

DATE: January 14, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-19503

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 September 3, 2003 which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guideline J (Criminal Conduct), Guideline G (Alcohol Consumption), Guideline F (Financial Considerations) and Guideline E (Personal Conduct). Administrative Judge Michael J. Breslin issued an unfavorable security clearance decision, dated September 8, 2004.

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 alcohol consumption allegations is arbitrary, capricious, or contrary to law, (2) whether the Administrative Judge erred by concluding Applicant's history of financial difficulties was not extenuated or mitigated, and (3) whether the Administrative Judge erred by finding the Applicant's falsifications were deliberate. 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⁾

Whether the Administrative Judge's decision with respect to the alcohol consumption allegations is arbitrary, capricious, or contrary to law. Applicant contends the Judge's decision should be reversed because: (1) his alcohol related offense occurred while he was a minor, (2) he has been married for over six years and has not had an alcohol related offense during that time, (3) his alcohol consumption decreased from 1993 to 1995, and (4) he has recently decreased his alcohol consumption and has not been intoxicated since approximately three months before the submission of his answer. The Board interprets Applicant's appeal brief as raising the issue of whether the Judge's decision is arbitrary, capricious, or contrary to law.

Applicant's appeal brief introduces new evidence. The Board may not consider this new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29.

The Applicant has not met his burden of demonstrating that the Judge's material findings and conclusions either: (1) do not reflect a reasonable or plausible interpretation of the record evidence, or (2) are not a legally sufficient application of Directive provisions. Considering the record evidence as a whole, the Judge's material findings of fact and his conclusions are sustainable. In this case, the Applicant had a lengthy history of excessive alcohol consumption. In his background investigation interview he had stated that his current level of alcohol consumption was a 12 pack of beer monthly, that he became intoxicated approximately monthly or quarterly, and that he considered himself a problem drinker.⁽²⁾

The favorable record evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary,

capricious, or contrary to law. As the trier of fact, the Judge had to weigh the evidence as a whole and decide whether the favorable evidence outweighed the unfavorable evidence or *vice versa*. The Judge reasonably addressed the possible application of the relevant disqualifying and mitigating conditions, and explained why Applicant had not sufficiently mitigated the security concerns raised by his history of excessive alcohol consumption. ⁽³⁾

Applicant's disagreement with the Judge's weighing of the record evidence is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. There is sufficient record evidence to support the Judge's conclusions.

2. Whether the Administrative Judge erred by concluding Applicant's history of financial difficulties was not extenuated or mitigated. Applicant contends the Judge should have concluded that the security concerns raised by his substantial indebtedness were mitigated because: (1) one of the debts resulted from a medical emergency, and (2) the debts have been paid off, or are in the process of being paid off. *See* Financial Considerations Mitigating Conditions 1, ⁽⁴⁾

3, ⁽⁵⁾

4, ⁽⁶⁾

and 6. ⁽⁷⁾

Applicant's arguments do not persuade the Board that the Judge erred.

The application of a disqualifying or mitigating condition by an Administrative Judge requires the exercise of sound discretion in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 01-14740 (January 15, 2003) at p. 7.

In this case, the Applicant had pattern of substantial, repeated indebtedness over many years. At the time the SOR was issued, he still had significant outstanding debts and had only taken steps towards resolving them just prior to the submission of his case for administrative determination. Given the record in this case, it was reasonable for the Judge to conclude that Applicant's recent efforts to pay off his indebtedness were not a substitute for a consistent record of timely remedial action. Furthermore, even if Applicant's financial difficulties initially arose due to circumstances outside his control, the Judge could consider whether Applicant acted in a reasonable manner when dealing with those financial difficulties. *See, e.g.*, ISCR Case No. 02-06338 (September 7, 2004) at pp. 3-4. Therefore, the Judge was not required as a matter of law to conclude Applicant's efforts to address his financial difficulties warranted application of Financial Considerations Mitigating Conditions 1, 3, 4 and 6.

Again, the favorable record evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. The Judge addressed the possible application of the relevant mitigating conditions and explained why he concluded Applicant had not sufficiently mitigated the security concerns raised by his history of substantial, outstanding indebtedness. ⁽⁸⁾ Applicant's disagreement with the Judge's weighing of the record evidence is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. There is sufficient record evidence to support the Judge's conclusions.

3. Whether the Administrative Judge erred by finding the Applicant's falsifications were deliberate. The Applicant contends that he did not deliberately lie to his employer or falsify his security clearance application by failing to disclose material information about his alcohol use and prior criminal record. Rather, he contends the omission of the information in question was the result of a misunderstanding with his employer and of the questions on his application. Applicant's arguments do not persuade us that the Judge erred.

An applicant's statements about his intent and state of mind in his dealings with his employer and when he completed his security clearance application are relevant evidence, but they are not binding on the Administrative Judge. *See* ISCR Case No. 01-19278 (April 22, 2003) at p.7; ISCR Case No. 99-0194 (February 29, 2000) at p. 3. As the trier of fact, the Judge has to consider an applicant's statements in light of the record evidence as a whole, and an applicant's denial of any intent to falsify does not preclude the Judge from weighing the record evidence and making a finding that contradicts Applicant's denial. *Id.* This case involved the omission of information which was of obvious security

significance in two different contexts--in his dealings with his employer and in response to three different questions on his security clearance application. It was not unreasonable for the Judge to conclude that the Applicant's failure to disclose the relevant information had been intentional--despite his denials to the contrary. The Judge's finding that Applicant deliberately falsified his questionnaire arises from legally permissible inferences drawn from the record evidence. Applicant's ability to argue for an alternate interpretation of the record evidence is not sufficient to demonstrate the Judge's finding of falsification is unsustainable.

Conclusion

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

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

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 the Applicant with respect to SOR paragraphs 1.a, 1.b, 2.d, 2.e, and 3.c. Those favorable findings are not at issue on appeal.

2. See Government Item 7, at p. 5.

3. Decision at pp. 7-8.

4. "The behavior was not recent" (Directive, Adjudicative Guidelines, Item E2.A6.1.3.1).

5. "The conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation)" (Directive, Adjudicative Guidelines, Item E2.A6.1.3.3).

6. "The person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control" (Directive, Adjudicative Guidelines, Item E2.A6.1.3.4).

7. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts" (Directive, Adjudicative Guidelines, Item E2.A6.1.3.6).

8. Decision at pp. 8-9.

