

DATE: May 26, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-00558

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 December 22, 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 Joseph Testan issued an unfavorable security clearance decision, dated February 25, 2005.

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 finding that Applicant exhibited a drinking problem after her involvement in a December 2000 alcohol-related incident; and (2) whether it was arbitrary or capricious for the Administrative Judge to conclude Applicant had not demonstrated a sufficient track record of rehabilitation to warrant a favorable security clearance decision. 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

Applicant asks the Board to take into consideration the passage of time since she submitted her response to the File of Relevant Material, and makes factual assertions about her current situation. The Board does not retry a case on appeal, but rather reviews an Administrative Judge's decision in light of the record evidence that was available for the Judge to consider, in order to decide whether a claim of error raised on appeal has merit. The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Furthermore, Applicant cannot fairly challenge the Judge's decision based on a proffer of evidence that was not before the Judge during the proceedings below. The Board will limit its consideration of those issues raised by Applicant that do not rely on a proffer of new evidence.

1. Whether the Administrative Judge erred by finding that Applicant exhibited a drinking problem after her involvement in a December 2000 alcohol-related incident. The Administrative Judge found that: (a) Applicant consumed alcohol, at times to excess and to the point of intoxication, from approximately 1999-2000 to at least February 2004; (b) in December 2000, Applicant was arrested and charged with driving under the influence; (c) in April 2001, Applicant pleaded nolo contendere to the charge, and was sentenced to probation for 36 months, fined or assessed fees in the amount of approximately \$1500, ordered to complete an alcohol program, and had her driver's license suspended for one year; (d) Applicant successfully completed her probation; (e) in response to written interrogatories, Applicant stated that she drinks to the point of intoxication about once a week; (f) in her answer to the SOR, Applicant stated she drinks to intoxication "only rarely"; and (g) in response to the File of Relevant Material, Applicant indicated that she has significantly decreased her drinking since the security clearance process began.

On appeal, Applicant contends the Administrative Judge erred by finding that she has exhibited a drinking problem since the December 2000 incident, asserting that she has not had a problem with alcohol since that incident. Considering

the record in this case, the Judge had a rational basis for finding that Applicant episodically abused alcohol after the December 2000 incident. Even in the absence of any evidence that Applicant was involved in another alcohol-related incident after December 2000, the Judge could consider Applicant's admissions that she drank to intoxication on other occasions after the December 2000 incident.

2. Whether it was arbitrary or capricious for the Administrative Judge to conclude Applicant had not demonstrated a sufficient track record of rehabilitation to warrant a favorable security clearance decision. Applicant makes various statements that, taken together, constitute a claim that she has demonstrated her alcohol abuse is a thing of the past. The Board construes Applicant's claim as raising the issue of whether it was arbitrary or capricious for the Judge to conclude that Applicant had not demonstrated a sufficient track record of rehabilitation to warrant a favorable security clearance decision.

Given the record evidence of Applicant's history of episodic alcohol abuse, Applicant had the burden of demonstrating reform, rehabilitation, or changed circumstances sufficient to warrant a favorable security clearance decision. *See* Directive, Additional Procedural Guidance, Item E3.1.15. Considering the record as a whole, it was not arbitrary or capricious for the Judge to conclude that Applicant had not presented sufficient evidence to overcome the security concerns raised by her history of episodic alcohol abuse. Applicant's appeal arguments do not demonstrate the Judge's analysis is arbitrary or capricious.

Conclusion

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

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: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board