

DATE: April 15, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-05500

APPEAL BOARD DECISION AND REMAND ORDER

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

John D. Morgan, Esq.

Administrative Judge Barry M. Sax issued a decision, dated November 15, 2002, in which he concluded that 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, dated January 2, 1992, as amended.

Applicant's appeal raises the following issues: 1. Whether the Administrative Judge was biased and prejudged Applicant's case. 2. Whether the Administrative Judge's findings of fact were reasonably based on the record evidence. and 3. Whether the Administrative Judge conclusions were arbitrary, capricious or contrary to law. For the reasons that follow, the Board remands the case to the Administrative Judge with instructions.

Procedural History

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant dated February 26, 2002. The SOR was based on Guideline J (Criminal Conduct) and Guideline G (Alcohol Consumption). Applicant requested a hearing which was held on October 1, 2002. Subsequently, the Administrative Judge issued an adverse decision. Applicant appealed.

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 Issues

1. Whether the Administrative Judge was biased and prejudged Applicant's case. Applicant asserts the Administrative Judge: (a) did not weigh the evidence in a dispassionate manner; (b) made up his mind before examining all the evidence; (c) demonstrated "judicial bias"; (d) exhibited "prosecutorial bias"; and (e) engaged in a "less than objective review of the evidence." The Board construes these assertions as raising the issue of whether the Judge was biased and prejudged Applicant's case.

There is a rebuttable presumption that an Administrative Judge is impartial and unbiased, and a party raising a claim of bias has a heavy burden of persuasion on appeal. *See, e.g.*, ISCR Case No. 99-0462 (May 25, 2000) at p. 3. As will be discussed later in this decision, the Board concludes the Judge committed various factual and legal errors. However, Applicant's identification of factual and legal errors by the Judge is not sufficient to demonstrate the Judge was biased. *See, e.g.*, ISCR Case No. 98-0515 (March 23, 1999) at p. 5. Considering the record as a whole, the Board concludes Applicant has failed to overcome the presumption that the Judge was impartial and unbiased.

2. Whether the Administrative Judge's findings of fact were reasonably based on the record evidence. Applicant disputes several of the Administrative Judge's findings of fact from the Judge's November 15, 2002 decision.

The Board concludes Applicant persuasively argues the following findings were not supported by the record evidence:

1. Applicant had a 1975 alcohol-related arrest (there is no evidence of a 1975 arrest).⁽¹⁾ 2. Applicant had a 1982 conviction for negligent homicide (there is absolutely no evidence for this). 3. There is no indication Applicant informed his alcohol counselor of renewed drinking after his completion of the program (Applicant's counselor discussed this matter in Applicant's Exhibit J). 4. Applicant began drinking in 1975 (this is a later date than supported by the record). 5. Applicant resumed drinking in April 2001 (this is an earlier date than supported by the record). and 6. Applicant's 1998 DWI was dismissed apparently because the arresting officer was outside his jurisdiction (the record indicates the dismissal resulted from Applicant's completion of a deferred prosecution program).

Applicant's also contends the Administrative Judge erred by finding: (a) Applicant is a research technician; (b) Applicant had two alcohol treatment counselors; and (c) the Judge erroneously drew an adverse conclusion about Applicant's credibility by finding Applicant denied any other alcohol-related arrests and then stating "However, he has also admitted to an alcohol-related Article 15 proceeding while in the Air Force, between 1971 and 1978."

There is record evidence supporting the Administrative Judge's finding that Applicant is a research technician. *See, e.g.*, Government Exhibit 5. And, in any event, Applicant's precise job title is not material to any issue in this case. Given the record evidence in this case, Applicant fails to persuade the Board that the Judge erred by finding Applicant had two alcohol treatment counselors. And, in any event, whether Applicant had one or two alcohol treatment counselors is not material to any issue in this case. It is not clear whether the Administrative Judge drew an adverse conclusion from his juxtaposition of his findings that (i) Applicant denied any other alcohol-related arrests, but (ii) Applicant admitted to an alcohol-related Article 15 proceeding. Unless there is record evidence that Applicant was arrested in connection with the Article 15 proceeding, it would not be inherently incorrect or misleading for Applicant to deny any other alcohol-related arrests while admitting an alcohol-related Article 15 proceeding. Given the numerous errors by the Judge discussed in this decision, the Judge's failure to articulate or explain his reasoning on this aspect of the case leaves the Board unable to discern whether the Judge's analysis on this point is reasonable or whether it is arbitrary and capricious.

The Board concludes that the totality of fact-related error in the Administrative Judge's decision was harmful.

3. Whether the Administrative Judge's conclusions are arbitrary, capricious, or contrary to law. Applicant contends the

Administrative Judge erred by reaching various conclusions that are arbitrary, capricious or contrary to law. Specifically, Applicant argues: (a) the Judge erred by reaching adverse conclusions based on the record evidence that a few months before the hearing Applicant resumed taking Antabuse and resumed attending Alcoholics Anonymous (AA) meetings; (b) the Judge erred by reaching an adverse conclusion based on the record evidence that Applicant did not tell his security manager about his alcohol problem; (c) the Judge erred by concluding Applicant's criminal conduct warranted adverse formal findings under Guideline J; (d) the Judge erred by drawing adverse conclusions about Applicant's history of alcohol abuse despite the record evidence that Applicant has not been involved in an alcohol-related incident since 1998 and has maintained a life of sobriety since March 1999; and (e) the Judge erred by not applying various Adjudicative Guidelines mitigating conditions.

(a) The Administrative Judge did not articulate an explanation why he reached adverse conclusions based on the record evidence that Applicant resumed taking Antabuse and resumed attending AA meetings. Given the record evidence in this case, it is not clear why the Judge reached adverse conclusions about that evidence instead of reaching favorable conclusions. Given the numerous errors by the Judge, the Judge's failure to articulate or explain his reasoning on this aspect of the case leaves the Board unable to discern whether the Judge's analysis is reasonable or whether it is arbitrary and capricious. On remand, the Judge should articulate his reasoning about this aspect of the case.

(b) Applicant persuasively argues that the Administrative Judge appears to be reaching an adverse conclusion from the fact that Applicant's security manager was unaware of his history of alcohol-related problems (including alcohol-related arrests) until she received his security clearance questionnaire. Given the record evidence in this case, it is not clear why the Judge reached this adverse conclusion. Given the numerous errors by the Judge, the Judge's failure to articulate or explain his reasoning on this aspect of the case leaves the Board unable to discern whether the Judge's analysis is reasonable or whether it is arbitrary and capricious. On remand, the Judge should articulate his reasoning about this aspect of the case.

(c) Applicant makes a nonfrivolous argument that this case involves a history of alcohol abuse, not a history of criminal conduct, because his criminal offenses were always related to his alcohol abuse. The Board is remanding the case to the Administrative Judge with instructions to issue a new decision after correcting the errors identified by the Board. On remand, correction of the errors identified by the Board may result in changes in the Judge's analysis of this case that could moot this issue. However, the Judge's decision (at p. 6) uses language about his obligation to analyze this case under Guideline G (Alcohol Consumption) and Guideline J (Criminal Conduct) that is somewhat ambiguous. On remand, the Judge must consider Applicant's conduct under each Guideline cited in the SOR, and reach reasonable conclusions about Applicant's conduct under each Guideline. *See, e.g.*, ISCR Case No. 01-03107 (August 27, 2002) at pp. 4-5.

(d/e) It would be premature to address Applicant's last two claims of error. On remand, correction of the errors identified in this decision may result in changes in the Administrative Judge's analysis of this case that could moot these two claims of error.

Conclusion

Applicant has met his burden of demonstrating harmful error. The case is remanded to the Administrative Judge with instructions to issue a completely new decision consistent with the Board's conclusions and rulings.

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. On appeal, Applicant also asserted the Administrative Judge erred by finding there was a 1988 alcohol-related arrest. That claim of error is not well-founded in light of Applicant's admissions to SOR subparagraphs 1.e and 2.b. *See* Applicant's Amended Answer to SOR.