DATE: January 29, 2004

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 01-07292

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Russell W. Woodlief, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated September 19, 2002, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline G (Alcohol Consumption), and Guideline E (Personal Conduct). Administrative Judge Joan Caton Anthony issued an unfavorable security clearance decision dated July 21, 2003.

Applicant appealed the Administrative Judge's unfavorable decision. The Board has jurisdiction under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

The following issues have been raised on appeal: (1) whether it was arbitrary and capricious for the Administrative Judge to place great weight on offenses for which Applicant was found "not guilty"; (2) whether the Administrative Judge gave sufficient weight to the evidence of extenuation and mitigation; (3) whether there was a reasonable basis for the Administrative Judge's finding that Applicant's current alcohol use is six beers plus four to five ounces of bourbon per week; (4) whether it was arbitrary and capricious for the Administrative Judge to consider Applicant's February 1999 Statement (Government Exhibit 5) in which Applicant admitted that usually once a weekend his consumption of alcohol made him unable to safely and responsibly operate an automobile; (5) whether it was arbitrary and capricious for the Administrative Judge to consider Applicant's January 1990 Statement (Government Exhibit 3) in which he acknowledged that a former supervisor observed that Applicant's use of alcohol on weekends caused him to be late for work on Mondays and impaired his dependability on the job; (6) whether it was arbitrary and capricious for the Administrative Judge to consider evidence that cannot be considered under the Directive and Rule 402 of the Federal Rules of Evidence; and (7) whether there is sufficient evidence in the record to support the Administrative Judge's finding that Applicant deliberately failed to disclose his 1991 arrest for driving under the influence on his 1998 security clearance application. For the reasons that follow, the Board affirms the Administrative Judge's 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. 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 the rulings or conclusions of an Administrative Judge are challenged, the Board must consider whether they are: (1) arbitrary or capricious; or (2) contrary to law. Directive, Additional Procedural Guidance, Item E3.1.32.3. In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See, e.g.*, ISCR Case No. 97-0435 (July 14, 1998) at p. 3 (citing Supreme Court decision). In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. Compliance with state or local law is not required because security clearance adjudications are conducted by the Department of Defense pursuant to federal law. *See* U.S. Constitution, Article VI, clause 2 (Supremacy Clause). *See, e.g.*, ISCR Case No. 00-0423 (June 8, 2001) at p. 3 (citing Supreme Court decisions).

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, and whether the Judge's findings reflect a reasonable interpretation of the record evidence as a whole. Although a Judge's credibility determination is not immune from review, the party challenging a Judge's credibility determination has a heavy burden on appeal.

When an appeal issue 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).

If an appealing party demonstrates factual or legal error, then the Board must consider the following questions:

Is the error harmful or harmless? *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine);

Has the nonappealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds? *See, e.g.*, ISCR Case No. 99-0454 (October 17, 2000) at p. 6 (citing federal cases); and

If the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded? (Directive, Additional Procedural Guidance, Items E3.1.33.2 and E3.1.33.3).

Appeal Issues

(1) Whether it is arbitrary and capricious for the Administrative Judge to place great weight on offenses for which Applicant was found "not guilty." Applicant agrees that his use of alcohol resulted in three arrests. According to the SOR, they were driving while intoxicated (DWI) in November 2000, public intoxication in November 1998, and driving under the influence (DUI) of alcohol, reckless driving and refusal to submit to a breath or blood test in January 1991 (SOR subparagraphs 1b, 1c, and 1d). However, he contends that it "is arbitrary and capricious to place great weight on offenses for which the Applicant has been found not guilty." The two driving offenses were dismissed without convictions for DUI or DWI, but Applicant was convicted of reckless driving and other charges in 1991.[(1)]

Applicant's argument is not persuasive. Alcohol-related arrests that do not result in conviction may nonetheless disqualify an applicant from obtaining a security clearance under Guideline G when there is sufficient record evidence showing that alcohol consumption played a significant part in the conduct that lead to the arrests. *See* DISCR Case No. 92-1134 (November 23, 1993) at p. 3.

(2) Whether the Administrative Judge gave sufficient weight to the evidence of extenuation and mitigation; and (3) whether there is a reasonable basis for the Judge's finding that Applicant's current alcohol use is six beers plus four to five ounces of bourbon per week. Applicant argues that the arrests were not recent. He also states that the "unrefuted evidence adduced at the hearing," i.e., Applicant's own testimony, indicates that he reduced his alcohol consumption to a total of 12 beers in the year prior to the hearing. Acknowledging the "obvious" pattern of weekend arrests, Applicant nevertheless contends that such a pattern is insignificant and that "it could not be better for the Applicant to have had alcohol incidents during the workweek." These issues relate to the Alcohol Consumption Mitigation Conditions (Directive, Enclosure 2, Item E2.A7.1.3), and we will discuss these as raising the issue of whether the Administrative Judge gave sufficient weight to the evidence of extenuation and mitigation.

The application of Adjudicative Guidelines disqualifying and mitigating conditions does turn simply on a finding that one or more of them applies to a particular set of facts. The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. The Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. Applicant's disagreement with the Judge's weighing of the record evidence is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious or contrary to law. *See, e.g.*, ISCR Case No. 01-03767 (December 5, 2003) at p. 3. Here, the Judge found that the incidents in SOR subparagraphs 1b, 1c, and 1d "occurred a number of years ago," but she saw a disturbing pattern to these arrests - all occurred on weekends after Applicant had been drinking. Applicant fails to offer any reasonable basis as to why such a pattern was insignificant. The comment that it was better than having such incidents during the workweek is particularly unpersuasive.

Alcohol Consumption Mitigating Condition 3 (Directive, Enclosure 2, Item E2.A7.1.3.3), stresses positive changes in behavior supportive of sobriety. At the hearing Applicant explained that he reduced his consumption of alcohol to12 beers per year starting in the summer of 2002, a reduction supposedly prompted by a medical condition. But the Judge found that Applicant's current consumption was six beers and four to five ounces of bourbon weekly as stated in Applicant's June 2002 response to written interrogatories (Government Exhibit 6). Applicant argues that the Judge's findings regarding his current consumption of alcohol are erroneous apparently because he believes that the Judge had to accept Applicant's hearing testimony in the absence of contrary evidence. We disagree. While the Judge had to consider Applicant's hearing testimony regarding his reduced alcohol consumption levels, she was not bound by it. An Administrative Judge is not required to accept testimony merely because it is unrebutted. It would be arbitrary and capricious to uncritically accept a witness's testimony without considering whether it is plausible and consistent with other evidence. *See*, *e.g.*, ISCR Case No. 00-0620 (October 19, 2001) at p. 3. In view of Applicant's responses to the interrogatories in June 2002, his long history of alcohol abuse, and other support in the record, we cannot conclude that the Judge had no reasonable basis for her findings.

(4) Whether it was arbitrary and capricious for the Judge to consider Applicant's February 1999 Statement (Government Exhibit 5) in which Applicant admitted that usually once a weekend his consumption of alcohol made him unable to safely and responsibly operate an automobile; (5) whether it was arbitrary and capricious for the Judge to consider Applicant's January 1990 Statement (Government Exhibit 3) in which he acknowledged that a former supervisor observed that Applicant's use of alcohol on weekends caused him to be late for work on Mondays and impaired his dependability on the job; and (6) whether it was arbitrary and capricious for the Judge to consider evidence that cannot be considered under the Directive and Rule 402 of the Federal Rules of Evidence. Applicant elected to represent himself at the hearing. At the hearing, Applicant did not object to evidence presented by Department Counsel. Having failed to object to that evidence at the hearing, Applicant cannot now fairly complain that the Administrative Judge considered that evidence in making her decision. Even a *pro se* applicant has the obligation to take timely, reasonable steps to bring to a Judge's attention any objections, concerns, or questions the applicant has about evidence presented during the hearing. Since Applicant essentially waived any objection to the admission of evidence presented by Department Counsel, there is no need to address Applicant's arguments concerning the Federal Rules of Evidence or Directive, Additional Procedural Guidance, Item E3.1.19.

(7) Whether there is sufficient evidence in the record to support the finding that Applicant deliberately failed to disclose his 1991 arrest for driving under the influence and related charges.

Applicant argues that he did not deliberately conceal his January 1991 arrest as evidenced by his disclosure of this arrest

in his National Agency Questionnaire signed on April 7, 1992 (Government Exhibit 2). Applicant claims that he was confused by the question and believed that he was required to go back only seven years in his September 1998 security clearance application. The Judge had to consider and weigh the written and testimonial statements made by Applicant concerning his intent in light of the record evidence as a whole, as well as her assessment of the credibility of Applicant's hearing testimony. However, the Judge was not bound by Applicant's explanation. *See*, *e.g.*, ISCR Case No. 01-06270 (July 3, 2002) at pp. 2-3. Considering the entire record, including Applicant's SOR response and cross-examination, it was not arbitrary, capricious, or contrary to law for the Judge to find that Applicant deliberately omitted the January 1991 arrest from his 1998 security clearance application.

Conclusion

Applicant has failed to demonstrate error below. Accordingly, the Board affirms the Administrative Judge's security clearance decision.

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Separate Opinion of Chairman Emilio Jaksetic, concurring:

Applicant's appeal raises three issues: (1) whether the Administrative Judge erred by admitting and considering evidence that would have been objected to if Applicant had been represented by counsel at the hearing; (2) whether the Administrative Judge's adverse findings and conclusions about Applicant's history of episodic alcohol abuse are arbitrary, capricious, or contrary to law; and (3) whether the Administrative Judge erred by finding that Applicant falsified a security clearance questionnaire in September 1998. For the reasons that follow, I conclude Applicant has failed to demonstrate error below.

(1) I fully concur with my colleagues' conclusion that Applicant waived any objection to the admission of evidence presented by Department Counsel and, therefore, there is no need to discuss Applicant's arguments concerning the Federal Rules of Evidence or Directive, Additional Procedural Guidance, Item E3.1.19.

(2) Applicant challenges the Administrative Judge's findings and conclusions about Applicant's history of episodic alcohol abuse. In support of that challenge, Applicant argues for an alternate interpretation of the record evidence concerning his history of alcohol consumption. However, Applicant's arguments do not persuade me that the Judge weighed the record evidence in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 00-0621 (January 30, 2002) at p. 3 (absent a showing that the Judge acted in a manner that is arbitrary, capricious, or contrary to law, the Board will not disturb a Judge's weighing of the record evidence). The mere presence of conflicting record evidence does not detract from the Judge's responsibility to weigh the record evidence and make findings of fact. *See, e.g.*, ISCR Case No. 99-0435 (September 22, 2000) at p. 3. Nor does the mere presence of conflicting record evidence make the Judge's findings of fact unsustainable. When faced with conflicting record evidence, the Judge must consider the record evidence as a whole, decide which record evidence is entitled to be given more weight, and make findings of fact that reflect a reasonable interpretation of the record evidence. *See, e.g.*, ISCR Case No. 95-0576 (May 7, 1996) at p. 3.

To the extent Applicant argues that his hearing testimony runs contrary to some of the Administrative Judge's findings, Applicant's argument runs afoul of two interrelated legal principles: (a) the Judge is entitled to consider and weigh an applicant's testimony in light of the Judge's assessment of the applicant's demeanor while the applicant is testifying; and (b) the Judge is entitled to consider and weigh an applicant's testimony in light of the record evidence as a whole. Although a Judge cannot ignore an applicant's testimony, a Judge is not compelled to accept it at face value or consider it in isolation from the record evidence as a whole.

I do not have to agree with the Administrative Judge's particular findings of fact concerning Applicant's history of episodic alcohol abuse to conclude that: (a) Applicant has not shown that the Judge weighed the record evidence in a manner that is arbitrary, capricious, or contrary to law; and (b) the Judge's findings of fact are sustainable. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1. Furthermore, although Applicant makes some plausible arguments for interpreting the record evidence differently (and, therefore, for drawing more favorable conclusions from the record evidence), Applicant's arguments do not persuade me that the Judge's conclusions about Applicant's overall history of alcohol consumption are arbitrary or capricious.

(3) Considering the record evidence as a whole, and giving deference to the Administrative Judge's credibility determination, the Administrative Judge's finding that Applicant falsified a security clearance questionnaire in September 1998 is sustainable. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1. *See also* ISCR Case No. 99-0194 (February 29, 2000) at p. 3 (although Administrative Judge must consider record evidence concerning applicant's intent or state of mind, the Judge is not bound by the applicant's denial of any intent to falsify; rather, the Judge must consider and weigh the evidence as a whole and make a finding of fact as to whether a falsification occurred).

Because Applicant has failed to demonstrate error below, I concur with my colleagues' conclusion that the Administrative Judge's security clearance decision should be affirmed.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

1. Government Exhibit 8 indicates that the driving while intoxicated charge of November 2000 was dismissed, but it does not indicate that Applicant entered a plea and was tried on the charge. At the hearing Applicant also noted that the DUI charge of 1991 was "dismissed"(R.T. at pp. 39-40). Under these circumstances, it was inaccurate for Applicant's attorney to state on appeal that Applicant was found "not guilty."