

DATE: January 25, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-03832

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated July 22, 2003, 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 Henry Lazzaro issued an unfavorable security clearance decision, dated November 29, 2004.

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 the Administrative Judge erred by finding Applicant continues to drink; and (2) whether Applicant can be given an opportunity to prove that he now understands that his personal conduct is relevant to his eligibility for a security clearance. 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 the Administrative Judge erred by finding Applicant continues to drink. The Administrative Judge made the following material findings of fact: (a) Applicant had at least eight alcohol-related incidents between 1977 and 2000; (b) Applicant continued drinking despite attending Alcoholics Anonymous (AA) meetings after alcohol-related incidents in 1997 and 2000; (c) Applicant stopped attending AA meetings because he did not think he had the type of alcohol problems described by others in attendance at those meetings; (d) Applicant's last reported instance of drinking to intoxication occurred in March 2003; (e) as of the hearing, Applicant continued to drink alcohol; and (f) Applicant was not willing to stop drinking entirely unless he had to do so to get a security clearance. The Judge concluded that the record evidence concerning Applicant's history of episodic alcohol abuse raised security concerns under Guideline G (Alcohol Consumption) that Applicant had not successfully extenuated or mitigated, because he had failed to recognize the problems that his alcohol abuse had been causing him for so many years. The Judge also found additional security concerns were raised under Guideline E (Personal Conduct) by the record evidence that Applicant was found in contempt of court in 2001 for lying during testimony he gave in a domestic relations case.

On appeal, Applicant does not challenge the Administrative Judge's findings of fact about his history of alcohol abuse, or the Judge's finding of fact about his being found in contempt of court in 2001. However, Applicant asserts that he has stopped drinking alcohol since he received the Judge's decision in this case and claims that it is no longer correct that he continues to drink. The Board construes Applicant's claim as raising the issue of whether the Judge erred by finding that Applicant continues to drink alcohol.

The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Applicant's assertion about what he has done since receiving the Administrative Judge's decision constitutes new evidence, which the Board cannot consider. Given the record evidence in this case, the Judge did not err by finding that Applicant continues to drink alcohol.

2. Whether Applicant can be given an opportunity to prove that he now understands that his personal conduct is relevant to his eligibility for a security clearance. Applicant asks the Board to reverse the Administrative Judge's decision and give him the opportunity to prove that he now understands that his personal conduct is relevant to his eligibility for a security clearance. The Board construes Applicant's request as a request that he be granted a conditional or probationary security clearance. There is no authority under the Directive to grant a conditional or probationary security clearance. *See, e.g.,* ISCR Case No. 01-21274 (January 8, 2004) at p. 3. Furthermore, as noted earlier in this decision, there is no presumption of error below. Applicant has not demonstrated any factual or legal error by the Judge. Without such a showing, there is no legitimate basis to grant Applicant's request that the Board reverse the Judge's decision.

Conclusion

The Board affirms the Administrative Judge's security clearance decision because Applicant has not demonstrated any error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board