

DATE: June 15, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-24743

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 August 26, 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) and Guideline J (Criminal Conduct). Administrative Judge Richard A. Cefola issued an unfavorable security clearance decision dated February 25, 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 issue has been raised on appeal: whether the Administrative Judge's adverse conclusions under Guideline G (Alcohol Consumption) are arbitrary, capricious, or contrary to law because Applicant has demonstrated a willingness to pursue alcohol rehabilitation. 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 Issue⁽¹⁾

Whether the Administrative Judge's adverse conclusions under Guideline G (Alcohol Consumption) are arbitrary, capricious, or contrary to law because Applicant has demonstrated a willingness to pursue alcohol rehabilitation.

Applicant does not challenge the Administrative Judge's findings of fact about Applicant's history of alcohol abuse.⁽²⁾ However, Applicant challenges the Judge's conclusion that he had failed to present evidence sufficient to mitigate the security concerns raised by his history of alcohol abuse. Specifically, Applicant: (a) notes that in his response to the File of Relevant Material he stated a willingness to enroll in an alcohol awareness or rehabilitation program; (b) states he now is pursuing such rehabilitation after a referral from his Employee Assistance Program; (c) describes some of the actions he has undertaken in connection with that rehabilitation program; and (d) asserts he has demonstrated he is committed to "total and complete sobriety."

The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Applicant's statements about what actions he has taken since the issuance of the Administrative Judge's decision constitute a proffer of new evidence that the Board cannot consider.

Applicant's response to the File of Relevant Material was part of the record before the Administrative Judge. However, the Judge was not bound by the statements in Applicant's response to the File of Relevant Material. Rather, the Judge had to consider and weigh those statements in light of the record evidence as a whole. Moreover, the Judge was not required to give great or controlling weight to Applicant's stated willingness to enroll in an alcohol awareness or rehabilitation program. An offer to take remedial actions in the future is not evidence of actual reform and rehabilitation. A promise to change is not the same as evidence of an actual change in conduct or circumstances. *See, e.g.*, ISCR Case No. 01-12922 (April 18, 2003) at p. 4. Given Applicant's history of alcohol abuse, Applicant had the burden of presenting evidence of reform and rehabilitation sufficient to warrant a favorable security clearance decision. *See* Directive, Additional Procedural Guidance, Item E3.1.15. Given the record evidence in this case, it was not arbitrary or

capricious for the Judge to conclude that Applicant failed to satisfy his burden of persuasion under Item E3.1.15.

Conclusion

Applicant has failed to demonstrate error below. Accordingly, the Board affirms the Administrative Judge's unfavorable 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. The Administrative Judge entered a formal finding in favor of Applicant with respect to Guideline J (Criminal Conduct). That favorable formal finding is not at issue on appeal.
2. Applicant states the Administrative Judge's decision refers to him as being 44 years old when he really is 53 years old, and asks that the matter be corrected for the record. When responding to the File of Relevant Material, Applicant indicated his birth date was not correctly listed in his security clearance application. However, neither the Judge nor this Board has the authority to order or direct that Applicant's security clearance application be amended or changed.