

DATE: May 5, 2000

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 99-0293

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Chief Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

Administrative Judge Darlene Lokey-Anderson issued a decision, dated October 22, 1999, in which she concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed. For the reasons set forth below, the Board affirms the Administrative Judge's decision.

The 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 following issues: (1) whether the Judge made certain erroneous factual findings concerning Applicant's drug abuse history; (2) whether the Judge erred by finding that Applicant had engaged in deliberate falsifications when responding to various government inquiries regarding his drug abuse history; and (3) whether the Judge's decision is arbitrary, capricious and contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated April 30, 1999 to Applicant. The SOR was based on Criterion H (Drug Involvement), Criterion E (Personal Conduct) and Criterion J (Criminal Conduct). Applicant elected to have the case determined on a written record in lieu of a hearing. The Administrative Judge issued a written decision, dated October 22, 1999, in which she 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 Administrative Judge's decision.

Appeal Issues

1. Whether the Administrative Judge made certain erroneous factual findings regarding Applicant's drug abuse history. Applicant asserts that the Judge erred by making the following factual findings: (a) Applicant used cocaine/crack cocaine twice yearly between 1985 and 1989 during social situations while at home on military leave; (b) Applicant purchased cocaine from his cousin from 1985 to 1989; and (c) Applicant used cocaine until May 1998. [\(1\)](#)

Regarding Applicant's first assignment of error, record evidence in the form of an October 29, 1998 signed, sworn statement of Applicant establishes that Applicant used cocaine beginning in 1985 and continuing approximately twice yearly until 1989. Applicant's chief complaint on this point seems to be the assertion of the SOR and the finding of the Judge that the cocaine use took place in social situations while Applicant was on military leave. Applicant cites reasons as to why he could not have been on military leave on all occasions while using cocaine during this period. The Judge's finding regarding the setting of the cocaine use is based on the wording of an admission of Applicant contained in an October 29, 1998 statement to a Defense Security Service (DSS) investigator. The finding appears to be in conflict with other evidence, such as a discharge certificate establishing Applicant's departure from the military in 1988. Irrespective of the accuracy of the details about the location of Applicant's cocaine use, the important facts of the Applicant's repeated use of cocaine at a stated frequency during the 1985-1989 time frame are essentially not in dispute. Applicant has failed to demonstrate that the Judge committed harmful error on this point.

Applicant asserts that the allegation at 1(b) of the SOR (and the Judge's corresponding finding) erroneously asserts that he purchased cocaine from approximately 1985 to 1989. Notwithstanding Applicant's position on appeal, the record evidence contains a statement by Applicant which could be interpreted as an admission of purchase of cocaine during the 1985 to 1989 time frame as well as purchase of cocaine on later occasions. ⁽²⁾ Applicant's assertion of error here is unpersuasive.

Likewise lacking in merit is Applicant's assertion on appeal that the SOR improperly charged, and the Judge erroneously found that he used cocaine shortly after receiving a security clearance in May 1997 and then used it continuously until May 1998. Applicant is correct in claiming that one possible interpretation of the SOR allegation is that he used cocaine between May 1997 and January 1998. However, the Administrative Judge cured any overbreadth in the SOR allegation by finding: (a) Applicant did not use any illegal drugs from 1990 until December 1997; and (b) that Applicant used cocaine after he had been granted a security clearance without reference to any specific dates of use. Applicant fails to demonstrate that the Judge's findings on this allegation were erroneous.

2. Whether the Administrative Judge erred by finding that Applicant had engaged in deliberate falsification when responding to various government inquiries regarding his drug abuse history. On appeal Applicant objects to the Judge's findings that he intentionally falsified responses to government inquiries about his drug use. In raising this issue, Applicant asserts: (a) he provided answers to government investigators that were the truth to the best of his recollection at the time; (b) he responded to the inquiries too quickly and did not have time to carefully reflect back over a period of more than 14 years; and (c) he had tried to forget about the times of his past drug use and never expected to have to recall the details of his drug history.

Applicant makes these assertions concerning the Judge's handling of the falsification issue for the first time on appeal. He did not give detailed responses in his answer to the SOR and he did not respond to the government's File of Relevant Material (FORM). The assertions he makes now involve the introduction of new evidence that the Board cannot consider. *See* Directive, Additional Procedural Guidance, Item 29. Moreover, the Judge's findings regarding Applicant's falsifications are amply supported by evidence of record, including Applicant's admissions about various falsifications in his signed, sworn statement of October 29, 1998.

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

Applicant refers to various perceived shortcomings of the government's case and the Judge's decision in his appeal brief. These include the following contentions: (a) the Judge's adverse decision was based solely on information that Applicant provided; (b) the DSS did not provide enough information in developing the case and the Judge did not look into additional facts which would have provided favorable background information; (c) the Judge wrongly found that he had engaged in a pattern of criminal activity under Criterion J; (d) since the last drug incident of April 20, 1998, Applicant has been law-abiding and drug-free; and (e) the Judge did not properly consider a number of mitigating factors when deciding the case. The Board interprets these statements as raising the issue of whether the Judge's decision was arbitrary, capricious, and contrary to law.

The fact that Applicant was the source of the derogatory information that provided the basis for the Judge's decision is of no consequence. Applicants for positions of trust are expected to be thorough and candid with the government when

inquiries are made about potentially disqualifying conduct. Similarly, the fact that Applicant was the source of pertinent adverse information does not serve to mitigate the security significance of the underlying conduct.

Applicant's complaints about the investigative failures of the DSS and the Administrative Judge are without merit. The methods and scope of DSS investigations are outside the scope of review of the Board. A DOHA administrative judge is duty bound to consider all of the evidence developed on the record of the case before the judge. Any attempt on the part of a judge to independently investigate allegations or independently develop facts would, of course, conflict with the judge's role as an impartial fact finder.

Applicant objects to a characterization under Criterion J (Criminal Conduct) that he has demonstrated a history or pattern of criminal activity. Applicant's complaint is more properly directed toward language contained in the SOR than any specific findings or conclusions of the Administrative Judge.⁽³⁾ The Judge's findings and conclusions are not couched in terms of a "history" or "pattern" of criminal conduct. She does speak in terms of repeated conduct when referencing Applicant's several falsifications to the government. This characterization is adequately supported by the record evidence.

Applicant notes that he has been law abiding and responsible since April 20, 1998, the day he tested positive for cocaine use in a company-directed drug screen. The Administrative Judge made factual findings concerning Applicant's entry into drug rehabilitation in May 1998, his participation in aftercare treatment and random drug testing, and his stated intent not to use illegal drugs again. Notwithstanding these favorable facts, the record supports the Administrative Judge's conclusion that there is not sufficient evidence in mitigation to overcome the negative effects of Applicant's drug involvement and criminal conduct.

Applicant provides a detailed list in his appeal brief of other matters in mitigation, mostly in the form of job and career achievements, drug rehabilitation, and family support. He feels these factors counteract the negative aspects of his history contained in the record. After a complete review of the record evidence, the Board is not convinced that the Administrative Judge failed to take these matters into consideration or assigned them improper weight in reaching her decision. The presence of these matters in mitigation, on this record, do not mandate a favorable security clearance decision. Applicant's drug abuse history and his falsifications provide a rational basis for the Judge's adverse security clearance decision.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating harmful error below. Accordingly, the Board affirms the Administrative Judge's October 22, 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. Applicant asserts other factual errors in his brief, but these assertions are directed more toward the wording of the SOR than toward any specific findings of the Administrative Judge. These include his complaint that the SOR was in error in subparagraph 1(e) by describing a 1998 company directed drug test as "random." The Administrative Judge, while finding for the government on this allegation, did not specifically describe the test as "random." Also included is Applicant's complaint that the SOR alleged incorrect dates for his 1998 drug rehabilitation treatment regimen. The Administrative Judge never made findings as to the specific dates of the treatment. Her general references to the months Applicant was undergoing treatment are supported by the record evidence.
2. Specifically, the second full paragraph on page 2 of Government Exhibit 4.
3. The relevant part of the SOR reads as follows: "Criterion J: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness." This language is in the nature of a preamble and is routinely included in SORs that contain allegations under Criterion J.