

DATE: March 15, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-07218

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Nygina T. Mills, Department Counsel

FOR APPLICANT

Andrew B. Golkow, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated March 21, 2003, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based on Guidelines G (Alcohol Consumption) and E (Personal Conduct). Administrative Judge Matthew E. Malone issued an unfavorable security clearance decision dated October 31, 2003.

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 considering Applicant's history of drug use even though drug involvement was not cited in the Statement of Reasons; (2) whether the Administrative Judge erred by issuing a finding against Applicant under paragraph 1.j of the SOR; and (3) whether the Administrative Judge's application of Guideline G's disqualifying and mitigating conditions in Applicant's case was arbitrary, capricious or contrary to law. 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 erred by considering Applicant's history of drug use even though drug involvement was not alleged in the Statement of Reasons. Applicant challenges the Administrative Judge's consideration of Applicant's history of marijuana use in the Judge's decision. Applicant argues on appeal that the SOR did not cite Guideline H (Drug Involvement) as a basis for denying Applicant a clearance, and therefore the Judge's consideration of the Applicant's prior marijuana use was in violation of the notice requirements of Executive Order 10865 and the Directive. Although Applicant raises an important issue, after a thorough review of the Judge's decision, the Board does not agree.

An applicant is entitled to receive reasonable notice of the allegations being made against him so that the applicant can have a meaningful opportunity to respond to the allegations. *See, e.g.*, ISCR Case No. 99-0710 (March 19, 2001) at p. 2. However, an SOR need not allege every piece of evidence that is relevant and material to evaluating an applicant's security eligibility. *See, e.g.*, ISCR Case No. 01-07360 (April 10, 2002) at p. 5. Furthermore, as long as there is fair notice to an applicant about the matters that are at issue in his case, and the applicant has a reasonable opportunity to respond, a security clearance case should be adjudicated on the merits of the relevant issues and should not be overly concerned with pleading niceties. *See, e.g.*, ISCR Case No. 99-0710 (March 19, 2001) at p. 2. Finally, the Board has previously held that conduct not alleged in an SOR may be considered: (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; or (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable. *See, e.g.*, ISCR Case No. 98-0582 (November 12, 1999) at p. 9.

In this case, the evidence of Applicant's marijuana use was contained in Government's Exhibit 3--a signed, sworn

statement made by the Applicant. A copy of that document was provided to the Applicant prior to the hearing⁽²⁾ and the document was admitted into evidence without objection.⁽³⁾ In his Decision, the Judge noted that although the Applicant's marijuana use had not been alleged in the SOR as an independent basis for the denial of Applicant's clearance, it was evidence which tended to undermine a significant inference which the Applicant urged the Judge to draw from the evidence Applicant was offering in extenuation, mitigation, and changed circumstances, regarding the Guideline G allegations. The Judge also noted that that evidence reflected adversely on the sincerity--and thus credibility--of Applicant's arguments with respect to the Guideline G allegations. Such use of the evidence in question was permissible. *See Id.* Because the Judge found for Applicant under Guideline E (Personal Conduct) the Board concludes that ultimately the Judge did not make use of the Applicant's marijuana history as an independent basis for denial of his clearance. The Judge did consider the marijuana use for whatever light it cast upon Applicant's alcohol consumption which was an issue which was properly before him. It was not unreasonable for the Judge to conclude that a person's use of non-therapeutic drugs is of some relevance to an analysis of that person's use of alcohol. Applicant has not demonstrated error on this point.

2. Whether the Administrative Judge erred by issuing a finding against Applicant under paragraph 1.j of the SOR. Paragraph 1.j of the SOR reads: "From approximately December 2001 to January 2003, you drank wine approximately 3-5 times a month to the point of intoxication." In his decision, the Judge stated: "It is uncontroverted that Applicant has not been intoxicated since his last arrest" [1998] and "Applicant's responses to adjudicator-issued interrogatories clearly show he still drinks although not to intoxication as alleged in subparagraph 1.j." Given those findings, the Judge erred by finding against Applicant with respect to paragraph 1.j -- absent an amendment of that paragraph to conform with the evidence. *See Directive, Additional Procedural Guidance, Item E3.1.17.* However, because the Judge's findings and conclusions with respect to the other Guideline G allegations are sustainable, this error does not change the ultimate outcome of the case. It is therefore, harmless.

3. Whether the Administrative Judge's application of Guideline G's disqualifying and mitigating conditions in Applicant's case was arbitrary, capricious or contrary to law. Applicant challenges the Administrative Judge's application of Guideline G's disqualifying conditions in several respects: (1) Applicant argues that the Directive is concerned about consumption of alcohol to excess and he believes the government did not demonstrate that he drinks to excess; (2) Applicant argues the government failed to demonstrate a nexus between Applicant's history of alcohol consumption and the security clearance concerns; (3) Applicant argues he has not been intoxicated since 1998; (4) Applicant argues that the testimony of six character witnesses demonstrates that he has no problem with alcohol; (5) Applicant argues that if he had an alcohol problem and is now 'dry' he would be protected by the Rehabilitation Act; and (6) Applicant points to DOHA cases in which persons with alcohol issues received clearances.

Applicant's first argument is unpersuasive. The Concern section of the Guideline does use the language "Excessive alcohol consumption." The Directive then outlines specific conditions which may be disqualifying, the first of which is "Alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol use." Applicant's history includes five alcohol-related arrests over a thirty-year period which was the basis for the Administrative Judge's adverse security clearance decision.

Applicant's second argument is without merit. The Board has previously held that satisfying the disqualifying conditions of the Directive is sufficient to demonstrate a nexus between an Applicant's conduct (or circumstances) and the government's security clearance concerns. *See, e.g., ISCR Case No. 99-0424 (February 8, 2001), at p. 12.* As discussed in the previous paragraph, Applicant's history of alcohol-related incidents fits the terms of Disqualifying Condition 1 under Guideline G.

Applicant's remaining arguments are best addressed in the context of his arguments challenging the Administrative Judge's application of the mitigating conditions.

Applicant claims the Administrative Judge's application of Guideline G mitigating conditions was arbitrary, capricious or contrary to law because: (1) Applicant argues his conduct did not constitute a pattern; (2) Applicant believes that he has not had a recent problem; (3) Applicant believes he has positive changes in his behavior; (4) Applicant cites testimony of character witnesses; and (5) Applicant cites DOHA cases in which other applicants were granted security clearances.

Applicant's first argument is unpersuasive. Five alcohol-related arrests over twenty-five years are certainly enough to establish a pattern. The fact that they are spread out irregularly over a period of decades may make the pattern hard to describe succinctly, but they are of more than adequate quantity and weight to meet the government's security concerns.

Applicant's second and third arguments are also unpersuasive. Applicant's multiple arrests were not grouped neatly together; the gap between his third and fourth alcohol-related arrests was about twelve years. The fact that Applicant has not been arrested since 1998 is not sufficient, given his history and circumstances, to demonstrate that his problem is solved. Similarly, Applicant's recent period of abstinence (from January 2003 to the close of the record in June 2003) is not enough legally or logically to mandate that the Administrative Judge offset Applicant's lengthy history of alcohol-related arrests through application of the mitigating conditions. This paragraph is also responsive to Applicant's third and fifth arguments regarding the Judge's application of the disqualifying conditions.

Applicant's fourth argument here (as well as his fourth argument regarding the disqualifying conditions) is without merit. The Board will not disturb the Administrative Judge's weighing of the evidence absent a showing that that weighing was arbitrary, capricious or contrary to law. Nothing here suggests that the Judge was arbitrary, capricious, or contrary to law in assigning weight to the character testimony.

Applicant's fifth argument here (and his sixth argument under the disqualifying conditions) relies on DOHA hearing office decisions. The Board has previously noted that a decision by a Hearing Office Administrative Judge is not legally binding precedent on other Hearing Office Judges or the Board. Just as the decision of one trial-level judge is not legally binding precedent on a fellow trial-level judge, the decision of one Hearing Office Judge is not legally binding precedent on another Hearing Office Judge. Similarly, just as the decision of a trial-level tribunal is not legally binding precedent on an appellate tribunal, the decisions of Hearing Office Judges are not legally binding precedent on the Board. Accordingly, Applicant's ability to cite Hearing Office decisions in other cases that appear to support his position does not demonstrate the Judge's decision in this case is arbitrary, capricious, or contrary to law. Furthermore, the Board has no obligation to follow the Hearing Office decisions cited by Applicant, and no obligation to reconcile the Judge's decision below with the Hearing Office decisions cited by Applicant. *See, e.g.*, ISCR 02-15358 (July 22, 2003) at p. 3.

Conclusion

Applicant has failed to meet his burden of demonstrating error on appeal. The Administrative Judge's October 31, 2003 decision is affirmed.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

Dissenting opinion of Chairman Emilio Jaksetic:

I dissent from the majority's decision to affirm the decision below. The first appeal issue demonstrates error that warrants remand to the Administrative Judge with instructions to reopen the record and receive additional evidence from the parties (subject to appropriate objections, cross-examination of witnesses, and possible presentation of rebuttal evidence) on the matter of Applicant's history of marijuana use.

An SOR need not enumerate every thing that is relevant to a case. *See, e.g.*, ISCR Case No. 00-0030 (September 20, 2001) at p. 6. Furthermore, an Administrative Judge may consider conduct not alleged in an SOR for some purposes. *See, e.g.*, ISCR Case No. 01-07360 (April 10, 2002) at p. 5 (conduct not alleged in SOR can be considered: to assess an applicant's credibility; to evaluate an applicant's claim of extenuation, mitigation, or changed circumstances; or to consider whether an applicant has demonstrated successful rehabilitation). However, if there is a significant variance between the SOR allegations and Judge's findings and conclusions, then a serious question may arise as to whether an applicant received adequate notice and a fair opportunity to adjudicate his or her security eligibility. *See, e.g.*, ISCR Case No. 99-0710 (March 19, 2001) at pp. 2-3.

An Administrative Judge must be fair and impartial. Directive, Section 4.1; Directive, Additional Procedural Guidance, Item E3.1.10. However, a Judge's obligation to be fair and impartial does not require the Judge to simply ignore record evidence that is relevant to evaluating an applicant's security eligibility. Even if neither party moves to amend an SOR to conform to the record evidence, a Judge has the authority to do so. *See* Directive, Additional Procedural Guidance, Item E3.1.17. But, even if a Judge amends an SOR to conform to the record evidence, a Judge cannot do so without providing the parties with: (a) notice of the Judge's intention to do so; (b) an opportunity to be heard on the proposed amendment to the SOR; and (c) an opportunity to present evidence pertinent to the SOR amendment. *See, e.g.*, ISCR Case No. 94-0729 (May 31, 1995) at pp. 4-6.

In this case, the Administrative Judge had a rational basis for concluding that the record evidence of Applicant's marijuana use had relevance to evaluating Applicant's history of alcohol use and Applicant's claim of reform and rehabilitation. However, given the manner in which the Judge took that evidence into account in his decision, and given the appearance that the Judge is basing his adverse decision, in part, on conduct outside Guideline G (Alcohol Consumption)⁽⁴⁾, Applicant's claim of surprise is not frivolous and raises a serious question as to the fairness of his security clearance adjudication.

Although Applicant's claim of unfair surprise is persuasive, the remedy he seeks (*i.e.*, reversal) is not warranted. Given the procedural nature of the error identified by Applicant, the appropriate remedy would be a remand to the Administrative Judge with instructions to reopen the record and allow the parties to present evidence on (subject to appropriate objections, cross-examination of witnesses, and possible presentation of rebuttal evidence) on the matter of Applicant's history of marijuana use.

I express no opinion as to the rest of the appeal issues. Because I conclude that remand of the case would be the appropriate disposition of this appeal, it would be premature for me to address the remaining appeal issues since the evidence that would be introduced on remand could result in the Administrative Judge modifying his findings and conclusions.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

1. The Administrative Judge issued a formal finding for Applicant under Guideline E (Personal Conduct). That finding is not at issue on appeal.

2. Hearing Transcript at p. 12.

3. *Id.* at pp. 16-18.

4. In footnote 5 of the decision below, the Administrative Judge indicated he was taking into account Applicant's marijuana use for two purposes: (a) assessing the credibility of Applicant's statements; and (b) assessing Applicant's judgment. The first purpose is totally unobjectionable and proper. The second purpose goes beyond the scope of the

SOR allegations and suggests the Judge was basing his decision on a reason that constitutes an implicit amendment to the SOR, either in the form of a *sub silentio* amendment to Guideline E or a *sub silentio* addition of Guideline H (Drug Involvement).