

DATE: February 16, 2006

In Re:

-----

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-03186

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Peregrine D. Russell-Hunter, Chief Department Counsel

Eric Borgstrom, Department Counsel

**FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 21, 2004, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision--security concerns raised under Guideline G (Alcohol Consumption), pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested the case be decided on the written record. On June 30, 2005, after considering the record, Administrative Judge Barry M. Sax granted Applicant's request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: (a) whether record evidence supports the Administrative Judge's finding that Applicant's supervisor was aware of the government's security concerns; (b) whether record evidence supports the Administrative Judge's finding that Applicant stopped his alcohol consumption completely after about July 2003; (c) whether record evidence supports the Administrative Judge's conclusions that Alcohol Consumption itigating Conditions 2 and 3 apply; and (d) whether the Administrative Judge's mitigation of Guideline G security concerns as a whole is arbitrary and capricious. We remand the case to the Administrative Judge.

**Whether the Record Supports the Administrative Judge's Factual Findings**

**A. Facts**

The Administrative Judge made the following dispositive findings of fact that, with specific exceptions noted, Department Counsel adopted for purposes of the appeal:

Applicant is a 34-year-old engineer. The July 21, 2004 SOR contains seven allegations under Guideline G (Alcohol Consumption). In his August 2, 2004 response to the SOR, Applicant admits all seven allegations, SOR 1.a. - 1.f.

Applicant consumed alcohol, at times to excess and to the point of intoxication, from 1993 to at least July 12, 2003.

Applicant was arrested on November 20, 1993 and charged with (1) Operating While Intoxicated, and (2) having a Blood Alcohol Content above the legal limit of .10%. The court found him guilty of Count 1 and fined him

approximately \$150.00. His driving privileges were suspended for six months, and he was ordered to have an alcohol evaluation. Count 2 was dismissed.

Applicant had an alcohol evaluation, in which it was recommended that he receive alcohol counseling. He attended weekly group alcohol counseling from May 1994 to October 1994.

Applicant was arrested on January 19, 1997 and charged with Obstructing an Officer. He pleaded guilty and was fined approximately \$271.00. He had consumed alcohol prior to the arrest.

Applicant was arrested on March 1998 and charged with Public Intoxication. He pleaded guilty and was fined approximately \$90.00.

Applicant was arrested on March 18, 2000 and charged with (1) Driving Under the Influence of Alcohol and (2) Hit and Run. He pleaded guilty to Count 1 and was sentenced to ten days in jail. He was placed on Probation for one year and was fined approximately \$1,101.99. Count 2 was dismissed.

Applicant received outpatient alcohol group counseling treatment from June 3, 2000 to August 8, 2000. He was advised to abstain from consuming alcohol during his counseling period.

Applicant has had four alcohol-related arrests, in 1994, 1997, 1998, and 2000. In a 1999 sworn statement given to an agent of the Defense Security Service (DSS), Applicant stated that he had: "no drinking/driving incidents since [his 1994 arrest]." Notwithstanding this 1999 claim, he was arrested again the following year, in March 2000, for Driving Under the Influence of Alcohol. This last arrest occurred after Applicant had submitted an application in November 1998 to obtain a DoD security clearance.

As of his July 12, 2002, sworn statement, he did not have a drink of choice, but liked variety. "I usually go out one night a week to a club and have approximately three to six drinks. I also drink at home three nights a week and have two to five drinks. I consume alcohol in the evenings."

Applicant apparently slowed his consumption of alcohol after his 2000 arrest and treatment, and then stopped completely after about July 2003, some two years ago. He has now "shunned drinking." The file does not contain any indication of arrests or other alcohol-related problems since 2000. [\(1\)](#)

The Director of Programs at Applicant's employing company says: "[He] has been a reliable and honest employee at all times during his three-year tenure . . . His work ethic is beyond reproach, and his scientific and professional integrity are at the highest levels. As [Applicant's] supervisor, I unreservedly recommend him for this level of clearance." Applicant has received a letter of recognition from work in 2002 and an award in 2003.

## B. Discussion

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. In security clearance decisions decided on the written record without a hearing, the Administrative Judge does not have the same opportunity to observe personally Applicant's demeanor as he would in a hearing, and accordingly, less deference is accorded to the Judge's credibility determination in such circumstances. *See* ISCR Case No. 99-0005 at 2-3 (App. Bd. Apr. 19, 2000). In such cases, the Judge must look at the record for corroboration of Applicant's testimony.

There are two factual-related issues in dispute. They are:

1. Whether record evidence supports the Administrative Judge's finding that Applicant stopped his alcohol consumption completely after about July 2003. We need not agree with the Judge to conclude that the Judge's finding here is supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion that Applicant stopped consuming alcoholic beverages sometime after July 2003. Directive ¶ E3.1.32.1. Significantly, in this case, Applicant's honesty was not placed in issue, and the Judge was not required to engage in a critical evaluation of Applicant's statements and denials. *See* ISCR Case No. 99-0005 at 3 (App. Bd. Apr. 19, 2000). While Department Counsel's interpretation of record evidence might also be plausible, the Administrative Judge was not compelled to follow that interpretation of events.

2. Whether record evidence supports the Administrative Judge's finding that Applicant's supervisor was aware of the government's security concerns. In explaining his favorable security clearance determination for Applicant, the Administrative Judge stated that the "most compelling is the letter of recommendation from his supervisor, who is aware of the Government's concerns." Department Counsel argues that the record lacks any evidence that the supervisor was aware of the government's security concerns.

We agree with Department Counsel that the letter from Applicant's supervisor is insufficient to demonstrate that the supervisor was aware of the reasons for the government's security concerns or of the Applicant's alcohol-related arrests and counseling. Moreover, such knowledge is not indicated in any other document in the record. The supervisor's letter merely states that he was aware that "the security clearance process" for Applicant "is at risk for not going to completion." *See* Item 9 of Applicant's Response to FORM. The Administrative Judge's finding that the supervisor was aware of the government's security concerns is strained and speculative, and this is not a reasonable basis on which to predicate this finding.

### **Whether the Record Supports the Administrative Judge's Ultimate Conclusions**

The Appeal Board may reverse the Administrative Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. The Board does not review a case *de novo*; rather, it 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 ¶ E3.1.32. *See also* ISCR Case No. 00-0050 at 2-3 (App. Bd. Jul. 23, 2001) (discussing reasons why party must raise claims of error with specificity). Our scope of review under this standard is narrow, and the Board may not substitute its judgment for that of the Administrative Judge.

In the case before us, the Department Counsel has demonstrated factual error in the Administrative Judge's finding that the supervisor was aware of the government's security concerns. When an appealing party demonstrates factual error, the Board must consider whether: (a) the error is harmful or harmless; (b) the non-appealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds; and (c) if the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded. Here the Judge stated that the supervisor's knowledge of the government's security concerns was a "compelling" factor in his ultimate security clearance decision. Considering the critical role of such knowledge in the Judge's ultimate security clearance determination, the Judge's error must be considered material and warrants remand of this case.

The issues raised by Department Counsel as to Alcohol Consumption Mitigating Conditions 2 and 3 (Directive ¶¶ E2.A7.1.3.2 and E2.A7.1.3.3), and the Administrative Judge's overall mitigation of security concerns, are not ripe for consideration at this time.

### **Order**

The judgment of the Administrative Judge granting Applicant a clearance is REMANDED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

**Separate Opinion of Member William S. Fields**

I agree with the Board's conclusion that the Administrative Judge's finding that Applicant had stopped his alcohol consumption completely after about July 2003 is sustainable. I also agree with their conclusion that the Judge erred in finding that Applicant's supervisor was aware of the government's security concerns and that the error is material. However, I disagree with the Board's conclusion that the other issues raised by Department Counsel are not ripe for consideration. I would address those issues, rather than remand the case.

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. Department Counsel argues on appeal that Applicant provided no information as to when he abstained from drinking or whether he has continued to abstain from drinking, and that there is no evidence of any participation in any alcohol support groups or lifestyle changes supportive of alcohol abstinence.