

DATE: June 7, 2004

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-11454

**APPEAL BOARD DECISION AND REVERSAL ORDER**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer I. Campbell, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated June 4, 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). Administrative Judge Martin H. ogul issued a favorable security clearance decision, dated February 6, 2004.

Department Counsel appealed the Administrative Judge's favorable 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 applying Alcohol Consumption Mitigating Condition 1; (2) whether the Administrative Judge erred by applying Alcohol Consumption Mitigating Condition 2; and (3) whether the Administrative Judge's favorable security clearance decision is arbitrary, capricious, or contrary to law. For the reasons that follow, the Board reverses 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

The Administrative Judge found that Applicant consumed alcohol, at times to excess, from 1991 to the present, and that Applicant was involved in a minor alcohol-related incident in 1994, when he was 19 years old. The Judge concluded Alcohol Consumption Disqualifying Condition 1<sup>(1)</sup> applied to the 1994 incident. The Judge also concluded Alcohol Consumption Disqualifying Condition 5<sup>(2)</sup> applied because Applicant had, at times, been involved in habitual or binge drinking to the point of impaired judgment. However, the Judge concluded that Applicant had overcome the security concerns raised by his history of alcohol abuse because: (a) the 1994 alcohol-related incident was dated; (b) Applicant's alcohol consumption had diminished significantly; (c) Alcohol Consumption Mitigating Condition 1<sup>(3)</sup> applied; and (d) Applicant presented credible evidence that he had reformed his drinking habits.

1. Whether the Administrative Judge erred by applying Alcohol Consumption Mitigating Condition 1. Department Counsel contends the Administrative Judge erred by applying Alcohol Consumption Mitigating Condition 1. In support of that contention, Department Counsel argues: (a) the Judge cannot use Alcohol Consumption Mitigating Condition 1 to mitigate Alcohol Consumption Disqualifying Condition 5; and (b) in the alternative, even if the Board concludes the Judge was not legally precluded from applying Alcohol Consumption Mitigating Condition 1, the record evidence does not support its application in this case. These arguments are not persuasive.

First, Department Counsel's argument is based on the premise that the Administrative Judge used Alcohol Consumption Mitigating Condition 1 to mitigate Alcohol Consumption Disqualifying Condition 5. However, it is not clear from our reading of the decision below that the Administrative Judge is using Alcohol Consumption Mitigating Condition 1 to mitigate Alcohol Consumption Disqualifying Condition 5.

Second, Department Counsel argues for an interpretation of alcohol-related incidents that deviates from the plain

meaning of Alcohol Consumption Disqualifying Conditions 1 and 2.<sup>(4)</sup> Not every instance of drinking to excess constitutes an alcohol-related incident that falls under Alcohol Consumption Disqualifying Condition 1 or Alcohol Consumption Disqualifying Condition 2. The Board declines to accept an argument that ignores the plain meaning of those two disqualifying conditions.

Third, Department Counsel's argument assumes that Alcohol Consumption Disqualifying Condition 5 is the functional equivalent of Alcohol Consumption Disqualifying Condition 1 or Alcohol Consumption Disqualifying Condition 2. Acceptance of that argument would render one or more of those three Alcohol Consumption disqualifying conditions meaningless or superfluous. The Board has declined to interpret or construe the Directive in a manner that renders any provision meaningless or superfluous.<sup>(5)</sup>

Fourth, Department Counsel's argument is predicated on the premise that an Administrative Judge must apply the Adjudicative Guidelines in a mechanical manner. The Board has rejected such an approach to application of the Adjudicative Guidelines as not being consistent with the provisions of the Directive. *See, e.g.*, ISCR Case No. 01-14740 (January 15, 2003) at p. 7.

Fifth, Department Counsel's argument is inconsistent with the legal requirement that an Administrative Judge must evaluate an applicant's security eligibility by taking into account, as appropriate, the general factors set forth in Directive, Section 6.3 and Directive, Adjudicative Guidelines, Item E2.2.1.<sup>(6)</sup> The Adjudicative Guidelines disqualifying and mitigating conditions do not exhaust the realm of human experience or the realm of security clearance adjudications.

For all these reasons, taken cumulatively, the Board concludes Department Counsel has failed to demonstrate the Administrative Judge erred by applying Alcohol Consumption Mitigating Condition 1.

2. Whether the Administrative Judge erred by applying Alcohol Consumption Mitigating Condition 2. Department Counsel argues that it is not clear whether the Administrative Judge relied on Alcohol Consumption Mitigating Condition 2<sup>(7)</sup>, but that if the Judge did so, the record evidence does not support application of that mitigating condition. The Board does not share Department Counsel's uncertainty. The Administrative Judge cited Alcohol Consumption Mitigating Condition 2 (Decision at p. 4) and used language that indicates he concluded Applicant's alcohol abuse is no longer a problem (Decision at p. 5). Department Counsel's alternative argument is persuasive, however.

Apart from the record evidence of Applicant's past alcohol abuse, Applicant's answers to written interrogatories (File of Relevant Material, Item 5) show he admitted: (a) he becomes "talkative" and "intoxicated" when he drinks, and (b) he drinks to the point of intoxication on weekends, with the last instance of intoxication occurring on the weekend just before Applicant signed his answer to the interrogatories. Applicant did not respond to the File of Relevant Material to retract, modify, explain, or otherwise qualify his answer to the interrogatories. Nor did Applicant offer any other evidence in response to the File of Relevant Material. Given the record evidence that Applicant admitted drinking to intoxication within approximately seven months of the date the case was assigned to the Administrative Judge, it was untenable for the Judge to apply Alcohol Consumption Mitigating Condition 2.

3. Whether the Administrative Judge's favorable security clearance decision is arbitrary, capricious, or contrary to law. Department Counsel also contends the Administrative Judge's decision is arbitrary, capricious, or contrary to law because it is not supported by the record evidence in this case.

The Administrative Judge found Applicant had a history of alcohol abuse. That finding is supported by the record evidence in this case. Given the record evidence in this case, Applicant had the burden of presenting evidence "to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and ha[d] the ultimate burden of persuasion as to obtaining a favorable clearance decision."<sup>(8)</sup> The Judge's conclusion that Applicant had satisfied that

burden of persuasion is not supported by the record evidence and reflects arbitrary and capricious reasoning by the Judge.

The Administrative Judge's conclusion that Applicant had satisfied his burden of persuasion is arbitrary and capricious in light of the totality of the following: (a) Applicant's history of episodic alcohol abuse; (b) Applicant's admission to drinking to the point of intoxication on weekends (as recently as the weekend before he signed his answer to the interrogatories); (c) the absence of any evidence submitted by Applicant in response to the File of Relevant Material; (d) the vagueness and lack of specificity of Applicant's claim -- made in his answer to the SOR -- that he has "since taken corrective actions to prevent a pattern [of alcohol abuse] from developing"; and (e) the absence of any evidence to corroborate Applicant's claim. Given the totality of the record evidence in this case, it was arbitrary and capricious for the Judge to rely on Applicant's vague, uncorroborated claim of reform to conclude Applicant had satisfied his burden of persuasion. <sup>(9)</sup>

### **Conclusion**

Department Counsel has met its burden of demonstrating harmful error that warrants reversal. Accordingly, pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.3, the Board reverses the Administrative Judge's favorable 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. "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" (Directive, Adjudicative Guidelines, Item E2.A7.1.2.1).

2. "Habitual or binge consumption of alcohol to the point of impaired judgment" (Directive, Adjudicative Guidelines, Item E2.A7.1.2.5).

3. "The alcohol related incidents do not indicate a pattern" (Directive, Adjudicative Guidelines, Item E2.A7.1.3.1).

4. Given the record evidence in this case, the Administrative Judge properly did not apply Alcohol Consumption Disqualifying Condition 2, which covers alcohol-related incidents at work. The Board refers to that disqualifying condition because it -- like Alcohol Consumption Disqualifying Condition 1 -- lists examples of alcohol-related incidents. The examples of alcohol-related incidents listed in Alcohol Consumption Disqualifying Conditions 1 and 2 provide important guidance about what constitutes an alcohol-related incident.

5. *See, e.g.*, ISCR Case No. 01-23356 (November 24, 2003) at p. 8. *Cf.* ISCR Case No. 99-0511 (December 19, 2000) at

p. 15 (declining to interpret ASDC3I memorandum on foreign passports in a manner that would render a passage in it meaningless or a nullity).

6. *See, e.g.*, ISCR Case No. 02-05110 (March 22, 2004) at p. 5 n.7.

7. "The problem occurred a number of years ago and there is no indication of a recent problem" (Directive, Adjudicative Guidelines, Item E2.A7.1.3.2).

8. Directive, Additional Procedural Guidance, Item E3.1.15.

9. *See, e.g.*, ISCR Case No. 99-0511 (December 19, 2000) at p. 9 (quoting federal case for proposition that "There is some point at which evidence, though it exists, becomes so slight and so thoroughly outweighed by contrary evidence, that it would be an abuse of discretion to base a decision upon it.").