DATE: September 5, 2002

In Re:

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

Applicant for Security Clearance

ISCR Case No. 01-22403

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Chief Department Counsel

Erin C. Hogan, Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge John R. Erck issued a decision dated April 23, 2002, in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The government appealed. For the reasons set forth below, the Board reverses 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.

The government's appeal presents the following issue: Were the Administrative Judge's findings and conclusions arbitrary, capricious and contrary to law?

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated October 30, 2001. The SOR was based on Guideline G (Alcohol Consumption) and Guideline E (Personal Conduct). In his response to the SOR Applicant requested a hearing which was conducted on February 21, 2002 and continued on April 3, 2002. The Administrative Judge issued a decision in Applicant's favor. The case is before the Board on the government's appeal of that 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 Issue

Were the Administrative Judge's findings and conclusions arbitrary, capricious and contrary to law? The government makes several contentions in support of its argument that the Administrative Judge's findings and conclusions were arbitrary, capricious and contrary to law:

As to Guideline G, (1) the Judge erred by concluding that 6 alcohol-related arrests over 23 years were not indicative of a pattern; (2) the Judge erred by concluding that court dispositions of the 6 arrests were relevant to determining the security significance of the events; (3) the Judge should not have applied mitigating condition 3; and (4) the Judge should have applied disqualifying condition 5;

As to Guideline E, (5) the Judge erred by applying mitigating condition 1; (6) the Judge's finding that Applicant's omissions from his SF-86 were not deliberate is contrary to the record evidence; (7) Applicant changed his story with regard to his failure to list a 1997 arrest; and (8) Applicant failed to list that arrest even though it was on a document he obtained to help him prepare the form which discredits his claim that he forgot the arrest.

As to Guideline G (Alcohol Consumption):

The government's first contention is that the Judge erred by concluding that 6 alcohol- related arrests over 23 years were not indicative of a pattern. The Board has declined to define the word pattern in terms of a hard and fast rule of a specific number over a given time-frame. However, six alcohol-related arrests over 23 years is sufficient to constitute a pattern. Thus the Administrative Judge erred by applying mitigating condition 1 (Directive, Item E2.A7.1.3.1)[(1)] to Applicant's conduct.

The government's second contention is that the Judge erred by drawing inferences from court dispositions of Applicant's six 6 alcohol-related arrests without record evidence to support those inferences. Department Counsel correctly notes that the Board has previously held that a Judge cannot rely on a dismissal of criminal charges absent record evidence of the reasons for the dismissal. Similarly, the Judge here erred by making inferences about the reasons for the court dispositions in the Applicant's case without record evidence to support those inferences.

The government's third contention regards the Administrative Judge's application of mitigating condition 3 (Directive, Item E2.A7.1.3.3).[(2)] The record evidence in the case below is ambiguous as to the facts which are the predicate for the Administrative Judge's application of mitigating condition 3. The Board need not agree with the Administrative Judge's findings in order to conclude that Department Counsel has failed to meet its burden on appeal of demonstrating that the Judge's application of mitigating condition 3 was arbitrary, capricious and contrary to law. On this issue Department Counsel has not met that burden.

The government's fourth contention is not adequately supported by the record evidence to prove error below. Although there is a pattern of alcohol-related incidents in Applicant's behavior, there is no requirement given this record that the Judge apply disqualifying condition 5 (Directive, Item E2.A7.1.2.5.)[(3)]

As to Guideline E:

The government's fifth contention is that the Administrative Judge's application of mitigating condition 1 (Directive, Item E2.A5.1.3.1.)[(4)] to Applicant's omissions of arrests from his SF 86 was erroneous. The Administrative Judge

concluded that because the omitted arrests were punished with relatively light penalties or dismissed that they were not pertinent to a security determination. Department Counsel argues on appeal that the criminal penalties have no bearing on the security significance of the underlying conduct. A lenient criminal disposition is not dispositive for analyzing the security eligibility of an applicant. There are many reasons why a perpetrator of a crime may be not charged, not tried, found not guilty, or given a light penalty. Most of those reasons have little or nothing to do with security significance of an applicant for a security clearance (examples include standards of proof for conviction, prison overcrowding, and unavailability of witnesses). In the instant case the Judge had no reason based on the record evidence to give weight to the dispositions of Applicant's arrests. The Judge also gave insufficient weight to the fact that they were felony arrests. The Board also notes that there is a logical problem in applying a mitigating factor to an issue that the Judge has said is not disqualifying as happened here. Therefore the government's assignment of error to the Judge's application of mitigating condition 1 is well founded.

As to the government's sixth, seventh and eighth contentions, the Judge's finding that the omissions were not deliberate is not sustainable. Applicant concedes that a month prior to preparing the form he sought documentation of his arrest record which included a 1997 felony arrest. Nonetheless, he failed to list that felony arrest. Applicant offered varying explanations for his failure to list this arrest including two which appear somewhat inconsistent (that he forgot about it and that he did not know it was a felony). Applicant also failed to list a 1975 felony arrest.

Conclusion

Department Counsel has met its burden appeal of demonstrating reversible errors in the decision below. Therefore the Administrative Judge's decision is reversed.

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

Concurring opinion of Chairman Emilio Jaksetic:

For the reasons that follow, I concur with my colleagues' decision to reverse the Administrative Judge's favorable security clearance decision.

Department Counsel contends the Administrative Judge erred in several ways. Specifically, Department Counsel argues:

(1) the Judge erred by concluding Applicant's six alcohol-related arrests did not establish a set pattern and applying Alcohol Consumption Mitigating Condition 1;

(2) the Judge erred by concluding the judicial disposition of the various charges against Applicant was relevant to determining whether Applicant's conduct was mitigated under Guideline G;

(3) the Judge erred by applying Alcohol Consumption Mitigating Condition 3;

(4) the Judge erred by not applying Alcohol Consumption Disqualifying Condition 5;

(5) the Judge erred by applying Personal Conduct Mitigating Condition 1; and

(6) the record evidence does not support the Judge's finding that Applicant's omissions were due to carelessness and inattention rather than a deliberate intent to conceal them.

I will discuss each contention in turn.

(1) Although the Administrative Judge found that Applicant had six alcohol-related arrests over a 23-year period, the Judge concluded those arrests were mitigated because they were "dispers[ed] over a 23-year-time frame according to no set pattern." The Judge also noted that the "common thread" linking Applicant's arrests "is the obvious enjoyment/pleasure he derives from drinking beer with his friends. While there are more constructive pastimes, drinking beer with friends is neither illegal nor unusual" (Decision at pp. 6-7). Moreover, the Judge cited Alcohol Consumption Mitigating Condition 1[(5)] as being applicable (Decision at p. 5). Department Counsel argues the Judge erred because Applicant's six alcohol-related arrests show a pattern of alcohol abuse.

My colleagues correctly note that the Board has declined to adopt a bright-line definition for the word "pattern" in Alcohol Consumption Mitigating Condition 1. However, such a definition is not necessary to reach the conclusion that the Judge relied on arbitrary and capricious reasoning to conclude that Applicant's six alcohol-related arrests do not demonstrate a pattern. First, nothing in the plain language of Alcohol Consumption Mitigating Condition 1 supports the Judge's use of the phrase "no set pattern." As long as there is a pattern of alcohol-related incidents, however regular or irregular that pattern may be, then Alcohol Consumption Mitigating Condition is not applicable. If a Judge wishes to draw conclusions, favorable or unfavorable, about the nature and significance of an applicant's pattern of alcohol-related incidents, then the Judge can do so under the provisions of Directive, Section 6.3 and Item E2.2.1. Second, the Judge erred by relying on his observation that "drinking beer with friends is neither illegal or unusual." The issue in this case (under Guideline G) is not whether Applicant drinks beer with his friends, or whether drinking beer is legal or usual; rather, the issue is whether Applicant has abused alcohol. The Judge's observation about the legality and normalcy of drinking alcohol with friends is irrelevant to whether Applicant has abused alcohol. Given the record evidence in this case, Applicant's six alcohol-related arrests involved alcohol abuse, not merely nonabusive drinking with friends. I concur with my colleagues' conclusion that six alcohol-related arrests constitutes a pattern that precludes application of Alcohol Consumption Mitigating Condition 1.

(2) The Administrative Judge concluded the judicial disposition of the various charges against Applicant indicated Applicant's conduct was less serious than the charges suggest (Decision at p. 7). Department Counsel contends the Judge erred because disposition of the charges against Applicant is irrelevant to determining whether Applicant's conduct was mitigated under Guideline G. Given the record evidence in this case, Department Counsel's contention has merit.

First, Department Counsel correctly notes the importance of the record evidence that shows Applicant's offenses were alcohol-related. Evidence that an applicant has engaged in alcohol abuse is relevant under Guideline G even if the applicant has never been charged with any criminal offenses. Accordingly, once the record evidence showed that Applicant's offenses were alcohol-related, they were relevant and material to assessing his security eligibility under Guideline G. Second, although the Administrative Judge could consider the nature and seriousness of Applicant's alcohol-related conduct (Directive, Section 6.3.1 and Item E2.2.1.1), the Judge had to do so based on the record evidence before him. I agree with my colleagues that the record evidence does not support the Judge's inferences about why Applicant received lenient dispositions of his alcohol-related offenses.

(3) The Administrative Judge applied Alcohol Consumption Mitigating Condition 3[(6)] and concluded that Applicant had reduced his alcohol consumption and no longer drinks to the point of intoxication (Decision at pp. 5, 7). Department Counsel argues the Judge erred in applying Alcohol Consumption Mitigating Condition 3 because: (a) the Judge's favorable conclusion is contradicted by the Judge's finding that Applicant "rarely if ever drink[s] to the point of intoxication"; and (b) application of that Alcohol Consumption Mitigating Condition 3 is not supported by the record evidence.

It is difficult to discern what the Administrative Judge meant by the phrase "rarely if ever drink[s] to the point of

intoxication." The words "if ever" introduce an element of uncertainty that is contrary to the Judge's obligation to make findings of fact that are understandable. *See, e.g.*, ISCR Case No. 00-0621 (January 30, 2002) at p. 3 (Judge must set forth findings and conclusions with sufficient specificity and clarity to allow the parties and the Board to discern what the Judge is finding and concluding). In this case, the Judge had to make a finding that either Applicant currently drinks to the point of intoxication or he does not. The Judge's use of the words "if ever" leaves one guessing about what finding the Judge was making. However, given the record evidence in this case, Department Counsel's arguments fall short of demonstrating the Judge erred in applying Alcohol Consumption Mitigating Condition 3.

(4) Department Counsel contends the Administrative Judge erred by not applying Alcohol Consumption Disqualifying Condition 5.[(7)] As discussed earlier in this separate opinion, the Judge erred by not concluding Applicant's six alcohol-related incidents demonstrated a pattern. However, Department Counsel presents no good argument for its contention that the Judge should have applied Alcohol Consumption Disqualifying Condition 5. Although Applicant exhibited a pattern of episodic alcohol abuse, the record evidence in this case did not require the Judge to find that Applicant's alcohol abuse was habitual in nature or involved binge drinking. I agree with my colleagues' conclusion that this claim of error is not persuasive.

(5) The Administrative Judge concluded that the information Applicant failed to disclose was not relevant and material to a determination of Applicant's judgment, trustworthiness and reliability and applied Personal Conduct Mitigating Condition 1[(8)] (Decision at pp. 6, 7-8). Department Counsel persuasively contends the Judge erred.

Department Counsel correctly notes the Board has held that, for purposes of falsification, materiality is not limited to consideration of whether the information involved would result in an adverse security clearance adjudication, but rather also covers information that is relevant to a security clearance investigation. Falsification of a security clearance application constitutes violation of 18 U.S.C. §1001, a federal felony. *See United States v. Yermian*, 468 U.S. 63 (1984). The case law concerning 18 U.S.C. §1001 makes clear that materiality is not limited to consideration of whether the information involved would affect a final agency decision. *See, e.g.*, ISCR Case No. 95-0560 (August 16, 1996) at pp 3-4 (citing federal cases); ISCR Case No. 95-0495 (March 22, 1996) at p. 5 (citing federal case); DISCR Case No. 91-0109 (July 1, 1993) at pp. 5-6 (citing federal cases). There is no good reason to apply in security clearance cases a narrower standard of materiality than is applied in criminal prosecutions under 18 U.S.C. §1001. Furthermore, the federal government is entitled to conduct a thorough and complete background investigation of applicants, unimpeded by deliberate falsifications, so that it can obtain information to make a fully informed, reasoned decision on an applicant's security eligibility. *See* ISCR Case No. 94-1159 (December 4, 1995) at pp. 6-7. Construing materiality to apply only to a final security clearance adjudication fails to recognize the important governmental interest in conducting a complete and thorough background investigation. A narrow interpretation of materiality that fails to take into account such an important governmental interest runs contrary to the principle that the Directive should be construed and interpreted in a manner that effectuates its purpose of protecting classified information. *See, e.g.*, ISCR Case 97-0783 (August 7, 1998) at p. 4. It was arbitrary, capricious, and contrary to law for the Judge to characterize the information Applicant failed to disclose as not relevant or material.

(6) The Administrative Judge found that Applicant's failure to disclose certain arrests was due to carelessness and inattention rather than a deliberate intent to conceal them (Decision at pp. 4, 7). Department Counsel contends the record evidence does not support the Judge's finding. That contention is persuasive.

As noted in the Scope of Review section of the majority opinion, when reviewing an Administrative Judge's findings of fact that have been challenged, the Board must (a) consider whether the "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"; and (b) consider not only whether there is record evidence supporting the Judge's findings, but also whether there is record evidence that fairly detracts from the weight of the evidence supporting those findings. In this case, the record evidence as a whole does not support the Judge's finding. Indeed, Department Counsel points to various portions of the record evidence that significantly undercut the Judge's finding of fact. I agree with my colleagues' conclusion that the Judge's finding that Applicant's omission of certain arrests was not deliberate is not sustainable.

Given the totality of the Administrative Judge's errors, I concur with my colleagues' conclusion that the Judge's favorable security clearance decision should be reversed.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

1. "The alcohol related incidents do not indicate a pattern."

2. "Positive changes in behavior supportive of sobriety."

3. "Habitual or binge consumption of alcohol to the point of impaired judgment."

4. "The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability."

5. "The alcohol related incidents do not indicate a pattern."

6. "Positive changes in behavior supportive of sobriety."

7. "Habitual or binge consumption of alcohol to the point of impaired judgment."

8. "The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability."