

DATE: November 19, 2001

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-03090

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Administrative Judge Jerome H. Silber issued a decision, dated August 17, 2001, in which he 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.

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 following issues: (1) whether the Administrative Judge mischaracterized Applicant's drinking history; (2) whether the Administrative Judge erred by finding that Applicant falsified a security questionnaire; and (3) whether the Administrative Judge's adverse 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 February 16, 2001. The SOR was based on Guideline G (Alcohol Consumption), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct). A hearing was held on July 11, 2001. The Administrative Judge issued a written decision, dated August 17, 2001, in which he 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.

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, e.g.*, 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 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 Issues

1. Whether the Administrative Judge mischaracterized Applicant's drinking history. The Administrative Judge made findings of fact concerning Applicant's history of episodic alcohol abuse. With one exception, Applicant does not challenge the Judge's findings about his history of alcohol abuse. Specifically, Applicant contends "it is misleading for the [Judge] to say I have been drinking since I was 15" because although he first drank alcohol "at age 15 it was the FIRST time but for the next 10+ years I very rarely drank." (Emphasis in original)

A review of the Administrative Judge's decision shows that the Judge found that Applicant started drinking alcohol at about age 15, not that Applicant began abusing alcohol then. The Judge's remaining findings of fact about Applicant's drinking history are unchallenged and provide a rational basis for the Judge's adverse conclusions under Guideline G.

2. Whether the Administrative Judge erred by finding that Applicant falsified a security questionnaire. The Administrative Judge found that Applicant did not falsify a security questionnaire in November 1999 by failing to disclose certain alcohol-related offenses, as alleged in SOR paragraph 2.a. But, the Judge did find that Applicant falsified that security questionnaire by failing to list alcohol treatment and counseling he received in 1994, as alleged in SOR paragraph 2.b. Applicant asks the Board "to consider that two of the 'Reasons' are unjustified because I was instructed by my company security officer that I only had to 'give information back for the past seven years.'" The Board construes Applicant's argument as raising the issue of whether the Judge erred by finding Applicant falsified a security questionnaire.

A review of the Administrative Judge's decision shows that the Administrative Judge accepted Applicant's explanation that his security officer told him that he only had to provide information that went back seven years, and based on acceptance of Applicant's explanation, the Judge found in Applicant's favor with respect to the falsification allegation covered by SOR paragraph 2.a. Therefore, Applicant's argument fails to demonstrate any error by the Judge with respect to SOR paragraph 2.a.

The Administrative Judge's adverse finding with respect to the falsification allegation covered by SOR paragraph 2.b. is totally unaffected by Applicant's argument. Since the alcohol treatment and counseling Applicant received in 1994 occurred less than seven years before Applicant completed the security questionnaire, the security officer's guidance to Applicant was totally irrelevant to Applicant's omission of the 1994 alcohol treatment and counseling from the security questionnaire.

3. Whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. In addition to the two arguments already discussed, Applicant states: (a) "I have also made an agreement to go through my company and enter a substance abuse program for at least one year"; and (b) "I am financially well off, have received promotions at work and have received good marks on my annual performance reviews." The Board construes these statements as raising the issue of whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law.

Applicant's statement about agreeing to enter a substance abuse program constitutes new evidence, which the Board cannot consider. Directive, Additional Procedural Guidance, Item E3.1.29. Furthermore, an appealing party cannot fairly challenge an Administrative Judge's decision based on evidence that was not presented for the Judge's consideration.

Applicant's financial situation is irrelevant to the negative security implications of his history of episodic alcohol abuse and his falsification of the security questionnaire in November 1999.

The favorable evidence concerning Applicant's job performance does not demonstrate the Administrative Judge's decision is arbitrary, capricious, or contrary to law. The Judge had to consider the evidence as a whole, both favorable and unfavorable, and decide whether the favorable evidence outweighed the unfavorable evidence or vice versa. Considering the record as a whole, it was not arbitrary or capricious for the Judge to conclude Applicant's history of episodic alcohol abuse and falsification of the security questionnaire in November 1999 warranted an adverse security clearance decision despite the favorable evidence of Applicant's job performance. *See, e.g.*, ISCR Case No. 00-0741 (October 9, 2001) at p. 3 ("An applicant's job performance may reflect favorably on the applicant. However, an applicant with good job performance may engage in off-duty conduct that has negative security implications.").

Conclusion

The Board affirms the Administrative Judge's adverse security clearance decision because Applicant has failed to demonstrate error below.

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