

DATE: May 27, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-21614

## **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 October 3, 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 Henry Lazzaro issued an unfavorable security clearance decision, dated March 5, 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 by holding Applicant's past conduct against her; and (2) whether the Administrative Judge erred by concluding Applicant had failed to mitigate her history of alcohol abuse. 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**

On appeal, Applicant does not challenge the Administrative Judge's findings of fact about her history of alcohol abuse. However, Applicant does argue: (i) it is unfair that her career is being taken away from her because of mistakes that she made in the past; and (ii) she presented evidence that shows she has been honest about her alcohol problems, that she can remain sober, and that she can now lead a productive life without posing a security risk. The Board construes Applicant's arguments as raising the following two issues: whether the Administrative Judge erred by holding Applicant's past conduct against her; and whether the Administrative Judge erred by concluding Applicant had failed to mitigate her history of alcohol abuse.

1. Whether the Administrative Judge erred by holding Applicant's past conduct against her. The Board does not find persuasive Applicant's argument that it is unfair for the Administrative Judge to base his unfavorable security clearance decision on her past mistakes. Security clearance decisions involve predictive judgments about an applicant's security eligibility in light of their past conduct and present circumstances. *See Department of Navy v. Egan*, 484 U.S. 518, 528-529 (1988). Accordingly, it was proper for the Judge to consider Applicant's overall history of alcohol abuse to evaluate her current security eligibility. Acceptance of Applicant's argument would result in her security eligibility being evaluated by the Judge without regard to her past alcohol abuse, which would be inconsistent with the requirements that the Judge consider all the relevant and material information (Directive, Section 6.3), make findings of fact and reach conclusions about the SOR allegations (Directive, Additional Procedural Guidance, Item E3.1.25), and evaluate Applicant's security eligibility under the whole person concept (Directive, Enclosure 2, Item E2.2.1).

2. Whether the Administrative Judge erred by concluding Applicant had failed to mitigate her history of alcohol abuse. The Administrative Judge found that: (a) Applicant has a history of alcohol abuse, including four alcohol-related driving incidents (once in October 1996; twice in May 1998; once in September 2002); (b) Applicant received inpatient treatment for alcohol abuse in June-July 1998; (c) Applicant was diagnosed as alcohol dependent in connection with that treatment; (d) Applicant stayed sober after completion of the 1998 treatment program until she relapsed in August 2002;

(e) Applicant continued to drink alcohol after the September 2002 incident; (f) Applicant did not stop drinking alcohol until July 2003; (g) in July 2003, Applicant enrolled in a 52-week relapse avoidance program; (h) since then, Applicant has been an active participant in the relapse avoidance program; and (i) Applicant attends Alcoholics Anonymous sessions twice a week. The Judge concluded that Applicant's current efforts at alcohol rehabilitation were not sufficient to warrant a favorable security clearance decision because, given her overall history of alcohol abuse, it was too soon to conclude she will not resume drinking in the future.

Given the record evidence in this case, Applicant had the burden of presenting evidence to extenuate or mitigate her history of alcohol abuse sufficiently to warrant a favorable security clearance decision. *See* Directive, Additional Procedural Guidance, Item E3.1.15. The Administrative Judge had the responsibility of weighing the record evidence as a whole and deciding whether Applicant had satisfied her burden of persuasion under Item E3.1.15. Based upon the record before us, the Board concludes Applicant's arguments fail to show the Judge erred.

This case does not involve any allegation that Applicant has been dishonest with the government. Rather, this case involves the issue of Applicant's security eligibility in light of her overall history of alcohol abuse. Applicant's honesty about her alcohol problems did not preclude the Administrative Judge from considering the security significance of Applicant's history of alcohol abuse. *See, e.g.*, ISCR Case No. 02-15358 (July 22, 2003) at p. 6.

The Administrative Judge specifically considered the record evidence about Applicant's efforts at reform and rehabilitation and weighed that favorable evidence in light of Applicant's overall history of alcohol abuse, including the nature and length of her previous period of abstinence which was followed by a relapse. *Cf.* ISCR Case No. 02-08032 (May 14, 2004) at pp. 6-7. Absent a showing that the Judge acted in a manner that is arbitrary, capricious, or contrary to law, the Board will not disturb the Judge's weighing of the record evidence. *See, e.g.*, ISCR Case No. 00-0621 (January 30, 2002) at p. 3. Applicant strongly disagrees with the Judge's weighing of the record evidence. However, Applicant's strong disagreement with the Judge on this matter is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 01-03767 (December 5, 2003) at p. 3. Considering the record evidence as a whole, the Judge's conclusions reflect a plausible, legally permissible interpretation of that record evidence.

Applicant seeks to be given the benefit of the doubt as to whether her current efforts at rehabilitation will continue to be successful. Applicant is not legally entitled to receive the benefit of the doubt. Given the Administrative Judge's findings of fact, the Judge articulated a rational basis for his doubts about whether Applicant would continue to maintain her sobriety. Given those doubts, the Judge properly resolved them in favor of the national security. *See* Directive, Enclosure 2, Item E2.2.2. *See also Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

### **Conclusion**

The Board affirms the Administrative Judge's unfavorable security clearance decision because Applicant has not demonstrated error below.

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