

DATE: April 10, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-07360

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Administrative Judge Elizabeth M. Matchinski issued a decision, dated December 10, 2001, 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.

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 Applicant was denied a prompt adjudication of his case; (2) whether the Administrative Judge was biased; and (3) whether the Administrative Judge made various factual or legal errors.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated April 16, 2001. The SOR was based on Guideline E (Personal Conduct). A hearing was held on September 28, 2001. The Administrative Judge issued a written decision, dated December 10, 2001, 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 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 Applicant was denied a prompt adjudication of his case. Applicant refers to the saying "Justice delayed is justice denied" and argues: (a) the SOR was not issued until 14 months after he was interviewed by a Special Agent of the Defense Security Service (DSS); (b) Department Counsel did not contact Applicant until 18 months after Applicant was interviewed by the DSS Special Agent; (c) it took Department Counsel 18 months after Applicant was interviewed by the DSS Special Agent to realize he was not in Florida; (d) because of the passage of time, Applicant was unable to get a copy of the DSS Special Agent's notes of his interviews of Applicant; (e) because of the passage of time, the DSS Special Agent's testimony at the hearing "was not very helpful to either party"; and (f) Applicant could not be expected to be able to remember how many drinks he had on the night of November 1, 1990 when asked about it by Department Counsel at the hearing. The Board construes Applicant's arguments as raising the issue of whether he was denied a prompt adjudication of his case.

The expeditious adjudication of security clearance cases is desirable for both the government and applicants. However, neither Executive Order 10865 nor the Directive provides for statutes of limitation or analogous deadlines for how soon an SOR must be issued after an applicant has been interviewed by an investigator. Absent such an express provision of law, the federal government is not precluded from adjudicating an applicant's security clearance case. ⁽¹⁾

The Board does not have supervisory authority or jurisdiction over the actions of Department Counsel. And, in any event, Applicant fails to articulate how he was prejudiced in any specific, identifiable manner by the passage of approximately four months from the issuance of the SOR to the time Department Counsel contacted Applicant. Absent any such showing, Applicant's dissatisfaction with the performance of Department Counsel provides no basis for the Board to conclude Applicant was harmed in any legally cognizable manner.

In any industrial security clearance case, there will be some amount of time that passes between the day an applicant is interviewed by a DSS Special Agent, the day an SOR is issued, and the day when a hearing is conducted. Such a passage of time is inevitable and unavoidable. With the passage of time, it is possible that memories may fade and the ability of witnesses to recall past events may be affected. Yet, such a possibility is unavoidable in any practical system of adjudication. An Administrative Judge is presumed, based on his or her legal training and experience, to be able to appreciate and evaluate the possible effect the passage of time might have on the ability of a witness to provide complete and accurate testimony about past events.

None of Applicant's arguments about the time it took for his case to be adjudicated demonstrate error by the Administrative Judge or persuade the Board that Applicant is entitled to remand or reversal of the decision below.

2. Whether the Administrative Judge was biased. Applicant asserts the Administrative Judge was biased. In support of that assertion, Applicant argues: (a) the Judge found no mitigating factors on Applicant's behalf even though Applicant has not had any security violations in 30 years; (b) the Judge failed to give due weight to evidence that Applicant received achievement awards in August 2000 and July 2001; (c) the Judge improperly referred to conduct by Applicant that was not alleged in the SOR; and (d) the Judge improperly concluded that Applicant is at risk for having a future incident of drunk driving.

There is a rebuttable presumption that an Administrative Judge is impartial and unbiased, and the appealing party has a heavy burden when seeking to overcome or rebut that presumption. ⁽²⁾ The issue is not whether the appealing party personally believes that the Judge was biased. Rather, the issue is whether the record of the proceedings below contains any indication that the Judge acted in a manner that would lead a reasonable person to question the fairness or

impartiality of the Judge.⁽³⁾

Bias is not demonstrated by either (a) the fact that the Administrative Judge ruled against an appealing party, or (b) legally erroneous rulings by the Judge.⁽⁴⁾ As will be discussed later in this decision, Applicant's specific arguments lack merit. However, even if Applicant's arguments had any legal merit, none of them would support a finding of bias by the Judge.

3. Whether the Administrative Judge made various factual or legal errors. Applicant also argues: (a) the Judge made erroneous findings about the circumstances under which Applicant was terminated from employment in 1998; (b) the Judge erred by finding Applicant falsified material facts about his termination from employment in 1998 in a written statement he gave in January 2000; (c) the Judge erred by considering a matter that was not alleged in the SOR; (d) the Judge made various errors in connection with considering Applicant's past alcohol abuse; (e) the Judge erred by failing to take into account certain mitigating evidence.

(a) There is sufficient record evidence to sustain the Administrative Judge's findings about the circumstances under which Applicant was terminated from employment in 1998. The Board is not persuaded by Applicant's argument that the Judge gave undue weight to Government Exhibit 7. Furthermore, Applicant's ability to argue for an alternate interpretation of the record evidence is not sufficient to persuade the Board that the Judge's findings about Applicant's termination from employment in 1998 are arbitrary, capricious, or otherwise unsustainable.

(b) The evidence cited by Applicant on appeal in support of this appeal argument is not sufficient to demonstrate the Administrative Judge's finding of falsification is erroneous. When faced with conflicting record evidence, a Judge must weigh the evidence as a whole and make findings of fact that reflect a reasonable interpretation of the record evidence. Applicant's denials of any intent to falsify are relevant evidence, but they are not conclusive or binding on the Judge. Rather, the Judge had to consider and weigh Applicant's denials in light of the record evidence as a whole and make a finding as to whether Applicant falsified material facts when he gave a written statement to a DSS Special Agent.⁽⁵⁾ Considering the record as a whole, there is sufficient evidence to sustain the Administrative Judge's finding that Applicant falsified material facts in a written statement he gave in January 2000.

(c) In concluding that Applicant has not been frank and candid with the government about his past conduct and circumstances, the Administrative Judge referred to a matter not alleged in the SOR (Decision at p. 9). Applicant cites the specific passage in the Judge's decision and argues the Administrative Judge erred by referring to a matter not alleged in the SOR. Although an SOR must place an applicant on reasonable notice of the reasons why the government proposed to deny or revoke access to classified information, an SOR need not allege every piece of evidence that is relevant and material to evaluating an applicant's security eligibility.⁽⁶⁾ Furthermore, conduct not alleged in an SOR may be considered: (i) to assess an applicant's credibility; (ii) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; or (iii) to consider whether an applicant has demonstrated successful rehabilitation.⁽⁷⁾ In this case, SOR paragraph 1.a. alleged Applicant was terminated from employment in 1998 for mischarging time and attendance, and SOR paragraph 1.b alleged Applicant had falsified material facts in connection with a written statement he gave to a DSS Special Agent in January 2000. The matter not alleged in the SOR that the Judge referred to (which Applicant complains about) is relevant to an assessment of Applicant's

candor, honesty, and credibility. Accordingly, it was not arbitrary, capricious, or contrary to law for the Judge to consider that matter in connection with her assessment of Applicant's candor and credibility, or in connection with her conclusion that the matter was evidence showing Applicant has engaged in a pattern of dishonest conduct.

(d) In reference to the Administrative Judge's findings about Applicant's past alcohol abuse, Applicant argues: (i) the Judge improperly "relitigated" two alcohol-related cases heard by state authorities in the 1991 and 1995; (ii) Applicant's past alcohol abuse should have been alleged under Guideline G, not Guideline E; (iii) the Judge should have applied two Alcohol Consumption Mitigating Conditions to Applicant's past alcohol abuse; and (iv) because Guideline G was not alleged in the SOR, the Judge erred by concluding that a future incident of drunk driving could not be ruled out.

(d)(i) The Administrative Judge acted properly by making findings of fact about two incidents that were handled by

state authorities in 1991 and 1995. Although neither incident resulted in a conviction for driving under the influence, there is sufficient record evidence to support the Judge's finding that both incidents involved alcohol abuse.

(d)(ii) Although the SOR issued to Applicant contains two allegations of alcohol-related incidents, Guideline G (Alcohol Consumption) was not alleged. There is no indication in the record evidence as to why those two incidents were not alleged under Guideline G. The Board will not speculate as to the mental processes of the DOHA personnel involved in drafting the SOR issued to Applicant.

Was the SOR deficient or defective because it did not allege the two alcohol-related incidents under Guideline G? An SOR is a civil, administrative pleading that does not have to satisfy the stringent requirements of a criminal indictment. (8) Furthermore, factual allegations may be cited under more than one Guideline, as long as there is a rational basis for doing so. (9) An alcohol-related incident can demonstrate poor judgment or unreliability within the meaning of Guideline E. Furthermore, the Directive specifically notes that adverse information that might not be sufficient to warrant an adverse decision under a particular Guideline may be sufficient to support an adverse security clearance decision if it "reflects a recent or recurring pattern of questionable judgment, irresponsibility, or emotionally unstable behavior." See Directive, Adjudicative Guidelines, Item E2.2.4. Therefore, it was not arbitrary, capricious, or contrary to law for two alcohol-related incidents to be alleged under Guideline E in the SOR issued to Applicant.

(d)(iii) As discussed in the preceding paragraphs, it was not arbitrary, capricious, or contrary to law for the two alcohol-related incidents to be alleged under Guideline E instead of Guideline G. Because those incidents were not alleged under Guideline G, it was not arbitrary, capricious, or contrary to law for the Judge to not apply the Adjudicative Guidelines pertaining to Alcohol Consumption.

Furthermore, even if the Board were to assume, solely for the sake of deciding this appeal, that the two alcohol-related incidents should have been alleged under Guideline G, a remand or reversal would not be warranted. Even if the Administrative Judge had considered Applicant's two alcohol-related incidents under Guideline G and concluded that they were not sufficient to warrant overall adverse formal findings under Guideline G, the Judge still could have considered those two alcohol-related incidents under Guideline E and concluded that, when considered with the other matters alleged in the SOR, they formed part of a pattern of poor judgment and unreliability by Applicant that warranted adverse conclusions under Guideline E. Therefore, the absence of any discussion of those two alcohol-related incidents under Guideline G or the Adjudicative Guidelines pertaining to Alcohol Consumption in the Judge's decision was not prejudicial to Applicant.

(d)(iv) As discussed in the preceding paragraphs, it was not arbitrary, capricious, or contrary to law for the Administrative Judge to consider Applicant's two alcohol-related incidents under Guideline E. Because it was appropriate for the Judge to consider those two incidents, it was proper for the Judge to consider any evidence indicating whether Applicant was at risk of repeating such incidents in the future. See Directive, Sections 6.3. and 6.3.6 (adjudicator must weigh all relevant and material information and consider "[p]robability that the circumstances or conduct will continue or recur in the future"), and Directive, Adjudicative Guidelines, Item E2.2.1 and E2.2.1.9 (adjudicator should weigh all available information about person under whole person concept and consider "[t]he likelihood of continuation or recurrence").

(e) Applicant also contends the Administrative Judge did not take into account the following mitigating evidence: Applicant has no security violations in 30 years; and Applicant received achievement awards in 2000 and 2001. The absence of any security violations by Applicant does not preclude an adverse security clearance decision in his case. The federal government need not wait until an applicant mishandles or fails to properly safeguard classified information before it can make an adverse security clearance decision. (10) The Administrative Judge's findings and conclusions about Applicant's conduct in this case provide a rational basis for the Judge's adverse conclusions about his judgment and reliability and the Judge's overall adverse security clearance decision. Furthermore, the achievement awards cited by Applicant do not constitute favorable evidence of sufficient weight to render the Administrative Judge's adverse decision arbitrary, capricious, or contrary to law.

Conclusion

Applicant has failed to demonstrate the Administrative Judge erred. Therefore, the Board affirms the Judge's adverse security clearance 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. *See, e.g.*, ISCR Case No. 00-0030 (September 20, 2001) at p. 3 (no statute of limitations in security clearance cases, and the doctrine of laches cannot be invoked against federal government).
2. *See, e.g.*, ISCR Case No. 99-0462 (May 25, 2000) at p. 3; ISCR Case No. 97-0783 (August 7, 1998) at p. 2.
3. *See, e.g.*, ISCR Case No. 99-0710 (March 19, 2001) at p. 5.
4. *See, e.g.*, ISCR Case No. 99-0519 (February 23, 2001) at p. 7; ISCR Case No. 98-0515 (March 23, 1999) at p. 5.
5. *See, e.g.*, ISCR Case No. 00-0044 (December 22, 2000) at p. 3.
6. *See, e.g.*, ISCR Case No. 00-0030 (September 20, 2001) at p. 6.
7. *See, e.g.*, ISCR Case No. 98-0582 (November 12, 1999) at p. 9.
8. *See, e.g.*, ISCR Case No. 99-0710 (March 19, 2001) at p. 2.
9. *See, e.g.*, ISCR Case No. 00-0030 (September 20, 2001) at p. 8.
10. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970).