

DATE: June 20, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-21340

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Chief Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge James A. Young issued a decision dated February 13, 2003 in which he 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 presents the following issues: (1) whether he was denied a fair hearing by the government's failure to make a government investigating agent available as a witness at the hearing; (2) whether the Administrative Judge erred in his application of Guideline G disqualifying and mitigating conditions to Applicant's case; and (3) whether the Administrative Judge's decision was arbitrary, capricious, or contrary to law. For the reasons that follow, the Board affirms the Administrative Judge's decision.

Procedural History

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant dated September 23, 2002. The SOR was based on Guideline G (Alcohol Consumption) and Guideline E (Personal Conduct). Applicant requested a hearing which was held on January 22, 2003. The Administrative Judge issued a decision in which he concluded that it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. 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 Applicant was denied a fair hearing by the government's failure to make a government investigating agent available as a witness at the hearing. Applicant asserts on appeal that the government agent who investigated him would have provided valuable testimony at the hearing. He notes that he was not able to subpoena the agent and claims that his attorney approached Department Counsel in an effort to secure the agent's presence at the hearing, but ultimately failed. It is clear from Executive Order 10865, Section 6 (as amended by Executive Order 10909) that DoD is obliged to make personnel available for cross-examination. Applicant contends that Department Counsel had control over a witness that he needed for his defense and asserts this situation involves a conflict of interest.

The only instance where the subject of the investigative agent's availability was mentioned below is a one line reference in the hearing transcript. There, Applicant's attorney states simply, "We couldn't get him to be here."⁽¹⁾ There was no objection to the agent's absence, nor any motion made for production of the agent by the government. There was also no proffer made at the hearing as to what efforts had been made to obtain the agent for testimony. In addition, no documentation exists in the case file that would serve to indicate what took place regarding this procedural issue. Because Applicant did not make a formal request for the agent's appearance on the record, did not develop the record concerning this issue, or even raise before the Administrative Judge any concern about the availability of the agent, Applicant is relying on representations made for the first time on appeal. The Board cannot consider new evidence on appeal. Directive, Additional Procedural Guidance, Item E3.1.29. Furthermore, by failing to raise the matter at the hearing, Applicant waived any claim concerning the absence of the agent at the hearing. Accordingly, Applicant has failed to demonstrate error.

2. Whether the Administrative Judge erred by applying Guideline G disqualifying and mitigating conditions to Applicant's case. Applicant asserts the Administrative Judge erred by not applying several Guideline G mitigating factors to his alcohol consumption. He states that his alcohol related incidents do not indicate a pattern,⁽²⁾ his problems occurred a number of years ago and there is no indication of a recent problem,⁽³⁾ and he has exhibited positive changes supportive of sobriety.⁽⁴⁾

Included in his argument concerning positive changes supportive of sobriety is Applicant's assertion that evidence of his 16 weeks of attendance at alcohol education and awareness classes was essentially mitigating, and the Judge erred by not considering it as such.

Applicant's disagreement with the Administrative Judge's conclusion that the occasions of Applicant's alcohol-related vehicular arrests in September 1999 and January 2001 constituted a "pattern" does not establish that the Judge erred. The Judge's conclusion is reasonably supported by the evidence. Likewise, the Judge reasonably concluded that the age of the alcohol-related incidents and Applicant's more recent behavior did not provide a sufficient basis upon which to mitigate the government's claim against him. The fact that the Judge did not view the evidence of Applicant's attendance at the 16-week alcohol education and awareness classes in the light preferred by Applicant and Applicant's ability to argue in support of a different interpretation of the record evidence is not sufficient to establish error on the part of the Administrative Judge.

Applicant also asserts on appeal that the Administrative Judge's reliance on Guideline G Disqualifying Condition E2.A7.1.2.4⁽⁵⁾ was error because there is no evidence of any evaluation of alcohol dependence or abuse by a licensed clinical social worker in his case. Applicant's assertion has merit.

A review of the record evidence in this case reveals no evidence that would support application of Disqualifying Condition E2.A7.1.2.4. The Administrative Judge's conclusion that Disqualifying Condition E2.A7.1.2.4 had applicability to this case is clearly erroneous. The Judge's application of Disqualifying Condition E2.A7.1.2.4 provides a significant underpinning for his formal finding against Applicant under Guideline G. However, no useful purpose would be served by remanding the case to the Administrative Judge for a reassessment of the case under Guideline G. A review of the whole record and the entirety of the Judge's decision convinces the Board that the Judge's adverse formal finding under Guideline E (falsification) is sustainable.

2. Whether the Administrative Judge's decision was arbitrary, capricious, or contrary to law.

Applicant makes other assertions of error on the part of the Administrative Judge. Specifically, they are (a) the Judge did not consider applicable mitigating conditions under Guideline E; (b) the Judge did not consider favorable evidence under the "whole person" concept when reaching his decision; (c) the Judge's decision was inconsistent with DOHA case law; and (d) the Judge was inexperienced. The Board construes these arguments as raising the issue of whether the Administrative Judge's decision was arbitrary, capricious, or contrary to law.

Applicant argues that the Judge should have applied Personal Conduct Mitigating Conditions E2.A5.1.3.2⁽⁶⁾ and E2A5.1.3.5.⁽⁷⁾

Given the record evidence in this case, the Administrative Judge was not required to apply these mitigating conditions. In his decision the Judge notes two instances other than the February 2000 completion of a security clearance questionnaire where Applicant failed to reveal a 1999 arrest for driving while intoxicated. These findings are supported by the record evidence and, although not alleged in the SOR, preclude any conclusion that Applicant's falsification was isolated.⁽⁸⁾ Mitigating Condition E2.A5.1.3.5 is not strictly applicable to the facts of this case. Applicant has failed to establish error on the part of the Administrative Judge's disposition of the falsification allegation under Guideline E.

(b) Applicant claims the Administrative Judge did not employ the "whole person" concept in his decision. He cites to numerous documents that he submitted as evidence which contained favorable information about his work performance and character, his education, his church service, his community service, his military record and the absence of security violations in his record. He also points to the substance of an affidavit from a substance abuse counselor purportedly stating that Applicant is not an alcoholic and that no substance abuse treatment was required. Applicant complains that, other than to indicate that six exhibits were submitted, the Judge did not mention them and did not discuss their contents in the decision. He argues that the Judge did not consider this favorable evidence. Applicant asserts further that the "whole man" concept was not mentioned by the Judge and was likewise not considered.

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. See, e.g., ISCR Case No. 99-9020 (June 4, 2001) at p. 2. Administrative Judge's decisions are not held to a standard of perfection. While the Administrative Judge could have discussed Applicant's favorable evidence and related it to the record as a whole, the Board concludes that, based on the record in this case, he was not compelled to do so. The Board is not convinced that the Judge simply ignored Applicant's favorable evidence. Moreover, regarding the subject of alcohol treatment, the Administrative Judge specifically mentioned in his findings of fact an evaluation that concluded Applicant was not at risk for any alcohol-related problems in the future. Applicant's assertion that the Judge did not take into account the evidence he presented is not persuasive.

(c) Applicant cites numerous cases decided by DOHA Hearing Office Administrative Judges in support of an argument that the decision in his case is inconsistent with other cases decided by DOHA. Applicant claims that he was unable to find other cases as weak as his using a "side by side" comparison. Although decisions by Hearing Office Judges may be cited as persuasive authority, they are not legally binding on other Hearing Office Judges in other cases, nor are they legally binding on the Appeal Board. Applicant's ability to point to cases with favorable outcomes involving derogatory evidence he perceives as weaker than that existing in his own case fails to demonstrate that the Judge's decision was arbitrary, capricious, or contrary to law.

(d) Applicant indicates his perception that the Administrative Judge is "inexperienced." The experience level of an Administrative Judge is irrelevant to the establishment of error.

Conclusion

Applicant has failed to meet his burden of demonstrating error below that warrants remand or reversal. Accordingly, the Board affirms the Administrative Judge's 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. Hearing Transcript, p. 32.
2. Thus invoking Alcohol Consumption Mitigating Condition E2.A7.1.3.1.
3. Thus invoking Alcohol Consumption Mitigating Condition E2.A7.1.3.2.
4. This invoking Alcohol Consumption Mitigating Condition E2.A7.1.3.3.
5. "Evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program."
6. "The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily."
7. "The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation or duress."
8. Conduct not alleged in an SOR may be considered for some purposes. *See, e.g.*, ISCR Case No. 01-07360 (April 10, 2002) at p. 5 ("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.")