

DATE: December 17, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-29608

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

David E. McGehee, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued the Applicant a Statement of Reasons (SOR), dated January 23, 2003, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guidelines G (Alcohol Consumption) and E (Personal Conduct). Administrative Judge John G. Metz, Jr., issued an unfavorable security clearance decision, dated August 1, 2003.

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 is arbitrary, capricious, or contrary to law, and (2) whether the Administrative Judge erred in the application of the "whole person" concept as set forth in the Directive's Section 6.3 factors. 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 is arbitrary, capricious, or contrary to law. On appeal, Applicant argues that the Administrative Judge's decision is arbitrary, capricious, or contrary to law because the Judge: 1) erred in concluding that the Applicant was more likely than not to resume drinking at increased levels, 2) erred in concluding the Applicant demonstrated little insight into what alcohol had done to his life, and 3) erred in concluding the Applicant's pattern of alcohol abuse and continued consumption cast serious doubt on his judgment, reliability and trustworthiness. In support of that argument, Applicant specifically contends that the security concerns raised by Applicant's 19-year history of excessive alcohol consumption should have been mitigated as a matter of law under Alcohol Consumption Mitigating Conditions 2 ⁽¹⁾

and 3, ⁽²⁾

and Personal Conduct Mitigating Condition 1. ⁽³⁾

Applicant argues that the conduct of security concern was not recent and that he has demonstrated positive changes in behavior supportive of sobriety. He also argues that the conduct of security concern is not pertinent to a determination of judgement, trustworthiness, or reliability. Applicant cites no cases in support of these positions. Instead, he essentially makes the same arguments that he made at the hearing regarding his view of the evidence.

The Board does not review a Judge's decision against a standard of perfection. *See, e.g.*, ISCR Case No. 95-0319 (March 18, 1996) at p. 3; DISCR Case No. 91-0109 (July 1, 1993) at p. 7. It reviews a decision as a whole, rather than focusing on isolated sentences or passages in it, to discern what the Judge meant. *See, e.g.*, DISCR Case No. 90-1874 (July 30, 1993) at p. 4. There is a rebuttable presumption that the Administrative Judge considered all the record evidence unless

he specifically states otherwise. *See, e.g.*, DOHA Case No. 96-0228 (April 3, 1997) at p. 3; DISCR Case No. 93-1186 (January 5, 1995) at p. 5. Moreover, the Judge is not required to cite or discuss every piece of record evidence. *See, e.g.*, DISCR Case No. 90-1596 (September 18, 1992) at p. 5. Close cases should be resolved in the favor of national security, rather than in the favor of the Applicant. *See, e.g.* DISCR Case No. 93-1390 (January 27, 1995) at p. 8.

The application of Adjudicative Guidelines disqualifying and mitigating conditions does not turn simply on a finding that one or more of them applies to the particular facts of a case. Rather, the application of a disqualifying or mitigating condition 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. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighed the unfavorable evidence or *vice versa*. 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. However, the Judge's weighing of the record evidence is not immune from appellate review. The Judge does not have unfettered discretion--he must weigh the evidence in a manner that is reasonable and not arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 99-0511 (December 19, 2002) at p. 9; ISCR Case No. 99-0435 (September 22, 2000) at p. 3.

Further, evidence that Applicant's work performance was exemplary and that his associates considered him to be honest, trustworthy and reliable, does not compel a decision in his favor. Security clearance decisions are not limited to consideration of an applicant's conduct during duty hours. An applicant's off-duty conduct can raise concerns that would warrant an adverse security clearance decision. *See e.g.*, ISCR Case No. 01-13906 (January 3, 2003) at p. 3.

In this case, the Applicant engaged in the excessive consumption of alcohol--in some instances drinking as many as 15 to 20 beers a day--during the time period 1979 through 1998. He was charged with driving under the influence (DUI) in 1991 and 1997. At the time of the 1991 arrest, his blood alcohol content was .22%. The Applicant was diagnosed as "alcohol-dependent" in 1991, [\(4\)](#)

placed on the medication Antabuse, received inpatient treatment, and was advised to discontinue drinking. The Applicant attended Alcoholics Anonymous (AA) at various times and abstained from drinking alcohol for approximately one year during the 1991 through 1992 time period. He also abstained from drinking for a short period of time subsequent to his 1997 DUI offense. His excessive alcohol consumption was a factor in at least one of his divorces, in two previous security clearance hearings, and a shortened military career. Subsequent to a 1994 security clearance hearing, in which he received a favorable determination under different alcohol guidelines, his drinking got worse. During the last five years, the Applicant has continued to consume alcohol, but at a level lower than the excesses of the earlier period. He has married a supportive wife, has supportive friends, no longer frequents bars or pool halls, and does not drive after drinking. His job performance and character references are good. Applicant's level of alcohol consumption at the time of the hearing was three to four beers over a four to five-hour period on Sunday's while watching automobile races or football games. [\(5\)](#)

However, at the hearing, Applicant described himself as being "alcohol dependent," [\(6\)](#)

and when asked by the Judge what that meant stated: "That means that I am at danger of losing control whenever I drink." [\(7\)](#)

He further acknowledged that that danger was present even though he had a system supportive of sobriety in place. [\(8\)](#)

Alcohol abuse poses a security risk because it raises the potential for deliberate or inadvertent disclosure of classified information while an applicant is under the influence of alcohol. *See, e.g., Cole v. Young*, 351 U.S. 536, 550 n.13 (1956); *Croft v. Department of Air Force*, 40 M.S.P.R. 320, 321 n.1 (1989). Therefore, Applicant's history of alcohol abuse was substantiated and pertinent to a determination of the Applicant's judgment, trustworthiness, and reliability.

After reviewing the Judge's decision in this case it is our view that the Judge reasonably considered the fact that the Applicant's recent level of alcohol consumption was less than it had been during the 19-years prior to 1998, as well as the fact that over the last five years he had experienced some positive changes in behavior supportive of sobriety, and nevertheless concluded that that evidence was insufficient to overcome the security concerns raised by the magnitude

and longevity of the Applicant's 19-year history of excessive alcohol consumption and the implications of his current level of alcohol consumption. The Judge's adverse security clearance decision is reasonably supported by the record evidence and can be sustained even though it contains otherwise debatable opinions or characterizations.

The Judge's conclusion that the favorable evidence Applicant presented was not enough to demonstrate reform, rehabilitation, or changed circumstances sufficient to warrant a favorable security clearance decision with respect to the Guideline G allegations was not unreasonable. Considering the record as a whole, the Judge's application of the relevant disqualifying and mitigating factors, and his weighing of the record evidence was not arbitrary, capricious, or contrary to law.

Similarly, the Judge's conclusion that the favorable evidence Applicant presented was not enough to demonstrate judgment, trustworthiness, or reliability sufficient to warrant a favorable security clearance decision with respect to the Guideline E allegations was not unreasonable. Considering the record as a whole, the Judge's application of the relevant disqualifying and mitigating factors, and his weighing of the record evidence was not arbitrary, capricious, or contrary to law.

On appeal, as he did at the hearing, Applicant argues that the AA school of thought--that abstinence is the only successful approach for those who are alcohol dependent--is not the only approach that need be considered in evaluating the Applicant's situation. However, as the Judge noted in his decision, while the Applicant claimed to have heard of studies suggesting that a diagnosed alcohol-dependent could safely resume drinking, he provided no evidence of reliable studies to that effect. Conversely, there was evidence in the record Applicant had participated in, and at times benefitted from, AA programs. Therefore, it was not unreasonable for the Judge to evaluate the Applicant's situation in the context of the evidence before him. The Board does not endorse a specific methodology with respect to alcohol treatment. However, the AA approach is widely (albeit not universally) accepted, and can be appropriate for consideration when raised in the case.

2. Whether the Administrative Judge erred in the application of the "whole person" concept as set forth in the Directive's Section 6.3 factors. ⁽⁹⁾

On appeal, Applicant argues that the Administrative Judge's decision is arbitrary, capricious, or contrary to law because the Judge erred in the application of the "whole person" concept. In support of that argument, Applicant specifically contends that the security concerns raised by Applicant's history of excessive alcohol consumption should have been mitigated because of the circumstances surrounding that conduct, the motivation for the conduct, its lack of recency, the presence of rehabilitation and other pertinent behavioral changes, and the reduced likelihood of a continuation or recurrence of adverse conduct. Again, Applicant cites no cases in support of his positions. Instead, he essentially makes the same arguments that he made at the hearing regarding his view of the evidence.

After reviewing the Judge's decision in this case, it is our view that the Judge reasonably considered the fact that the Applicant's recent level of alcohol consumption was less than it had been during the 19-years prior to 1998, the fact that over the last five years he had experienced some positive changes in behavior, as well as the other "whole person" factors, such as the circumstances surrounding the conduct, the Applicant's motivation, and the likelihood of continuance or recurrence, and nevertheless concluded that that evidence was insufficient to overcome the security concerns raised by the magnitude and longevity of the Applicant's 19-year history of excessive alcohol and the implications of his current level of alcohol consumption.

The Judge's conclusion that the favorable evidence Applicant presented was not enough to demonstrate reform, rehabilitation, or changed circumstances sufficient to warrant a favorable security clearance decision with respect to either of the relevant Guidelines was not unreasonable. Considering the record as a whole, the Judge's application of the relevant Section 6.3 factors, and his weighing of the record evidence was not arbitrary, capricious, or contrary to law.

Conclusion

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

Signed: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

Separate Opinion of Chairman Emilio Jaksetic, concurring:

I concur with my colleagues' statement of the case and their identification of the issues raised by Applicant's appeal. However, I write separately to express concerns I have about this case because of flaws in the decision below that are highlighted by Applicant's appeal.

Applicant does not challenge the Administrative Judge's findings or conclusions about Applicant's history of alcohol abuse up to and including 1998. However, Applicant does challenge the Judge's adverse findings and conclusions about his drinking since 1998. Applicant's brief raises serious questions as to whether: (a) some of the 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*";⁽¹⁰⁾

and (b) the Judge's decision is arbitrary, capricious, or contrary to law because it: (i) fails to examine relevant evidence, (ii) fails to reflect consideration of relevant factors, or (iii) fails to articulate a satisfactory explanation for its adverse conclusions.⁽¹¹⁾

Applicant raises a serious challenge to the Administrative Judge's conclusion that Applicant "is more likely than not to resume drinking at increased levels" (Decision at p. 9). Under the Directive, the Judge had to consider the likelihood that Applicant might abuse alcohol again.⁽¹²⁾

However, given the totality of record evidence in this case and the absence of a finding that Applicant has abused alcohol since 1998, this aspect of the case calls for more explanation or elaboration than the Judge gave.⁽¹³⁾

Applicant also challenges the Administrative Judge's conclusion that Applicant demonstrates little insight into what alcohol has done to his life (Decision at p. 9). In support of that conclusion, the Judge relies, in part, on Applicant's past statements. Applicant points to record evidence that clearly runs contrary to the Judge's conclusion. Although Applicant's past statements are relevant and material evidence, the Judge does not explain why he concludes Applicant's past statements are entitled to be given so much weight despite more recent record evidence that indicates Applicant acknowledges his alcohol abuse has resulted in various adverse consequences for him. Moreover, the Judge's finding that Applicant has minimized his alcohol consumption is expressly linked to Applicant's ay 1993 written statement (Decision at pp. 4-5). Yet Applicant points to more recent record evidence pertinent to that matter, and the decision below lacks any explanation why the Judge considered Applicant's May 1993 written statement as pivotal to his finding of minimization. The majority correctly notes that there is no requirement that a Judge discuss each and every piece of record evidence. However, that general rule is severely strained when a Judge makes a finding that explicitly relies on a 10-year-old written statement without any apparent acknowledgment or discussion of more recent record evidence that is clearly pertinent to the matter and which runs contrary to the 10-year-old written statement.

Applicant also challenges the Administrative Judge's conclusion that Applicant's drinking since 1998 is a continuation

of his previous alcohol abuse. Given the totality of the record evidence in this case, and the absence of a specific finding that Applicant has abused alcohol since 1998, the Judge's conclusion calls out for more explanation or elaboration of the Judge's reasoning.

Applicant's appeal arguments highlight flaws in the Administrative Judge's decision that, viewed collectively, are troubling. However, the majority correctly notes that the Board does not review a Judge's decision against a standard of perfection. Furthermore, the Board has made clear that it applies the harmless error doctrine when an appealing party identifies factual or legal error. Given the record evidence in this case, I can envision the Judge correcting the flaws with his decision and reaching the same ultimate adverse security clearance decision if the Board were to remand the case. Since there is not a significant chance that a remand would result in a different result, no useful purpose would be served by remanding the case to the Judge to issue a new decision. *See, e.g.*, ISCR Case No. 98-0619 (September 10, 1999) at p. 8 (discussing harmless error doctrine). Accordingly, I concur with the majority's decision to affirm.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

1. "The problem occurred a number of years ago and there is no indication of a recent problem" (Directive, Enclosure 2, Item E2.A7.1.3.2).
2. "Positive changes in behavior supportive of sobriety" (Directive, Enclosure 2, Item E2.A7.1.3.3).
3. "The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability" (Directive, Enclosure 2, Item E2.A5.1.3.1).
4. The diagnosis was made by an interdisciplinary team consisting of a medical doctor, a Ph.D. clinical psychologist, a master's degree psychologist and certified drug and alcohol counselor, an intern, and a psychiatric clinic nurse specialist.
5. Applicant's Appeal Brief at p. 11. Transcript at pp. 39, 50, 70, and 81.
6. Transcript at p. 84.
7. *Id.*
8. *Id.*
9. Directive, Section 6.3 and Enclosure 2, Items E2.2.1.1 through E2.2.1.9."
10. Directive, Additional Procedural Guidance, Item E3.1.32.1 (emphasis added). Although an Administrative Judge has the primary responsibility for weighing the record evidence, the Judge's weighing of the record evidence is not immune from appellate review. When weighing the record evidence a Judge does not have unfettered discretion and must do so in a manner that is reasonable and not arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 99-0511 (December 19, 2000) at p. 9; ISCR Case No. 99-0435 (September 22, 2000) at p. 3.
11. *See* discussion of arbitrary and capricious standard in Scope of Review section of majority opinion.
12. Directive, Section 6.3.6; Enclosure 2, Item E2.2.1.9.
13. Administrative Judges have broad latitude and discretion in how they write decisions. However that latitude and discretion must be exercised within the legal constraints of the Directive. A Judge's decision must set forth findings of fact and conclusions with sufficient specificity and clarity that the parties and the Board can discern what the Judge is finding and concluding. *See* ISCR Case No. 98-0809 (August 19, 1999) at p. 2. Whether a Judge's findings and

conclusions are intelligible and understandable to the parties and the Board will depend largely on whether the Judge's articulation of those findings and conclusions is clear, specific, and congruent with the record evidence, applicable principles of law, and cogent reasoning.