

DATE: October 12, 1999

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 99-0201

**APPEAL BOARD DECISION AND REVERSAL ORDER**

**APPEARANCES**

**FOR GOVERNMENT**

William S. Fields, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

Administrative Judge Jerome H. Silber issued a decision, dated June 30, 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 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 erred by not admitting Government Exhibit 4 into evidence; (2) whether the Administrative Judge erred by finding that Applicant made a prompt, good faith effort to correct his falsification, and demonstrated clear evidence of rehabilitation; and (3) whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law.

**Procedural History**

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated March 19, 1999 to Applicant. The SOR was based on Criterion H (Drug Involvement), Criterion E (Personal Conduct), and Criterion J (Criminal Conduct). A hearing was held on June 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 Judge's favorable decision.

**Appeal Issues**

1. Whether the Administrative Judge erred by not admitting Government Exhibit 4 into evidence. A Special Agent of the Defense Security Service interviewed Applicant in October 1998. After Applicant declined to provide a written statement, the Special Agent prepared a memorandum about her interview of Applicant. At the hearing, Department Counsel offered the memorandum prepared by the Special Agent as an exhibit (Government Exhibit 4). Applicant objected to the admission of Government Exhibit 4. Department Counsel contended Government Exhibit 4 was admissible under Federal Rule of Evidence 803(6) as a business record. The Administrative Judge questioned the

Special Agent about the circumstances under which she prepared Government Exhibit 4. The Judge also asked questions to ascertain how much the Special Agent remembered about what Applicant said during the October 1998 interview. The Judge ruled Government Exhibit 4 was a document that fell within the hearsay exception for past recollection recorded. Applying Federal Rule of Evidence 803(5), the Judge did not admit Government Exhibit 4 into evidence, but read it into the record.

On appeal, Department Counsel contends the Administrative Judge erred by not admitting Government Exhibit 4 into evidence. In support of this contention, Department Counsel contends: (a) the Judge erred by relying on Item 20 of the Directive's Additional Procedural Guidance; (b) the Judge's ruling was contrary to a prior Board decision; and (c) the Judge's ruling "places a lengthy, cumbersome and unnecessary evidentiary burden on parties to DOHA proceedings." Applicant contends the Judge acted properly by not admitting Government Exhibit 4 into evidence.

Department Counsel concedes that the Administrative Judge's ruling is not outcome determinative. That concession is warranted. The Judge ruled that Government Exhibit 4 reflected the Special Agent's recollection of what transpired during the October 1998 interview. Although the Judge did not admit Government Exhibit 4 into evidence, he read it into the record, consistent with Federal Rule of Evidence 803(5). Considering the record as a whole, the Judge's ruling about Government Exhibit 4 did not affect the outcome of this case in any meaningful way.

It is well-settled that the Board will not reverse or remand a case in the absence of a showing of harmful error. Furthermore, the Board does not have general, supervisory jurisdiction or authority over Hearing Office Administrative Judges. In addition, Department Counsel has failed to articulate how it was prejudiced in any meaningful way when the Judge excluded Government Exhibit 4, but read it into the record, consistent with Federal Rule of Evidence 803(5). Considering all the circumstances, no useful purpose would be served by addressing the merits of this issue in this case.

2. Whether the Administrative Judge erred by finding that Applicant made a prompt, good faith effort to correct his falsification, and demonstrated clear evidence of rehabilitation. The Administrative Judge found Applicant: (a) used marijuana, on various occasions, from June 1990 through December 1996, and once in December 1997; (b) was arrested in February 1998 for possession of marijuana, pleaded guilty in April 1998 to an amended charge of attempted possession of marijuana, and was sentenced to six months supervised probation without adjudication of guilt; (c) signed a security questionnaire in June 1998, in which he acknowledged he had been charged with attempted possession of marijuana, but falsely denied that he had used marijuana since June 1991; and (d) knew his denial of marijuana use after June 1991 was false, was troubled about his false answer, but did not take any active step to correct his false answer until he was interviewed in October 1998. The Judge concluded Applicant's disclosure of his marijuana use after June 1991 to the Special Agent during the October 1998 interview constituted a prompt, good-faith disclosure under Personal Conduct Mitigating Condition 3. The Judge also concluded Applicant's disclosure of his marijuana use to the Special Agent "demonstrated clear evidence of successful rehabilitation" under Criminal Conduct Mitigating Condition 5. The Judge further concluded the confidence in Applicant's honesty shown by his employer and its chief customer weigh in Applicant's favor, and that Applicant's "rehabilitative action suggests that there is a low probability of recurrence of drug abuse or dishonesty in the future."

Department Counsel contends: (a) the Administrative Judge erred by applying Personal Conduct Mitigating Condition 3 because Applicant's disclosure of his post-June 1991 marijuana use to Special Agent was not a prompt, good-faith disclosure; and (b) the Administrative Judge erred by concluding Applicant demonstrated clear evidence of rehabilitation. Applicant contends the Judge did not err on those points. The Board will address these contentions in turn.

(a) Personal Conduct Mitigating Condition 3. The record evidence provides a rational basis for the Administrative Judge to find Applicant disclosed to the Special Agent his post-June 1991 marijuana use before he was confronted by the Special Agent with the fact of that drug use. However, the record evidence does not provide a rational basis for the Judge to find that Applicant's disclosure was a "prompt, good-faith" disclosure.

The words "prompt, good-faith" are not defined in the Directive. Undefined words in the Directive must be applied in a reasonable, common sense way. *See, e.g.*, ISCR Case No. 98-0803 (August 17, 1999) at p. 3. The Board specifically has declined to set forth a "bright line" definition of "prompt" in connection with Personal Conduct Mitigating Condition 3.

See ISCR Case No. 98-0809 (August 19, 1999) at p. 5. Resolution of this appeal does not require the Board to provide a "bright line" definition of the word "prompt." In a variety of contexts, courts have indicated that the word "prompt" means to act within a reasonable time. See, e.g., *American Employers Insurance Co. v. Metro Regional Transit Authority*, 12 F.3d 591, 592 (6th Cir. 1993); *K.M.L. Laboratories Ltd. v. Hopper*, 830 F. Supp. 159, 166 (E.D.N.Y. 1993); *Stonewall Insurance Co. v. Hamilton*, 727 F. Supp. 271, 273 (W.D. Va. 1989). See also *Black's Law Dictionary* (6th edition, West, 1990) at p. 1214 (definitions of "prompt" and "promptly"). What constitutes acting in a reasonable time will depend of the particular facts and circumstances of each case. <sup>(1)</sup>

The Board also has not set forth a "bright line" definition of "good-faith" in connection with Personal Conduct Mitigating Condition 3. The phrase "good-faith" is particularly ill-suited for a precise definition. Courts have construed or interpreted the phrase "good-faith" in a variety of ways:

(i) action that is contrary to what a reasonable person would be expected to do is not action taken in good faith, *Barrett v. United States*, 51 F.3d 475, 479-80 (5th Cir. 1995); (ii) "[T]hat state of mind denoting honesty of purpose, freedom from intention to defraud, and generally speaking, means being faithful to one's duty or obligation," *Arnold M. Diamond, Inc. v. Dalton*, 25 F.3d 1006, 1010 (Fed. Cir. 1994); (iii) a buyer acts in good faith if a buyer has legitimate business reason for its action, as opposed to a desire to avoid its contract, *Brewster of Lynchburg, Inc. v. Dial Corp.*, 33 F.3d 355, 366 (4th Cir. 1994); (iv) "Good faith requires that the parties exercise honesty in fact, and prudence in the exercise of discretion conferred by contract," *Continental Bank N.A. v. Modansky*, 997 F.2d 309, 312 (7th Cir. 1993); (v) good faith means a company must act reasonably and not arbitrarily or capriciously, *Olympic Chevrolet, Inc. v. General Motors Corp.*, 959 F. Supp. 918, 923 (N.D. Ill. 1997); (vi) "'Good faith' refers to a statement made in the honest belief that it is a correct statement and with reasonable grounds for believing it to be true," *Maggio v. Liztech Jewelry*, 912 F. Supp. 216, 220 (E.D. La. 1996). See also *Black's Law Dictionary* (6th edition, West, 1990) at p. 693 (definition of "good faith"). As these examples show, the concept of "good faith" requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation. Such standards are consistent with the level of conduct that must be expected of persons granted a security clearance. See, e.g., *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980)(government must be able to repose a high degree of trust in persons granted access to classified information); *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 175 (D.C. Cir. 1960)(security requirements include consideration of matters such as a person's honesty, judgment, sobriety, and sense of obligations), *aff'd*, 367 U.S. 886 (1961).

In this case, the Administrative Judge did not have a rational basis to find it was reasonable for Applicant to wait from the falsification in June 1998 until the October 1998 interview to disclose his post-June 1991 use of marijuana. Applicant was under a legal obligation to provide complete and accurate answers to the security questionnaire. Applicant knew his answer to the drug question was false. Applicant clearly took no active steps to correct his falsification despite his claim that he felt troubled by his false answer. Applicant passively waited until the Special Agent contacted him, set up an interview, and the Special Agent asked him specifically about marijuana use. Applicant did not correct his falsification until more than four months after he made it. Considering all the circumstances, Applicant's disclosure was not a prompt, good-faith one within the meaning of Personal Conduct Mitigating Condition 3. The Judge's finding otherwise does not reflect a reasonable interpretation of the record evidence. See, e.g., ISCR Case No. 98-0507 (May 17, 1999) at p. 6 (presence of conflicting evidence "requires the Judge to carefully consider the record evidence as a whole and weigh it in a reasonable manner"); ISCR Case No. 97-0625 (August 17, 1998) at p. 6 (Board will not sustain finding that does not reflect a reasonable interpretation of record evidence as a whole).

(b) Clear evidence of rehabilitation. Department Counsel contends the Administrative Judge erred by finding there is clear evidence of rehabilitation because: (i) Applicant did not complete any kind of rehabilitation program; (ii) there is little evidence of remorse on the part of Applicant; (iii) Applicant denied he had engaged in falsification when he answered the SOR; and (iv) Applicant's disclosure of his post-June 1991 marijuana use is not clear evidence of rehabilitation. Department Counsel's contention has mixed merit.

Department Counsel's argument is untenable to the extent it suggests the absence of evidence that Applicant has undergone a formal rehabilitation program precluded the Administrative Judge from entering formal findings for Applicant under Criterion J. Even in the absence of such evidence, the Judge still had to consider Applicant's misconduct in light of the record as a whole and render an overall common sense decision, as required by Section F.3.

of the Directive.

The Administrative Judge's finding that there is clear evidence of rehabilitation is not supported by the record evidence as a whole. The Judge's finding of rehabilitation focuses on Applicant's disclosure of his post-June 1991 marijuana use to the Special Agent in the October 1998 interview. The Judge's finding is undercut by record evidence that clearly runs contrary to it. Specifically, the Judge's finding is undercut by the following: (i) Applicant denied making a falsification at all when he answer the SOR and, (ii) Applicant's hearing testimony was inconsistent on the issue of falsification, offering a variety of different, incompatible explanations for why he did not correctly answer the drug question on the security questionnaire. Whatever weight reasonably could be given to Applicant's disclosure of his post-June 1991 marijuana use to the Special Agent in the October 1998 interview was seriously undercut by Applicant's failure to acknowledge his falsification in a straightforward manner once he received the SOR. The Judge's finding of clear evidence of rehabilitation cannot be sustained because there is evidence which clearly undercuts that finding. *See* Directive, Additional Procedural Guidance, Item 32.a. ("The Appeal Board shall . . . determine whether or not: The Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion *in light of all the contrary evidence in the same record.*")(italics added).

In addition to contending the Board should affirm the Administrative Judge's finding of clear evidence of rehabilitation, Applicant points to the Judge's finding that Applicant's employer and its chief customer (one of the military departments) have shown confidence in Applicant. Applicant's reliance on that finding it misplaced. Evidence that Applicant's employer and its chief customer expressed favorable opinions about Applicant (Exhibits A and B) cannot be considered in isolation. Rather, the Judge had to consider: (a) whether those favorable opinions are reasonable and well-founded; and (b) what weight reasonably can be placed on such favorable opinions in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 98-0350 (March 31, 1999) at p. 3. Although Applicant testified that the author of Exhibit A is aware of Applicant's history of marijuana use and falsification of a security questionnaire, a reading of Exhibit A shows its author qualified his favorable opinion of Applicant by basing it solely on his personal observations of Applicant's job performance. In addition, there is no record evidence that the author of Exhibit B is aware of either Applicant's history of marijuana use or his falsification of a security questionnaire. Security clearance decisions are not limited to consideration of an applicant's conduct during duty hours. *See, e.g.*, ISCR Case No. 98-0620 (June 22, 1999) at p. 3. Favorable opinions about an applicant based on personal observation of the applicant's conduct during duty hours constitute evidence that is relevant under the "whole person" concept, but such evidence must be evaluated in light of proven off-duty misconduct by the applicant. *See, e.g.*, ISCR Case No. 97-0821 (October 15, 1998) at p. 3 ("Evidence of an applicant's reputation for honesty and integrity cannot be considered in isolation, but rather must be considered in light of evidence that the applicant engaged in deliberate acts of falsification.").

3. Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. Department Counsel contends the Administrative Judge's decision is arbitrary, capricious, and contrary to law because: (a) the Judge failed to properly apply pertinent Adjudicative Guidelines, and failed to adequately explain his deviations from them; (b) the Judge reached conclusions that are contrary to the weight of the record evidence; (c) the Judge ignored pertinent Board precedent; and (d) the Judge reached conclusions in this case that are inconsistent with conclusions he reached in other cases involving similar circumstances and issues.

Department Counsel's first three arguments are merely brief, conclusory reiterations of its arguments about the Administrative Judge's ruling on Government Exhibit 4, the Judge's application of the Adjudicative Guidelines, the Judge's finding of clear evidence of rehabilitation. No useful purpose would be served by repeating the Board's discussion of those arguments.

Department Counsel's fourth argument raises the issue of whether the Board can or should review the Administrative Judge's decision in this case in light of the Judge's findings and conclusions in other cases. Department Counsel offers no rationale and cites no legal authority in support of this argument.

### **Conclusion**

Department Counsel has met its burden of demonstrating error that warrants reversal. Accordingly, pursuant to Item 33.c. of the Directive's Additional Procedural Guidance, the Board reverses the Administrative Judge's June 30, 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. Deciding what is reasonable is based on the reasonable person standard, not the personal beliefs of an applicant. *See, e.g.,* ISCR Case No. 98-0470 (April 19, 1999) at p.3.