

DATE: July 22, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-15358

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

Thomas F. Portelli, Esq.

Applicant has appealed the February 20, 2003 decision of Administrative Judge James A. Young, in which the Judge concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

This 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 is inconsistent with decisions by Hearing Office Administrative Judges in other Guideline G (Alcohol Consumption) cases; (2) whether the Statement of Reasons is inaccurate; (3) whether the Administrative Judge's findings and inferences are supported by substantial record evidence; and (4) whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. For the reasons that follow, the Board affirms the Administrative Judge's decision.

### **Procedural History**

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated August 9, 2002. The SOR was based on Guideline G (Alcohol Consumption) and Guideline J (Criminal Conduct).

A hearing was held on January 22, 2003. The Administrative Judge issued a written decision, dated February 20, 2003, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

The case is before the Board on Applicant's appeal from the Judge's adverse 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. *See* 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 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. *See, e.g.*, ISCR Case No. 99-0205 (October 19, 2000) at p. 2.

When a challenge to an Administrative Judge's rulings or conclusions 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).

## Appeal Issues

1. Whether the Administrative Judge's decision is inconsistent with decisions by Hearing Office Administrative Judges in other Guideline G (Alcohol Consumption) cases. During the hearing, Applicant specifically cited prior DOHA decisions and asked the Administrative Judge to take them into account when making a decision in this case. The Judge's decision does not mention or discuss any of the cases cited by Applicant. On appeal, Applicant relies on those decisions by Hearing Office Judges in other cases, arguing that the Judge erred by failing to consider them or any other DOHA decision in making his decision in this case. Applicant's argument fails to demonstrate the Judge erred.

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.<sup>(1)</sup> 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.

One of the Hearing Office decisions cited by Applicant (ISCR Case No. 00-0339, November 17, 2000) was affirmed by the Appeal Board (ISCR Case No. 00-0339, March 22, 2001). Whatever persuasive authority the Judge's decision in ISCR Case No. 00-0339 might have due to it being affirmed on appeal,<sup>(2)</sup> it does not demonstrate the Judge erred in this case. Here, the Administrative Judge cited Alcohol Consumption Mitigating Condition 1 ("The alcohol related incidents do not indicate a pattern"). Since the Judge did not conclude Applicant's two alcohol-related incidents constituted a pattern, his decision is not inconsistent with that part of ISCR Case No. 00-0339 (pertaining to what constitutes a pattern of alcohol-related incidents) cited by Applicant on appeal.

2. Whether the Statement of Reasons is inaccurate. On appeal, Applicant makes several arguments that challenge the SOR: (a) SOR paragraph 1 makes presumptions that are not applicable to his situation; (b) the SOR erred by alleging that he was "found guilty" of driving while intoxicated in connection with the May 2001 incident; and (c) SOR subparagraph 2.a is defective to the extent that it alleges the June 1996 and May 2001 incidents constitute "a history or pattern of criminal activity." These arguments fail to demonstrate the Judge erred or that Applicant was prejudiced in any meaningful way.

First, Applicant's disagreements with the wording of the SOR do not demonstrate any factual or legal error by the Administrative Judge. Second, an SOR is an administrative pleading that is not measured against the strict requirements of a criminal indictment. As long as an SOR places an applicant on reasonable notice of the allegations against him or her and there has been no showing that the wording of an SOR has prejudiced an applicant's ability to respond to the allegations and present evidence on his or her behalf, a security clearance case should be adjudicated on the merits of the relevant issues and not be concerned with pleading niceties. *See, e.g.*, ISCR Case No. 99-0710 (March 19, 2001) at p. 2. In this case, Applicant has not shown that the wording of the SOR prejudiced him in any discernable way. Accordingly, Applicant's complaints about the SOR need not be discussed any further.

3. Whether the Administrative Judge's findings and inferences are supported by substantial record evidence. Applicant contends the Administrative Judge's findings and inferences are not supported by the record evidence. In support of this contention, Applicant argues:

the Judge's adverse inferences about Applicant's credibility are unwarranted;

the Judge erred by rejecting Applicant's explanation for why he refused to take a breathalyzer test in connection with the June 1996 incident;

in connection with the June 1996 incident he "was not found guilty [of the charge of driving while intoxicated], but pled guilty [to lesser charges]";

the Judge erred by finding Applicant admitted having five alcoholic beverages at a restaurant before he was arrested in June 1986;

the Judge erred by finding Applicant was "convicted of" driving while intoxicated in connection with the May 2001 incident; and

the Judge erred by drawing adverse inferences and conclusions concerning SOR subparagraph 1.c.

For the reasons that follow, the Board concludes Applicant's arguments fail to demonstrate the Judge erred.

Applicant correctly notes that the SOR does not contain any allegation pertaining to his credibility. However, the absence of any SOR allegation concerning Applicant's credibility is irrelevant to the Administrative Judge's inherent authority to assess Applicant's demeanor during his testimony and make a determination about his credibility. Whenever an Administrative Judge conducts a hearing, the Judge is expected to personally observe the demeanor of witnesses and draw conclusions about their credibility based, in part, on the witnesses' demeanor. (3) Given the record evidence in this case, it was not arbitrary or capricious for the Judge to reject Applicant's explanation for why he refused to take a breathalyzer test in connection with the June 1996 incident.

Applicant correctly notes that he was not found guilty of the charge of driving while intoxicated in connection with the June 1996 incident, but rather pleaded guilty to lesser charges. However, the Administrative Judge's finding that Applicant was intoxicated when he was arrested in June 1996 reflects a plausible, legally permissible interpretation of the record evidence as a whole.

The Administrative Judge's statement that Applicant admitted having five alcohol beverages at a restaurant before he was arrested in June 1996 reflects a plausible, legally permissible interpretation of Government Exhibit 2 (Applicant's July 10, 2001 written statement). Applicant's argument to the contrary is not persuasive.

Applicant places great significance on the fact that, in connection with the May 2001 incident, he pleaded guilty to driving while intoxicated rather than being found guilty after entering a plea of not guilty. Applicant's emphasis on the distinction is misplaced. Applicant acknowledges his plea of guilty and the resultant suspension of drivers license and a sentence to a mandatory program, all in the context of a criminal court. For purposes of these proceedings a criminal court found Applicant responsible for the underlying conduct. If there is any distinction between Applicant's circumstances and a conviction, then such a distinction is trivial. The Administrative Judge did not err by finding Applicant was convicted of driving while intoxicated in connection with the May 2001 incident.

Applicant argues there is no evidence that he was ever diagnosed as an alcoholic or alcohol dependent, or that he has been a habitual or binge drinker, or that he ever drank on the job or arrived at work under the influence of alcohol. Applicant also argues that the Administrative Judge failed to give due consideration to his testimony that he has stopped drinking and will not drink again in the future. These arguments fail to demonstrate the Judge erred. Nothing in the Directive precludes consideration of the security significance of alcohol abuse that occurs in the absence of a diagnosis of alcoholism or alcohol dependence. Nothing in the Directive precludes consideration of the security significance of episodic alcohol abuse that falls short of habitual or binge drinking. Nothing in the Directive precludes consideration of

the security significance of alcohol abuse that occurs during off-duty hours. Given the record evidence in this case, the Judge had a rational basis for concluding that Applicant's episodic abuse of alcohol raised security concerns under Guideline G. As to Applicant's testimony about stopping his use of alcohol, there is no rule of law that compelled the Judge to accept that testimony uncritically and without regard to weighing it in light of the record evidence as a whole.

4. Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. Applicant makes several other arguments, which the Board construe as raising the issue of whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. Specifically, Applicant argues:

the Judge's decision refers to Guideline E (Personal Conduct), even though that Guideline was not alleged in the SOR, and fails to explain why that Guideline is being relied on;

Applicant is being "penalized for his candor and affirmative actions";

the Judge erred by not applying Alcohol Consumption Mitigating Conditions 2 and 4;

the Judge erred by relying on Alcohol Consumption Disqualifying Condition 5 and failing to give sufficient weight to Alcohol Consumption Mitigating Conditions 1 and 3;

the June 1996 and May 2001 incidents do not demonstrate a pattern of criminal conduct within the meaning of Guideline J;

the Judge erred by concluding Criminal Conduct Mitigating Condition 6 does not apply;

the "accolades, awards, recognitions and distinction [Applicant has received from] various government agencies" dispel and rebut whatever questions about Applicant's judgment, reliability and trustworthiness might be raised by Guideline J (Criminal Conduct); and

under the "whole person" concept and applicable mitigating factors, Applicant should be cleared.

For the reasons that follow, the Board concludes Applicant has failed to demonstrate harmful error.

Applicant correctly notes that the Administrative Judge's decision lists formal findings against Applicant with respect to Guideline E in connection with SOR paragraph 2 (and SOR subparagraph 2.a). The SOR does not allege Guideline E (Personal Conduct) and there is no indication in the record that the SOR was amended to include Guideline E. Reading the Judge's decision in its entirety, <sup>(4)</sup> the Board concludes the Judge was evaluating Applicant's case under Guidelines G and J, not Guideline E. Accordingly, the Board concludes the Judge's single reference to Guideline E was a typographical error that does not warrant remand or reversal.

Nothing in the Administrative Judge's conduct of the hearing or the Judge's written decision persuades the Board that Applicant is being "penalized for his candor and affirmative actions." An applicant's candor about his or her conduct and circumstances does not preclude a Judge from evaluating the security significance of the applicant's conduct and circumstances. *See, e.g.*, ISCR Case No. 01-08410 (May 8, 2002) at p. 3. Furthermore, whenever an applicant presents evidence of extenuation, mitigation or changed circumstances, a Judge has to consider and weigh that evidence in light of the evidence as a whole and decide whether it is sufficient to outweigh or overcome the negative implications of the applicant's conduct or circumstances. There is nothing inherently punitive or improper about a Judge weighing such evidence and concluding it is not sufficient to warrant a favorable security clearance decision.

Given the record evidence in this case concerning Applicant's overall drinking history, the Administrative Judge was not compelled to conclude Applicant's episodic alcohol abuse was mitigating under Alcohol Consumption Mitigating Condition 2. <sup>(5)</sup> Furthermore, given the record evidence in this case, Applicant's claim as to the applicability of Alcohol Consumption Mitigating Condition 4 <sup>(6)</sup> is groundless.

There is insufficient record evidence to support a finding that Applicant engaged in "habitual or binge consumption of alcohol" within the meaning of Alcohol Consumption Disqualifying Condition 5 (Directive, Enclosure 2, E2.A7.1.2.5).

Accordingly, the Administrative Judge erred by concluding this disqualifying condition applied to Applicant's case. However, under the particular facts and circumstances of this case, this error is harmless. First, the mere presence or absence of any given Adjudicative Guidelines disqualifying condition or mitigating condition is not dispositive of a case. *See, e.g.*, ISCR Case No. 00-0489 (January 10, 2002) at p. 10. Second, as noted earlier in this decision, nothing in the Directive precludes consideration of the security significance of episodic alcohol abuse that falls short of habitual or binge drinking. Third, the Judge's sustainable findings and conclusions about Applicant's episodic alcohol abuse provide a sufficient basis for the Judge's overall adverse conclusions under Guideline G.

Applicant's argument about the June 1996 and May 2001 incidents not indicating a pattern fails to demonstrate error below. As noted earlier in this decision, the Administrative Judge applied Alcohol Consumption Mitigating Condition 1. (7) Since the Judge concluded the two incidents did not indicate a pattern, Applicant's argument on this point is moot.

The Administrative Judge was not compelled to reach a favorable security clearance decision based on his conclusion that Alcohol Consumption Mitigating Conditions 1-(8) and 3-(9) were applicable. The mere presence or absence of Adjudicative Guidelines disqualifying or mitigating conditions is not dispositive of a case. Given the record evidence concerning Applicant's alcohol use, the Judge was not required to give great or decisive weight to his conclusion that those two incidents did not demonstrate a pattern. As to Applicant's testimony that he had stopped drinking alcohol, the Judge acted within the bounds of his discretion to weigh that testimony in light of the record evidence as a whole and conclude that Applicant had not yet demonstrated a sufficient track record of rehabilitation to warrant overall favorable conclusions under Guideline G.

Although the Administrative Judge noted that Applicant presented evidence of rehabilitation, the Judge concluded that the evidence was not sufficient to warrant application of Criminal Conduct Mitigating Condition 6. (10) Applicant's disagreement with the Judge's conclusion is not sufficient to persuade the Board the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. Given the record evidence in this case, the Board is not persuaded that Applicant's evidence of rehabilitation was of such a quantity or quality as to compel the Judge, as a matter of law, to conclude Applicant was entitled to application of this mitigating condition.

Applicant's other arguments about Guideline J (Criminal Conduct) are not frivolous, but they are not sufficient to demonstrate the Administrative Judge erred. And in any event, even if the Board were to conclude that Applicant made a persuasive argument as to why the Judge should have entered favorable conclusions under Guideline J, the Judge's findings and conclusions under Guideline G are sufficient to warrant his adverse security clearance decision.

Finally, the Board does not find persuasive Applicant's argument that the weight of the evidence is such that the Administrative Judge should have made a favorable security clearance decision. Given the record evidence as a whole, the Judge's findings and conclusions about Applicant's history of episodic alcohol abuse provide a rational, legally sufficient basis for his overall adverse security clearance decision.

### **Conclusion**

Applicant has failed to demonstrate error below that warrants remand or reversal. Accordingly, the Board affirms the Administrative Judge's adverse security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

1. Recently, the Board elaborated on the precedential value of Hearing Office decisions. *See* ISCR Case No. 01-22606 (June 30, 2003) at pp.3-5.
2. *But see* ISCR Case No. 01-22606 (June 30, 2003) at p. 4 (explaining why a party should not assume that a Hearing Office Administrative Judge's decision can be cited as persuasive authority simply because it was affirmed by the Board on appeal).
3. *See Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985) (discussing various things, other than demeanor, that also are pertinent to assessing witness testimony).
4. *See, e.g.*, ISCR Case No. 01-02452 (November 21, 2002) at p. 8 (Board will not consider isolated sentences in a Judge's decision, but rather will read the decision in its entirety to discern the Judge's findings and conclusions).
5. "The problem occurred a number of years ago and there is no indication of a recent problem." Directive, Enclosure 2, E2.A7.1.3.2.
6. "Following diagnosis of alcohol abuse or alcohol dependence, the individual has successfully completed inpatient or outpatient rehabilitation along with aftercare requirements, participates frequently in meetings of Alcoholics Anonymous or a similar organization, has abstained from alcohol for a period of at least 12 months, and received a favorable prognosis by a credentialed medical professional or licensed clinical social worker who is a staff member of a recognized alcohol treatment program." Directive, Enclosure 2, E2.A7.1.3.4.
7. "The alcohol related incidents do not indicate a pattern." Directive, Enclosure 2, E2.A7.1.3.1.
8. Quoted in footnote 7.
9. "Positive changes in behavior supportive of sobriety." Directive, Enclosure 2, E2.A7.1.3.3.
10. "There is clear evidence of successful rehabilitation." Directive, Enclosure 2, Item E2.A10.1.3.6.