

DATE: October 13, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-29739

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Philip W. Ogden, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued the Applicant a Statement of Reasons (SOR), dated April 16, 2004, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guideline G (Alcohol Consumption) and Guideline E (Personal Conduct). Administrative Judge James A. Young issued an unfavorable security clearance decision, dated April 8, 2005.

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 erred in concluding that the security concerns raised under Guideline G had not been mitigated, and (2) whether the Administrative Judge erred in finding against Applicant with respect to the Guideline E (Personal Conduct) allegation. 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 erred in concluding that the security concerns raised under Guideline G (Alcohol Consumption) had not been mitigated. On appeal, Applicant contends that: (a) the Administrative Judge made errors in his findings of fact; (b) the Judge erred by going outside the record to take administrative notice of a medical dictionary; (c) the Judge applied the inappropriate standard of abstinence when evaluating Applicant's problems with alcohol; and (d) the Judge should have concluded that the security concerns raised by Applicant's alcohol related conduct were mitigated by application of Guideline G Mitigating Conditions 1, [\(1\)](#)

2, [\(2\)](#)

3, [\(3\)](#)

and 4. [\(4\)](#)

For the following reasons, the Board concludes the Judge's decision is sustainable.

(a) Based upon the record before him, the Administrative Judge's material findings of fact concerning Applicant's history of alcohol consumption are sustainable. While the Judge erred in finding Applicant had retired from military service as an E-7, rather than as an E-8, that error is harmless. Applicant also contends that the Administrative Judge failed to consider evidence favorable to Applicant because the Judge's findings of fact, while technically correct, provide an incomplete explanation of the circumstances surrounding Applicant's alcohol related conduct and treatments. That contention is not persuasive. There is a rebuttable presumption that an 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. Furthermore, there is no requirement that a Judge cite or discuss every piece of record evidence. *See, e.g.*, DISCR Case No. 90-1596 (September 18, 1992) at p. 5. Applicant's disagreement with the Judge's weighing of the record evidence is not sufficient to rebut or overcome the presumption that the Judge considered all the record evidence.

Evidence that Applicant did not abuse alcohol on the job or during duty hours, that his work performance was exemplary, and that his associates considered him to be honest, trustworthy and reliable, did not compel a decision in his favor. Security clearance adjudications are not limited to consideration of an applicant's conduct on the job or during duty hours. Security clearance adjudications can be based on an applicant's conduct away from the job and during non-duty hours. *See, e.g.*, ISCR Case No. 02-22240 (July 16, 2004) at p. 5. Therefore, even in cases where there is no evidence that Applicant abused alcohol on the job or during duty hours, an Administrative Judge may still properly consider the record evidence of Applicant's alcohol abuse away from the job. *See, e.g.*, ISCR Case No. 01-26723 (November 30, 2004) at p.3. 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). Accordingly, Applicant's history of alcohol abuse and his course of treatment were pertinent to a determination of the Applicant's judgment, trustworthiness, and reliability.

(b) Applicant complains that the Administrative Judge erroneously went outside the record to consult a medical dictionary⁽⁵⁾

to obtain a definition of the drug Antabuse. Applicant asserts that if the Judge intended to consult a source beyond the record evidence, it was incumbent upon him to reveal his intent during the hearing and to make the dictionary available to the parties so that they could ask questions of witnesses about it.

As a general rule, the parties are entitled to know what information an Administrative Judge is relying on in making a decision. *See, e.g.*, ISCR Case No. 99-0452 (March 21, 2000) at p. 4. There are some narrow exceptions to this general rule: official or administrative notice, and matters known to an agency through its cumulative expertise. *See* DISCR Case No. 90-1550 (March 25, 1992) at p. 5 (citing federal cases). *See also* Kenneth C. Davis and Richard J. Pierce Jr., 2 *Administrative Law Treatise* (3rd Edition), Section 10.6 (Little Brown & Co., 1994); Jacob A. Stein, Glenn A. Mitchell and Basil J. Menzines, 4 *Administrative Law*, Section 25.01 (Matthew Bender, 1999). The passage from the dictionary cited by the Judge in this case is a basic and general definition of the properties of Antabuse. This basic definition is not subject to reasonable dispute and as such is a proper subject for the taking of administrative notice. Therefore the Judge's introduction of the definition into his factual findings did not require prior notice to the parties.

Applicant's contention that the Judge's reliance on this general definition caused the Judge to ignore record evidence about the harmful side effects of Antabuse is not persuasive. The short description of the basic properties of Antabuse relied on by the Judge did not purport to comment one way or another about any potential side effects of the drug. Nothing offered by Applicant in his brief works to overcome the presumption that the Administrative Judge considered all the evidence in the record, including evidence proffered by Applicant concerning potential harmful effects of Antabuse.

(c) Applicant argues that the Administrative Judge "inferentially" applied an inappropriate standard of rehabilitation to him-the standard of abstinence. Applicant bases this claim on the Judge's finding that the purpose of requiring Applicant to take Antabuse during his two-year probationary period following his 1999 DUI was to inhibit him from taking the first alcoholic drink, thus helping people like Applicant become abstinent and establish abstinence. The Board is not persuaded that the Judge applied a standard of abstinence in this case. The cited finding is derived directly from the testimony of Applicant's treating physician. In evaluating the finding, the Board does not view it in isolation. Rather, the Board considers the Judge's decision as a whole to determine whether the finding is supportable by the evidence, is used properly, or results in the application of a legal standard or conclusion that is not sustainable. After reviewing the Judge's decision as a whole, the Board concludes that the finding relates only to generally understood uses of Antabuse and nothing more. There is nothing elsewhere in the Judge's decision, particularly in his conclusions, that suggests he is imposing a standard of abstinence in his evaluation of Applicant's alcohol problems. Applicant has failed to establish error.

(d) Applicant asserts that the Administrative Judge should have concluded that the security concerns raised by his alcohol consumption were mitigated. The fact that Applicant produced some evidence falling under one or more of the applicable mitigating conditions did not necessarily mandate a decision in his favor. 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.

In this case, the favorable record evidence cited by Applicant is not sufficient to demonstrate the Administrative Judge's decision is arbitrary, capricious, or contrary to law. The Judge reasonably addressed the possible application of relevant mitigating conditions and explained why he concluded Applicant had not sufficiently mitigated the security concerns raised by his history of alcohol related incidents and treatment. There is sufficient record evidence to support the Judge's conclusions.

2. Whether the Administrative Judge erred in finding against Applicant with respect to the Guideline E (Personal Conduct) allegation. Applicant argues that the Administrative Judge erred in finding against him with respect to the Guideline E allegation that he had provided false information to a doctor performing a court-ordered evaluation, which allowed him to be released from a requirement to take Antabuse. It is Applicant's contention that either: (1) the conduct at issue did not fall under any of the disqualifying conditions for Guideline E, or (2) the conduct was mitigated by the Application of several Guideline E itigating Conditions, namely, Mitigating Conditions 1, [\(6\)](#)

2, [\(7\)](#)

3, [\(8\)](#)

5, [\(9\)](#)

and 7. [\(10\)](#)

Applicant's argument is not persuasive.

The presence or absence of any particular Adjudicative Guideline disqualifying or mitigating condition is not solely dispositive of a case. *See e.g.*, ISCR Case No. 02-33581 (July 20, 2004) at p.3. In this instance, it was not unreasonable for the Administrative Judge to conclude that Applicant's conduct fell under the Guideline E general concern, *i.e.* questionable judgment, lack of candor, dishonesty, *etc.*

As noted above, the application of mitigating conditions 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.

Considering the record as a whole, the Board concludes that the evidence did not require the Administrative Judge to apply Guideline E Mitigating Conditions 1, 3, 5, or 7. Applicant is not entitled to have the Administrative Judge apply Adjudicative Guidelines mitigating conditions when the record evidence does not support their application. *See, e.g.*, ISCR Case No. 03-09915 (December 16, 2004) at p. 4. Regarding Guideline E Mitigating Condition 2, given the seriousness of conduct and the circumstances of Applicant's subsequent disclosure, the Administrative Judge's decision not to apply Mitigating Condition 2 is sustainable. Although the falsification at issue was not recent, the Judge was not required, as a matter of law, to conclude that the security concerns that it raised were mitigated by disclosure to the government agent. *See* ISCR Case No. 01-19513 (January 22, 2004) at p. 5 (government's security concerns not

mitigated by the fact that Applicant voluntarily disclosed his falsifications to an investigator the first time he was interviewed); ISCR Case No. 01-03767 (December 5, 2003) at p. 4 (government's security concerns not mitigated by the fact Applicant had "come clean" and "had nothing left to hide"). Moreover, the Judge could reasonably consider the fact that the falsification had not been disclosed to the parties to which it had been made (in this case, the doctor and the court), in his evaluation of the mitigative value of Applicant's disclosure.

Applicant also contests the Administrative Judge's conclusion that Applicant deliberately misled a DSS agent during a May 1, 2001 interview at which time Applicant's history of alcohol consumption was discussed. The Judge concluded that Applicant was not honest with the agent when he failed to tell her about the fact that he lied to a physician on a prior occasion concerning whether or not he had ever been prescribed Antabuse. On appeal, Applicant asserts that there is no evidence in the record to support the notion that during the interview in question, the DSS agent ever discussed the nature of the punishments administered as a result of the 1999 DUI conviction or the deletion of the requirement to take Antabuse. Applicant's contention on this point has merit.

The record evidence in this case contains no details as to what Applicant and the DSS agent discussed during the May 1, 2001 interview. Although the evidence clearly establishes that the overall topic of conversation was Applicant's history of problems with alcohol, absent detailed evidence about what questions the DSS agent asked and what responses Applicant gave regarding the disposition of the 1999 DUI charge, there is insufficient basis to conclude that Applicant engaged in deliberate deception by not bringing up the matter of his lying to a doctor about Antabuse.

The Board notes that the SOR in this case did not contain an allegation that Applicant deliberately misled the DSS agent by failing to mention anything about his Antabuse misrepresentation to a doctor. An Administrative Judge is free to make findings and conclusions relating to credibility that are independent of SOR allegations for the purpose of assessing or resolving conflicts in the record evidence, but those findings and conclusions themselves must be based on record evidence. In this case, for the reasons cited in the preceding paragraph, the Judge's reliance on his conclusion that Applicant deliberately misled the DSS agent was error. However, the Board concludes that remand is unnecessary since the Judge's decision is sustainable on grounds that are independent of the error. *See* ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine).

Conclusion

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

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. "The alcohol related incidents do not indicate a pattern" (Directive, Enclosure 2, Item E2.A7.1.3.1).
2. "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).
3. "Positive changes in behavior supportive of sobriety" (Directive, Enclosure 2, Item E2.A7.1.3.3).
4. "Following diagnosis of alcohol abuse or alcohol dependence, the individual has successfully completed inpatient or outpatient rehabilitation along with aftercare requirements, participates frequently in meetings of Alcoholics Anonymous or a similar organization, has abstained from alcohol for a period of at least 12 months, and received a favorable prognosis by a credentialed medical professional or licensed clinical social worker who is a staff member of a recognized alcohol treatment program" (Directive, Enclosure 2, Item E2.A7.1.3.4).
5. Specifically, Dorland's Pocket Medical Dictionary.
6. "The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability" (Directive, Enclosure 2, Item E2.A5.1.3.1).
7. "The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily" (Directive, Enclosure 2, Item E2.A5.1.3.2).
8. "The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts" (Directive, Enclosure 2, Item E2.A5.1.3.3).
9. "The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress" (Directive, Enclosure 2, Item E2.A5.1.3.5).
10. "Association with persons involved in criminal activities has ceased" (Directive, Enclosure 2, Item E2.A5.1.3.7).