

DATE: March 3, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-07414

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 the Applicant a Statement of Reasons (SOR), dated February 7, 2003, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guidelines J (Criminal Conduct), G (Alcohol Consumption) and E (Personal Conduct). Administrative Judge Philip S. Howe issued an unfavorable security clearance decision, dated November 18, 2003.

Applicant appealed the Administrative Judge's unfavorable decision. The 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 the Administrative Judge's decision with respect to the Guideline G (Alcohol Consumption) allegations is arbitrary, capricious, or contrary to law, and (2) whether the Administrative Judge erred by concluding that the Guideline J (Criminal Conduct) allegations had not been mitigated. 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⁾

1. Whether the Administrative Judge's decision with respect to the Guideline G (Alcohol Consumption) allegations is arbitrary, capricious, or contrary to law. On appeal, Applicant argues that the Administrative Judge's decision with respect to the Guideline G allegations is arbitrary, capricious, or contrary to law because the Judge: 1) relied heavily on a psychological diagnosis that was not alleged in the SOR, and 2) imposed a rule of abstinence in evaluating the security significance of Applicant's alcohol consumption. For the reasons set forth below, we affirm the Judge's decision.

The Government is required to provide the Applicant with a written SOR that is as detailed and comprehensive as the national security permits. *See* Directive, Additional Procedural Guidance, Item E3.1.3. At the hearing, the Government must then present evidence to establish the facts alleged in the SOR that have been controverted. *Id.* at Item E3.1.14. Once this is done, the Applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate facts which he has admitted or which have been proven by the Government. *Id.* at Item E3.1.15. The Applicant also has the burden of persuasion as to obtaining a favorable clearance decision. *Id.*

In this case, the Applicant was provided with an SOR which placed him on reasonable notice that his alcohol consumption was a matter of security concern.⁽²⁾ In response to that SOR and evidence presented by Department Counsel, the Applicant chose to offer into evidence the psychological diagnosis⁽³⁾ which he now argues he was not properly put on notice of, and was thus improper for the Judge to consider. Having offered that evidence as part of his own case, the Applicant cannot reasonably complain that the Judge considered it along with the other record evidence in reaching his decision. *See* ISCR Case No. 95-0817 (February 21, 1997) at p. 7 ("However, no party has the right to insist that only portions of a document the party submits be considered by a Judge.").

After reviewing the Judge's decision it is our view that the Judge reasonably considered the fact that the Applicant's recent level of alcohol consumption was less than it had been at other times in the past, as well as the fact that in recent years the Applicant had experienced some positive changes in behavior supportive of sobriety, and nevertheless concluded that the evidence was insufficient to overcome the security concerns raised by the magnitude and longevity of the Applicant's history of excessive alcohol use and the implications of his current level of alcohol consumption.

It was not unreasonable for the Judge to conclude that the favorable evidence Applicant presented was not enough to demonstrate reform, rehabilitation, or changed circumstances sufficient to warrant a favorable security clearance decision with respect to the Guideline G allegations. Considering the record as a whole, the Judge's application of the relevant disqualifying and mitigating factors, and his weighing of the record evidence was not arbitrary, capricious, or contrary to law. He did not merely apply a rule of abstinence, as Applicant claims on appeal.

It is the Applicant's position that the AA school of thought--that abstinence is the only successful approach for those who are alcohol dependent--is not the only approach that need be considered in evaluating the Applicant's situation. However, the record contains no evidence supporting the position that a diagnosed alcohol-dependent could safely drink at moderate levels. Conversely, there is evidence in the record Applicant had previously participated in AA programs and that his own expert--a clinical psychologist--was currently recommending that he participate in those or similar programs. Therefore, it was not unreasonable for the Judge to evaluate the Applicant's situation in the context of the evidence before him. The Board has previously held that while it does not endorse a specific methodology with respect to alcohol treatment, the AA approach is widely (albeit not universally) accepted, and can be appropriate for consideration when raised in the case. *See* ISCR Case No. 02-29608 (December 17, 2003) at p.6.

2. Whether the Administrative Judge erred in concluding that the Guideline J (Criminal Conduct) allegations had not been mitigated. On appeal, Applicant contends that the security concerns raised by his prior criminal conduct should have been mitigated under Criminal Conduct Mitigating Conditions 1, [\(4\)](#) 2, [\(5\)](#) 5, [\(6\)](#) and 6. [\(7\)](#) In support of that contention, he notes that with the exception of the March 2001 arrest for driving under the influence (DUI)--which was dismissed--the other criminal conduct alleged in the SOR occurred prior to 1992. Thus, he argues that the March 2001 incident was isolated and did not result in a conviction, and, therefore, his criminal conduct was essentially not recent. He also argues that he was acquitted of one of the allegations and rehabilitated with respect to several others.

In his decision, the Judge found that the Applicant's March 2001 DUI charge had been dismissed. The dismissal of the charge did not preclude the Judge from making a finding, based upon the record evidence, whether the underlying criminal conduct had in fact occurred. *See, e.g.*, ISCR Case No. 01-12452 (January 27, 2003) at p. 3. However, the Judge did not make such a finding in this case. Instead, without indicating whether he found that Applicant engaged in criminal conduct on that occasion, the Judge evaluated the Applicant's alcohol consumption incident to the arrest only to the extent that it reflected upon the Guideline G security concerns. Therefore, given that the Judge's explicit finding of most recent criminal conduct was an incident that occurred in 1991, there is merit to Applicant's contention that the Judge erred in not applying Criminal Conduct Mitigating Condition 1. However, because the Judge's findings and conclusions with respect to the Guideline G allegations are sustainable, this error does not change the ultimate outcome of the case. It is therefore, harmless. Because the application of Criminal Conduct Mitigating Condition 1 would have resulted in the resolution of the Guideline J allegations in favor of the Applicant under the particular facts of this case, it is unnecessary for us to consider whether there was any error in the Judge's decision not to apply Criminal Conduct Mitigating Conditions 2, 5 and 6.

Conclusion

Applicant has failed to demonstrate outcome determinative error below. Therefore, the Board affirms the Administrative Judge's adverse security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge found in favor of Applicant with respect to the Guideline E allegation and SOR subparagraph 1.i. Those favorable findings are not at issue on appeal.
2. Alcohol abuse poses a security risk because it raises the potential for deliberate or inadvertent disclosure of classified information while an applicant is under the influence of alcohol. *See, e.g., Cole v. Young*, 351 U.S. 536, 550 n.13 (1956); *Croft v. Department of Air Force*, 40 M.S.P.R. 320, 321 n. 1 (1989).
3. Applicant's Exhibit I.
4. "The criminal behavior was not recent" (Directive, Enclosure 2, Item E2.A10.1.3.1).
5. "The crime was an isolated incident"(Directive, Enclosure 2, Item E2.A10.1.3.2).
6. "Acquittal"(Directive, Enclosure 2, Item E2.A10.1.3.5).
7. "There is clear evidence of successful rehabilitation"(Directive, Enclosure 2, Item E2.A10.1.3.6).