

DATE: March 15, 2005

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-17276

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer Campbell, Esq., Department Counsel

**FOR APPLICANT**

Alan R. Jones, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated February 19, 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), Guideline H (Drug Involvement), Guideline J (Criminal Conduct), Guideline F (Financial Considerations), and Guideline E (Personal Conduct). Administrative Judge Barry M. Sax issued an unfavorable security clearance decision, dated October 21, 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 regarding his characterization of Applicant's SOR response concerning drug use; (2) whether the Administrative Judge erred by downplaying the significance of Applicant's debt repayment efforts and not considering them as evidence that he is generally rehabilitated; (3) whether the Administrative Judge's characterization of Applicant's alcohol abuse was erroneous; (4) whether the Administrative Judge erred by concluding Applicant had not presented evidence sufficient to extenuate or mitigate his conduct; and (5) whether the Administrative Judge erred by finding that Applicant intentionally falsified answers on a security clearance application. 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 regarding his characterization of Applicant's SOR response concerning drug use. The Administrative Judge concluded that Applicant's drug use, including his use of cocaine, was disqualifying under Guideline H (Drug Involvement). In the "Conclusions" section of his decision, the Judge states that Applicant's explanations of his drug use in his response to the SOR "are not helpful to his position." The Judge states that Applicant does not even mention his cocaine use in his SOR response and Applicant's use of the term "relapse" suggests that even he does not claim he is cured of the drug use. On appeal, Applicant asserts that he did mention cocaine use in his SOR response and that there is nothing in his SOR response that suggests he does not claim to be cured of drug use.

A review of Applicant's SOR response and the overall record reveal that Applicant's claims regarding his SOR responses have merit. Applicant clearly mentions cocaine use in his SOR response. He describes relapses in 1999 and 2001 involving prescription pain medications related to surgery, but maintains that he is now rehabilitated and drug free. Based on these responses, the Administrative Judge's assertion that Applicant failed to mention cocaine use is error, and his conclusion that Applicant himself does not believe he is cured of drug use has no basis in the record. These erroneous characterizations about Applicant's responses to the SOR constitute a significant portion of the Judge's rationale with respect to the Guideline H allegations. The problem is compounded by the Judge's further statement: "it is just as likely that any lack of drug use over the past few years indicates a relapse. . ." The Board is puzzled by the Judge's use of the word "relapse" to describe a period where Applicant did not use drugs, and is unclear as to the

meaning of the statement. If there were no other allegations in the SOR other than the Guideline H allegations, then remand to the Judge for purposes of correction and clarification would be appropriate. However, because the Judge's ultimate adverse decision is sustainable on other grounds (Guidelines G, J, and E), remand to the Judge has no significant chance of changing the outcome of the case, and is therefore unnecessary.

2. Whether the Administrative Judge erred by downplaying the significance of Applicant's debt repayment efforts and by not considering them as evidence that he is generally rehabilitated. While acknowledging that the Administrative Judge found entirely in his favor with regard to the SOR allegations dealing with his financial problems, Applicant alleges on appeal that the Administrative Judge downplayed his debt repayment efforts. Applicant also asserts that the payment of financial obligations is clearly a consideration in connection with the Judge's resolution of the issues involving his drug use, alcohol consumption, and criminal conduct under Guidelines G, H, J, and E. Applicant argues that his success in retiring all his financial obligations in and of itself supports his testimony that he is rehabilitated in the context of those Guidelines.

There is no presumption of error below and an appealing party must assert error with sufficient specificity to enable the Board to meaningfully resolve the issue. The general statement that the Judge has "downplayed" the significance of certain evidence, without more, is insufficient to overcome that presumption. Administrative Judges are charged with the task of weighing the evidence, both favorable and unfavorable, when determining an applicant's security eligibility. A mere difference of opinion with the Judge's weighing of evidence does not establish that the Judge's evaluation of the evidence was erroneous. In this case, while Applicant is clearly asserting that he would weigh the mitigating evidence of debt retirement differently from the Judge, he has failed to establish that the Judge's weighing of the evidence was arbitrary, capricious, or contrary to law. Moreover, while administrative judges are required to evaluate cases using a "whole person" analysis, mitigating evidence applicable to one Guideline is not necessarily dispositive--or even applicable--to the resolution of other Guidelines. Given the totality of the record evidence in this case, the Administrative Judge was not required as a matter of law to mitigate Applicant's conduct under Guidelines G, H, J, and E, based wholly or in part on evidence that mitigated Applicant's conduct under Guideline F. Applicant has failed to establish error in this regard.

3. Whether the Administrative Judge's characterization of Applicant's alcohol use was erroneous. Applicant argues that there are no allegations or evidence to support the Administrative Judge's conclusion that Applicant had a seventeen-year history of alcohol use and abuse. Applicant's contention is without merit. A review of the record evidence indicates that there is sufficient basis for the Judge to characterize Applicant's history of alcohol involvement as being of seventeen years duration.

4. Whether the Administrative Judge erred by concluding Applicant had not presented evidence sufficient to extenuate or mitigate his conduct. Applicant contends the Administrative Judge should have concluded that he presented evidence sufficient to extenuate or mitigate his alcohol abuse, drug abuse, and criminal conduct. In support of this contention, Applicant argues the Judge should have concluded his conduct was extenuated or mitigated under various Adjudicative Guidelines mitigating conditions. Specifically, Applicant contends the Administrative Judge should have concluded: (a) Applicant's history of alcohol abuse was mitigated under Alcohol Consumption Mitigating Conditions 1, 2, and 3; (b) Applicant's history of drug abuse was mitigated under Drug Involvement Mitigating Conditions 1 and 3; and (c) Applicant's criminal conduct was mitigated under Criminal Conduct Mitigating Conditions 1 and 6. For the reasons that follow, the Board concludes Applicant has not demonstrated the Judge erred.

When a party challenges an Administrative Judge's application of the Adjudicative Guidelines, the Board has to decide whether the party has shown the Judge (i) reached conclusions not supported by substantial record evidence, (ii) acted in a manner that is arbitrary and capricious; or (iii) acted contrary to law. *See, e.g.*, ISCR Case No. 02-15339 (April 29, 2004) at p. 4.

Considering the record as a whole, the Board concludes the record evidence does not support the application of Alcohol Consumption itigating Condition 1 <sup>(2)</sup>

Applicant is not entitled to have the Administrative Judge apply Adjudicative Guidelines when the record evidence does not support their application.

Considering the record as a whole, it was not arbitrary or capricious for the Administrative Judge to conclude the record evidence did not warrant application of Alcohol Consumption Mitigating Condition 2, <sup>(3)</sup>

Alcohol Consumption Mitigating Condition 3, <sup>(4)</sup>

Drug Involvement Mitigating Condition 1, <sup>(5)</sup>

Drug involvement Mitigating Condition 3, <sup>(6)</sup>

Criminal Conduct Mitigating Condition 1, <sup>(7)</sup>

and Criminal Conduct Mitigating Condition 6. <sup>(8)</sup>

Applicant's ability to argue for an alternate interpretation of the record evidence is not sufficient to demonstrate the Judge erred by deciding that application of these six mitigating conditions was not warranted in light of the record evidence in this case.

5. Whether the Administrative Judge erred by finding that Applicant intentionally falsified answers on a security clearance application. Applicant challenges the Administrative Judge's findings that he falsified a security clearance application by not disclosing four instances in which he had been fired from jobs or left under unfavorable circumstances, and by not disclosing numerous alcohol and drug-related arrests. In the case below, Applicant indicated that he either could not remember certain incidents or thought he didn't have to list them because he was ultimately acquitted or the charges were dropped. In support of his challenge to the Judge's findings on appeal, Applicant argues: (a) his security clearance application together with three follow-up affidavits is detailed and candid; (b) there is no evidence of intentional falsification or any effort to mislead or deceive; and (c) Applicant gave detailed information to the government, and practically every allegation used against him in his case was raised by him, identified, and acknowledged. The Board concludes Applicant has not demonstrated the Judge's findings of falsification are erroneous.

The Administrative Judge had to consider the record evidence of Applicant's statements and explanations about his intent and state of mind when he completed the security clearance application, but the Judge was not bound to accept those statements and explanations at face value. Rather, the Judge had to consider Applicant's statements and explanations in light of the record evidence as a whole and his assessment of the credibility of Applicant's testimony, and make findings as to whether Applicant's omissions were deliberate or not. *See, e.g.*, ISCR Case No. 99-0194 (February 29, 2000) at p. 3. Considering the record as a whole, and recognizing the deference owed to the Judge's credibility determinations, the Board concludes that the Judge's findings of falsification are sustainable because they reflect a legally permissible interpretation of the evidence as a whole. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1. Applicant's appeal arguments reflect his strong disagreement with the Judge's findings of falsification, but they do not demonstrate the Judge's findings of falsification are erroneous.

### **Conclusion**

Applicant has failed to establish harmful error below. Accordingly, the Board affirms the Administrative Judge's decision.

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, 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

1. The Administrative Judge made formal findings in favor of Applicant under Guideline F (Financial Considerations). Those findings are not at issue on appeal. However, the Judge's findings and conclusions under Guideline F will be discussed as they relate to one of the issues Applicant raises on appeal.

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

3. "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).

4. "Positive changes in behavior supportive of sobriety" (Directive, Adjudicative Guidelines, Item E2.A7.1.3.3).

5. "The drug involvement was not recent" (Directive, Adjudicative Guidelines, Item E2.A8.1.3.1).

6. "A demonstrated intent not to abuse any drugs in the future" (Directive, Adjudicative Guidelines, Item E2.A8.1.3.3).

7. "The criminal behavior was not recent" (Directive, Adjudicative Guidelines, Item E2.A10.1.3.1).

8. "There is clear evidence of successful rehabilitation" (Directive, Adjudicative Guidelines, Item E2.A10.1.3.6).