

DATE: August 4, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-29615

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Marc E. Curry, Esq., Department Counsel

FOR APPLICANT

Neil W. Fleming, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated April 30, 2004, 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 Michael H. Leonard issued a favorable security clearance decision, dated February 17, 2005.

Department Counsel appealed the Administrative Judge's favorable 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 decision was arbitrary, capricious or contrary to law. For the reasons that follow, the Board reverses 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

Department Counsel argues that the Administrative Judge's analysis and conclusions are unsustainable in light of the record evidence. The Board finds Department Counsel's argument has merit.

The Administrative Judge correctly found that Applicant's history of excessive drinking and alcohol related incidents both at work (in 2001) and away from work (1975, 1997 and 1998) raised security concerns on the part of the government regarding Applicant's suitability to hold a security clearance.

Once an applicant admits or the Department Counsel proves facts that raise security concerns and may be disqualifying, the applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate or mitigate such facts. The applicant has the ultimate burden of persuasion as to obtaining a favorable clearance decision. *See* Directive, Additional Procedural Guidance, Item E3.1.15.

The Administrative Judge concluded that Applicant's alcohol abuse was mitigated under Alcohol Consumption Mitigating Conditions 2-[\(1\)](#) ("The problem occurred a number of years ago and there is no indication of a recent problem") and 3-[\(2\)](#) ("Positive changes in behavior supportive of sobriety"). However, the totality of the following record evidence belies such conclusions: (1) Applicant has been unable to adhere to his 2001 and 2002 commitments to stop drinking (the Judge found that Applicant currently drinks beer 1 to 2 times a week having as many as 4 beers if he is not driving), (2) when Applicant resumed drinking he sought advice from an Alcoholics Anonymous (AA) sponsor who told him to attend AA meetings, but Applicant has declined to follow that recommendation, (3) although Applicant does not drink when he is with his girlfriend (on weekends), he does drink during the week when he does not see her (Applicant's testimony to that effect runs contrary to the Judge's decision to rely on Applicant's girlfriend's two decades of abstention from alcohol as a motivation for Applicant to remain free from problems), and (4) Applicant's 1997, 1998 and 2001 incidents each led to a treatment plan (according to Applicant's testimony), yet in spite of three rounds of treatment, as noted above, Applicant is unable to maintain his commitments to refrain from alcohol consumption or to

follow through on reasonable advice from his AA sponsor.

In light of the substantial contrary record evidence regarding Applicant's recent alcohol related conduct, the Administrative Judge's conclusion that Applicant had successfully mitigated the government's security concerns regarding Applicant's history of excessive drinking is not sustainable.

Conclusion

Department Counsel has met its burden of demonstrating harmful error in the Administrative Judge's decision. The Judge's February 17, 2005 decision is reversed.

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. Directive, Adjudicative Guidelines, Item E2.A7.1.3.2.

2. Directive, Adjudicative Guidelines, Item E2.A7.1.3.3.