

DATE: January 27, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-00274

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

**FOR APPLICANT**

-----, Personal Representative

Administrative Judge Darlene Lokey Anderson issued a decision, dated October 17, 2002, in which she concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed.

The Board has jurisdiction under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant's appeal raises the issue: Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. For the reasons that follow, the Board affirms the Judge's decision.

**Procedural History**

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR), dated March 1, 2002. The SOR was based on Guideline G (Alcohol Consumption) and Guideline E (Personal Conduct). Applicant requested a hearing which was held on August 2, 2002. The Administrative Judge issued a decision, dated October 17, 2002 in which she found against Applicant under Guideline G and for Applicant under Guideline E. The case is before the Board on Applicant's appeal from that decision.

**Scope of Review**

On appeal, the Board does not review a case *de novo*. Rather, the Board addresses the material issues raised by the parties to determine whether there is factual or legal error. There is no presumption of error below, and the appealing party must raise claims of error with specificity and identify how the Administrative Judge committed factual or legal error. *See* Directive, Additional Procedural Guidance, Item E3.1.32. *See also* ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (discussing reasons why party must raise claims of error with specificity).

When an Administrative Judge's factual findings are challenged, the Board must determine whether "[t]he 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. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge." Directive, Additional

Procedural Guidance, Item E3.1.32.1. The Board must consider not only whether there is record evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings. *See, e.g.*, ISCR Case No. 99-0205 (October 19, 2000) at p. 2.

When a challenge to an Administrative Judge's rulings or conclusions raises a question of law, the Board's scope of review is plenary. *See* DISCR Case No. 87-2107 (September 29, 1992) at pp. 4-5 (citing federal cases).

### Appeal Issue<sup>(1)</sup>

Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. Applicant raises a number of arguments on appeal: (1) The Administrative Judge's description of Applicant's excessive use of alcohol was not substantiated by the record evidence; (2) The Judge erred in calling Applicant's 1987 experience in an alcohol treatment program a failure; (3) Applicant's two driving under the influence incidents (DUIs) in the 1970s are not linked to his DUI in 2000; (4) Applicant was shot in the head while a serviceman in Vietnam and is entitled to consideration for his military service; (5) Applicant submitted eight letters of reference which demonstrated the respect in which he is held; and (6) Applicant is prepared to complete an alcohol abuse program in order to earn the government's trust. The Board construes those arguments when taken together as asserting that the Judge's decision is arbitrary, capricious, or contrary to law.

Applicant's first two arguments dispute language from the synopsis of the Administrative Judge's decision. A fair reading of the Judge's entire opinion leads the Board to conclude that the Judge found that Applicant episodically abused alcohol from 1965 to 2001 rather than abused alcohol during the entire time. When read correctly, the Judge's findings of episodic alcohol abuse are sustainable. While Applicant reduced his hard liquor consumption as a result of the 1987 alcohol treatment program, given the record evidence as a whole it was reasonable for the Judge to conclude Applicant's experience in the 1987 treatment program was a failure. Applicant left the program before completion, resumed drinking after a brief period of abstinence, and ultimately had another DUI which caused him to lose his marriage and his home. Applicant has failed to demonstrate error.

Applicant argues that his two DUIs in the 1970s are not linked to the DUI in 2000. Applicant's argument is not persuasive. There was sufficient record evidence for the Judge to conclude that Applicant's long history of alcohol problems, including the three alcohol-related arrests, constituted a pattern. Applicant has not demonstrated error by the Administrative Judge.

Applicant argues on appeal that he was shot in the head in Vietnam and is entitled to consideration for his military service. A fair reading of the Judge's decision shows that the Judge gave fair consideration to Applicant's military service and travails in and after the Vietnam War. Applicant has failed to show the Judge erred.

Applicant's fifth argument fails to demonstrate error. Applicant's letters of reference were evidence that the Judge had to consider. The Judge is responsible for weighing the record evidence. A party's ability to point to evidence in their favor does not prove that the Administrative Judge erred in weighing the evidence as a whole. Absent a showing that the Judge acted in a manner that was arbitrary or capricious, the Board will not disturb the Judge's weighing of the evidence. *See* ISCR Case No. 01-02871 (January 8, 2003), p. 3.

Applicant sixth argument is based on his assertion that he is prepared to complete an alcohol abuse program in order to earn the government's trust. This representation constitutes new evidence, which the Board cannot consider on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Moreover, neither the Administrative Judge nor the Board has the authority to administer such an arrangement. Applicant's offer does not demonstrate the Judge erred.

Alcohol abuse poses a security risk. *See, e.g.*, ISCR Case No. 01-13906 (January 3, 2003) at p. 3. Considering the record as a whole, it was not arbitrary, capricious, or contrary to law for the Administrative Judge to conclude that Applicant's overall history of alcohol abuse raised questions about his security eligibility that were not sufficiently overcome by the favorable evidence submitted by Applicant.

### Conclusion

Applicant has failed to meet his burden on appeal of demonstrating that the Administrative Judge's October 17, 2002 decision is arbitrary, capricious, or contrary to law. Hence, that decision is affirmed.

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 favorable findings and conclusions under Guideline E are not at issue on appeal.