences and conclusions drawn by the Judge are arbitrary, capricious, or contrary to law (Directive, Additional Procedural Guidance, Item 32.b.). *See, e.g.*, ISCR Case No. 97-0435 (July 14, 1998) at p. 3 (Administrative Judge's decision may be arbitrary and capricious even though the Judge's specific findings of fact are supported by record evidence). *Cf. United States v. International Brotherhood of Teamsters*, 170 F.3d 136, 143 (2d Cir. 1999)(even if agency's findings of fact are supported by substantial evidence, reviewing court must guard against agency drawing inferences that are arbitrary in relation to the facts found).

The Administrative Judge's conclusion that Applicant demonstrated an intent to refrain from drug abuse in the future failed to take into consideration record evidence that reasonably detracts from that conclusion, and reflects an arbitrary

and capricious analysis. Although the Judge found that Applicant did not use marijuana during the period 1984-1988, the record evidence shows that Applicant used marijuana, on an occasional basis, from 1989 to at least June 1998 without any regard for the illegality of his conduct. Although the Judge found that Applicant last used marijuana in June 1998, that finding must be considered in light of (i) the evidence that Applicant's pattern of marijuana use was sporadic, averaging about once a year; and (ii) the evidence that Applicant was interviewed about his marijuana use by a Special Agent in late September 1998 and was issued an SOR in late January 1999. Given Applicant's pattern of sporadic marijuana use over a period of approximately 18 years, Applicant's abstinence from marijuana for less than a year (including several months when Applicant knew the government was concerned about that drug use) is not entitled to much weight as proof of a "demonstrated intent" within the meaning of Drug Involvement Mitigating Condition 3. ⁽⁴⁾

In addition, the Administrative Judge's reliance on Applicant's expressed motivation (*i.e.*, concern about adverse effect his marijuana use might have on his girl friend) reflects an arbitrary and capricious analysis that does not comport with the Directive's requirement to engage in a whole person analysis in light of all the record evidence. As will be discussed later in this decision, the Judge erred by deciding to ignore Applicant's statements about the legality of marijuana use. A person who engages in a pattern of illegal activity over a period of years and believes such conduct is not wrongful and should be legal is, as a matter of common sense, more at risk to repeat that conduct than a person who sincerely acknowledges the wrongfulness of the conduct, or a person who believes such conduct is not wrongful but who nevertheless consistently refrains from the conduct because it is illegal. The record evidence shows Applicant does not believe that marijuana use is wrongful, Applicant does not see his use of marijuana at social functions as a problem (apart from the DoD's concern, which Applicant characterizes as merely a "policy decision"), Applicant continues to attend social functions where marijuana occasionally is present, and Applicant has not expressed remorse or regret about his history of marijuana use. Furthermore, the Judge failed to take into account that Applicant's expressed reason for refraining from marijuana use reflects no concern for the illegality or security implications of marijuana use, ⁽⁵⁾ and is based on a purely personal concern of Applicant's that could fade or disappear with the passage of time or a change in Applicant's personal life.

Given the totality of the record evidence, Applicant's history of marijuana use, Applicant's relatively brief period of abstinence from marijuana, and Applicant's expressed motivation for refraining from marijuana use do not provide a sustainable basis for the Administrative Judge's application of Drug Involvement Mitigating 3 in this case.

3. Whether the Administrative Judge's security clearance decision is arbitrary, capricious, or contrary to law.

Department Counsel also contends the Administrative Judge's favorable security clearance decision is arbitrary, capricious, and contrary to law because the Judge erred by ruling he would not consider Applicant's statements about the legality of marijuana. For the reasons that follow, the Board concludes the Judge's ruling was legally erroneous and resulted in the Judge ignoring relevant evidence, contrary to the requirements of the Directive.

Applicant persuasively notes that Department Counsel is wrong in asserting that Applicant opened the line of questioning about his views on the legality of marijuana use. However, Department Counsel is correct in asserting that Applicant did not object to the questions when they were asked at the hearing. Furthermore, Department Counsel is correct in noting that the Administrative Judge asked questions of Applicant concerning his views on the legality of marijuana use. Given the absence of objection to the questions from Applicant at the hearing, and the Judge's

questioning of Applicant about his views on the legality of marijuana use, the Judge's post-hearing ruling is somewhat unexpected. However, there is a rebuttable presumption of good faith and regularity by Administrative Judges. *See, e.g.*, ISCR Case No. 97-0765 (December 1, 1998) at p. 5. Furthermore, the Judge's ruling sets forth an explanation for his apparent change of heart on the matter. Although the Board concludes the Judge's explanation is legally erroneous, that explanation demonstrates the Judge gave reasons for his apparent change of mind about the matter after he reflected on it after the hearing was over. *Compare* ISCR Case No. 98-0476 (July 22, 1999) at p. 3 (arbitrary and capricious for Administrative Judge to change an earlier ruling without giving an explanation for doing so). Accordingly, although the timing of the Judge's ruling may seem unusual, the Board concludes the Judge's explanation for the ruling removes it from the realm of being arbitrary and capricious on its face.

The Administrative Judge erred in several respects when he ruled that he would not consider Applicant's statements about the legality of marijuana use. In these proceedings, the Federal Rules of Evidence (FRE) are only a guide and

"technical rules of evidence may be relaxed, except as otherwise provided herein, to permit the development of a full and complete record." Directive, Additional Procedural Guidance, Item 19. It is not clear from the decision whether the Judge felt he was bound by FRE 403⁽⁶⁾ or whether he was citing it merely as a guide. Even if the Board assumes solely for purposes of deciding this appeal that the Judge was relying on FRE 403 as a guide and not an absolute requirement, the Judge erred. To the extent that FRE 403 is aimed at preventing miscarriages of justice due to juries being prejudiced, confused or misled by certain kinds of evidence, it is irrelevant to these proceedings. *See, e.g.*, ISCR Case No. 97-0299 (December 11, 1997) at p. 2 (in DOHA proceedings, "there is no need to apply rules of evidence and procedures intended to protect lay jurors from being confused or improperly influenced "). To the extent that FRE 403 is aimed at preventing undue delay, waste of time, or needless presentation of cumulative evidence, it was not applicable to the questions and answers concerning Applicant's views on the legality of marijuana use. Accordingly, FRE 403 does not provide a sustainable basis for the Judge's ruling.

Furthermore, Department Counsel persuasively argues that the Administrative Judge erred by intimidating that consideration of Applicant's views on the legality of marijuana use could "readily be converted by the unwary into a simple litmus test or measure of some sort of political correctness." The Judge's concern for Applicant's First Amendment rights is admirable, but legally misplaced in this case. The Judge's error rests on two mistakes: (a) a misreading of the case presented against Applicant by Department Counsel; and (b) a misunderstanding of the pertinent First Amendment issues.

A person reading the Administrative Judge's discussion of the significance of Applicant's views on marijuana, without access to the record below, might conclude that Department Counsel was seeking to punish Applicant for his expression of views on the legality of marijuana. A review of the record below does not support such a conclusion. The SOR issued to Applicant addresses his drug-related conduct, not his expression of views on the legality of marijuana. Furthermore, a review of the record shows Department Counsel's case was focused on Applicant's use of marijuana, not on his expression of views on its legality. Contrary to the Judge's suggestion, Department Counsel was not seeking to lure him "into [applying] a simple litmus test or measure of some sort of political correctness" based on Applicant's views on the legality of marijuana.

More importantly, the Administrative Judge's discussion fails to recognize some crucial distinctions in First Amendment case law that are pertinent to this case. First, the courts have held that in the context of security clearance investigations and adjudications the federal government has a greater degree of latitude in making inquiries about matters that might touch upon First Amendment concerns. *See Clark v. Library of Congress*, 750 F.2d 89, 94-95 (D.C. Cir. 1984) (inquiries into individual's political beliefs and associations may be justified in context of security investigation for position requiring security clearance); *Clifford v. Shoultz*, 413 F.2d 868, 876-77 (9th Cir. 1969) (questions about applicant's relations with Cuban Communist Party and Cuban government representatives and organizations are relevant to security clearance determination), *cert. denied sub nom Shoultz v. Laird*, 396 U.S. 962 (1969). Of course, any inquiries by the federal government in such areas must be "no more intrusive of an applicant's privacy than is reasonably necessary for a rational judgment to be reached with respect to security clearance." *Gayer v. Schlesinger*, 490 F.2d 740, 754 (D.C. Cir. 1973).

Second, the courts have recognized a distinction between pure speech and conduct. While pure speech is generally entitled to First Amendment protection, conduct is not so protected. *See, e.g., Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 456 (1978) (there is no absolute First Amendment bar to regulation of conduct which "was in part initiated, evidenced, or carried out by means of language"). The First Amendment is not a shield from prosecution for violations of the law. *See, e.g., Welsh v. United States*, 750 F.2d 1101, 1108 (1st Cir. 1985) (noncompliance with tax laws is not protected under First Amendment); *United States v. Conley*, 859 F.Supp. 909, 938 (W.D. Pa. 1994) ("First Amendment rights are not a means of immunizing one-self from prosecution. Convictions would be few indeed if during or after a course of crime a defendant could absolve himself by expressing his view that his conduct should be legal."); *United States v. Brodhead*, 714 F.Supp. 593, 599 (D. Mass. 1989) (disagreement with the law is not a defense to criminal prosecution for unlawfully entering Navy facility). The same reasoning can be applied to an applicant's opinions about the legality of the drug laws in the context of a security investigation and adjudication.

In this case, Applicant's views on the legality of marijuana were relevant and material to a determination whether Applicant was at risk to repeat his marijuana use in the future. *See* Directive, Sections F.3.d. (motivation of applicant)

and F.3.f. (probability that circumstances or conduct will continue or recur in future). A security clearance adjudicator is entitled to consider whether a person who believes there is nothing wrong with engaging in conduct that is illegal is more at risk to engage in that conduct in the future than a person who recognizes and acknowledges the illegality of that conduct. Nothing in the record indicates or suggests that Applicant was being targeted as punishment for his views on the legality of marijuana use. Furthermore, if Applicant had been concerned about such a possibility, his lawyer could have raised appropriate objections at the hearing. By failing to consider Applicant's statements about the legality of marijuana, the Judge erroneously failed to consider relevant and material information, a violation of his obligations under Section F.3. of the Directive.

Conclusion

Department Counsel has met its burden of demonstrating error that warrants reversal. Pursuant to Item 33.c. of the Directive's Additional Procedural Guidance, the Board reverses the Administrative Judge's July 19, 1999 decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

See dissenting opinion

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Dissenting opinion of Administrative Judge Michael Y. Ra'anan

I dissent from my colleagues's analysis of this case for the following reason. I believe that it was within the Administrative Judge's discretion to conclude that Applicant qualified for a security clearance in spite of his drug usage. I base my analysis on the Applicant's infrequent usage (an average of about once a year, albeit over a lengthy time frame) and Applicant's current decision to give up illegal drugs entirely.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

1. The Administrative Judge's written decision was issued on July 19, 1999. On July 20, 1999, the Administrative Judge issued an Order in which he indicated that he was correcting a typographical error on page 8 of the July 19, 1999 decision.

2. "[T]he drug involvement not recent."

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

4. A comparison illustrates the significance of this point. Assume, for the same time period, person X had a pattern of using marijuana once a year and person Y had a pattern of using marijuana once a month. Assume further that person X and person Y both abstain from marijuana use for a period of approximately eleven months. As a matter of common sense, person Y's eleven months of abstinence is entitled to be given more weight than person X's eleven months of abstinence, in light of their respective patterns of marijuana use.

5. See *AFGE Local 1533 v. Cheney*, 944 F.2d 503, 506 n.6 (9th Cir. 1991)(discussing several ways that drug abuse can pose security risks).

6. FRE 403 provides "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."