

DATE: July 29, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-20115

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 to Applicant a Statement of Reasons (SOR), dated May 7, 2004, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline J (Criminal Conduct) and Guideline G (Alcohol Consumption). Administrative Judge Roger C. Wesley issued an unfavorable security clearance decision, dated March 15, 2005.

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 should have concluded Applicant's conduct was mitigated by the passage of time; (2) whether the Judge erred in finding that Applicant still abuses alcohol; and (3) whether the Judge's decision is arbitrary, capricious, or contrary to law since in Applicant's view he is not a security risk and is not deemed to be one by his fellow employees. 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 should have concluded that Applicant's conduct was mitigated by the passage of time. Applicant appeals the Administrative Judge's finding that he had several alcohol-related arrests over a period of 15 years. Applicant argues that he had only one arrest in 15 years. He states that he had no arrests from 1990 until 2000 and that almost five years have passed since his arrest in 2000. The record evidence indicates that Applicant was arrested six times for driving under the influence of alcohol in the period from 1987 until 2000, including three arrests in the 15 years immediately preceding the Judge's decision. The Board sees no error in the Judge's finding, but will treat Applicant's appeal statements as raising the issue of whether Applicant's record of arrests should have been considered mitigated by the passage of time.

Applicant is responsible for presenting witnesses or other evidence to rebut, explain, extenuate, or mitigate facts that the Department Counsel proves or that Applicant admits, and Applicant also has the ultimate burden of persuasion to obtain a favorable security clearance decision. Directive, Additional Procedural Guidance, Item E3.1.15. The Judge had to consider the record evidence as a whole and evaluate the facts and circumstances of Applicant's past conduct and current circumstances in light of pertinent provisions of the Directive. In deciding whether Applicant met his burden of persuasion, the Judge reasonably could consider whether Applicant presented evidence that was indicative of extenuation, mitigation, changed circumstances, or reform and rehabilitation. *See, e.g.*, ISCR Case No. 02-05110 (March 22, 2004) at p. 6. The favorable evidence cited by Applicant did not compel the Administrative Judge to make a favorable security decision. The Judge had to consider the record evidence as a whole and consider whether the favorable evidence outweighed the unfavorable evidence or *vice versa* and whether Applicant had sufficiently rebutted, extenuated, or mitigated the security concerns raised under Guideline J and Guideline G to warrant a favorable security clearance decision. *See, e.g.*, ISCR Case No. 99-0296 (April 18, 2000) at p. 6.

Here, the Judge considered Applicant's recent efforts to curtail his alcohol encouraging, but did not consider them sufficient to mitigate the security concerns raised under Guideline J or Guideline G. Given the record evidence in this case, the Judge had a rational basis for his conclusion that Applicant had not demonstrated sufficient improvement to mitigate the security concerns raised under Guideline J and Guideline G.

2. Whether the Judge erred in stating that Applicant still abuses alcohol. The record indicates that Applicant: (a) was diagnosed with alcohol dependency in 1987; (b) has a long history of episodic alcohol abuse; (c) has had incidents of alcohol abuse after he received treatment for alcohol abuse; (d) has a record of alcohol abuse incidents occurring after periods of sobriety; and (e) has a spotty record of attending Alcoholics Anonymous. The Judge specifically noted that evidence in concluding that Applicant's continuing drinking of alcohol raised concerns as to whether Applicant could control his drinking. Applicant had the burden of presenting evidence to demonstrate extenuation, mitigation, changed circumstances, or reform and rehabilitation. The Judge noted that Applicant continued to drink and did not present any updated diagnosis and prognosis with regard to his alcohol dependency. He considered Applicant's efforts to curtail his alcohol consumption, but found that in the absence of an updated diagnosis and prognosis, Applicant's efforts were not sufficient to mitigate the government's concerns. Applicant has not met his burden of persuasion on this issue, and the record supports the Judge's expressed doubts as to whether Applicant has shown he can control his drinking.

3. Whether the Judge's decision is arbitrary, capricious, or contrary to law since in Applicant's view he is not a security risk and is not deemed to be one by his fellow employees. The government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). Security clearance decisions are not an exact science, but rather involve predictive judgments about whether a person may be at risk to fail to properly handle classified information. *Department of the Navy v. Egan*, 484 U.S. 518, 528-29 (1988). Applicant's opinion and the opinions of his fellow employees about the security significance of his history of alcohol abuse are not binding on the Administrative Judge. The record evidence of Applicant's history of alcohol abuse and alcohol-related arrests provides a rational basis for the Judge's adverse decision.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error below. Therefore, the decision below is affirmed.

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: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board