

DATE: November 15, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-00741

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Eric Borgstrom, Esq., Department Counsel

#### **FOR APPLICANT**

David P. Price, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated March 8, 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) and Guideline J (Criminal Conduct). Administrative Judge Thomas M. Crean issued a favorable security clearance decision, dated March 21, 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 issues have been raised on appeal: (1) whether the Administrative Judge erred by finding Applicant received a favorable result and prognosis following a February 2005 evaluation by a licensed clinical social worker; (2) whether the Administrative Judge's conclusion that Alcohol Consumption Disqualifying Condition 6 does not apply was arbitrary, capricious, and contrary to the record evidence; (3) whether the Administrative Judge's choice to apply Alcohol Consumption Mitigating Conditions 2 and 3 was not supported by the record evidence; (4) whether the Administrative Judge's choice to apply Criminal Conduct Mitigating Condition 1 was not supported by the record evidence; (5) whether it was arbitrary, capricious, and contrary to the record evidence for the Administrative Judge to conclude Applicant did not engage in criminal conduct in connection with the incident that resulted in his arrest in May 2001; and (6) whether the Administrative Judge's choice to apply Criminal Conduct Mitigating Condition 5 was not supported by the record evidence. 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 by finding Applicant received a favorable result and prognosis following a February 2005 evaluation by a licensed clinical social worker. The Administrative Judge found that "Applicant was recently examined by a licensed clinical social worker in a recognized alcohol treatment program with a favorable result and prognosis" (Decision at p. 4). Department Counsel challenges the Judge's finding, arguing: (a) the report of the evaluation does not include a prognosis; and (b) the contents of the report do not support the Judge's challenged finding. Applicant counters by arguing that although the report of the evaluation does not contain a heading or caption entitled "Prognosis," the contents of the report provide a sufficient basis for the Judge's challenged finding. The Board does not have to agree with the Judge's challenged finding to conclude it reflects a plausible interpretation of the report of Applicant's evaluation.

2. Whether the Administrative Judge's conclusion that Alcohol Consumption Disqualifying Condition 6 does not apply was arbitrary, capricious, and contrary to the record evidence. The Administrative Judge found that after Applicant had been diagnosed as alcohol dependent, Applicant consumed one beer on two separate occasions and a sip of champagne, but concluded that because that alcohol consumption occurred over a period of almost three years, application of Alcohol Consumption Disqualifying Condition 6 <sup>(1)</sup> was not warranted. Department Counsel contends the Judge erred because: (a) given the plain language of that disqualifying condition, the record evidence of Applicant's drinking after

he had been diagnosed as alcohol dependent warrants application of that disqualifying condition; and (b) nothing in the language of that disqualifying condition requires proof that consumption of alcohol after a diagnosis of alcohol dependence be excessive or abusive. Applicant counters the Judge's conclusion is not arbitrary, capricious or contrary to the record evidence.

An Administrative Judge must apply pertinent provisions of the Adjudicative Guidelines,<sup>(2)</sup> and cannot construe or interpret them in a manner contrary to their plain language. Given the plain language of Alcohol Consumption Disqualifying Condition 6, and the record evidence in this case, it was arbitrary and capricious for the Administrative Judge to conclude Alcohol Consumption Disqualifying Condition 6 does not apply. However, the conclusion that the Judge had to apply Alcohol Consumption Disqualifying Condition 6, given the record evidence in this case, is separate and distinct from what weight the Judge had to give to that disqualifying condition in light of the record evidence as a whole.<sup>(3)</sup> Just as the conclusion that a particular piece of evidence is admissible does not answer what weight the particular piece of evidence is entitled to be given,<sup>(4)</sup> the conclusion that a particular Adjudicative Guidelines disqualifying or mitigating condition applies does not answer what weight that particular disqualifying or mitigating condition is entitled to be given.<sup>(5)</sup> Department Counsel has not demonstrated that the Judge's failure to apply Alcohol Consumption Disqualifying Condition 6 is harmful.

3. Whether the Administrative Judge's choice to apply Alcohol Consumption Mitigating Conditions 2 and 3 was not supported by the record evidence. The Administrative Judge applied Alcohol Consumption Mitigating Condition 2<sup>(6)</sup> because the last alcohol-related incident occurred almost three years ago, and applied Alcohol Consumption Mitigating Condition 3<sup>(7)</sup> because of evidence that Applicant had significantly changed his alcohol-related behavior (Decision at p. 7).

Department Counsel contends the Administrative Judge erred by applying Alcohol Consumption Mitigating Condition 2 because the record evidence does not support a finding that Applicant's problem occurred a number of years ago, or a finding that there is no indication of a recent problem. Department Counsel further contends the Administrative Judge erred by applying Alcohol Consumption Mitigating Condition 3 because there is insufficient record evidence to support a finding that Applicant has demonstrated positive changes in behavior supportive of sobriety. Applicant counters that the record evidence supports the Judge's application of both those mitigating conditions.

The Board need not agree with the Administrative Judge to conclude that there is sufficient record evidence for the Judge to decide that application of Alcohol Consumption Mitigating Condition 2 and Alcohol Consumption Mitigating Condition 3 were applicable in this case. Department Counsel's ability to argue for an alternate interpretation of the record evidence is not sufficient to show the Judge's decision to apply these two mitigating condition was arbitrary or capricious in light of the evidence as a whole.

4. Whether the Administrative Judge's choice to apply Criminal Conduct Mitigating Condition 1 was not supported by the record evidence. The Administrative Judge concluded that Criminal Conduct Mitigating Condition 1<sup>(8)</sup> was applicable because the last incident of criminal behavior occurred in 2002. Department Counsel contends the Judge erred by applying Criminal Conduct Mitigating Condition 1 because: (a) Applicant was on supervised probation through June 2003; and (b) considering the evidence of Applicant's pattern of criminal conduct during the period January 1989-April 2002, Applicant's criminal conduct was still recent as of the January 2005 hearing. Applicant counters by arguing that it is not reasonable for Department Counsel to argue that Applicant's time on probation should be counted as extending the period of criminal behavior for purposes of Criminal Conduct Mitigating Condition 1.

Both parties correctly note that the Board has declined to adopt a "bright-line" definition or rule for what constitutes "recent" under Criminal Conduct Mitigating Condition 1. This case does not lead the Board to conclude that such a "bright-line" definition or rule be adopted. By its plain language, Criminal Conduct Mitigating Condition 1 refers to the recency of the applicant's "criminal behavior," not the legal consequences that may follow from it. Although it is reasonable for Department Counsel to argue that the period of time that Applicant was on probation should be a relevant consideration in this case, the period of time that Applicant was on probation does not constitute "criminal behavior." Although the record evidence of Applicant's probation can be relevant for the Judge to consider under the general factors of Directive, Section 6.3 or Adjudicative Guidelines, Item E2.2.1,<sup>(9)</sup> its relevance under those general factors

does not warrant construing or interpreting the phrase "criminal behavior" in a strained or artificial manner inconsistent with its plain meaning. Considering the record as a whole, the Board need not agree with the Judge to conclude that Department Counsel has not shown that it was arbitrary or capricious for the Judge to decide that application of Criminal Conduct Mitigating Condition 1 was warranted.

5. Whether it was arbitrary, capricious, and contrary to the record evidence for the Administrative Judge to conclude Applicant did not engage in criminal conduct in connection with the incident that resulted in his arrest in May 2001. Department Counsel challenges the Administrative Judge's conclusion that Applicant did not engage in criminal conduct in connection with the incident that resulted in his May 2001 arrest for false imprisonment, arguing: (a) the Judge's conclusion is implausible when viewed in light of the record evidence; (b) the record evidence shows Applicant participated in the criminal actions initiated by his brothers; (c) the Judge erred by relying on the fact that criminal charges against Applicant were dropped; and (d) the record evidence shows Applicant committed acts that satisfy the elements of the state statute defining the offense of false imprisonment. Applicant contends the Judge's conclusion is sustainable because: (i) the actions and motives of Applicant's brothers are irrelevant to the actions of Applicant; and (ii) the record evidence supports the Judge's conclusion. <sup>(10)</sup>

The Board does not have to agree with the Administrative Judge's conclusion to decide that, considering the record evidence as a whole, Department Counsel has not demonstrated the Judge's conclusion is arbitrary, capricious, or contrary to the record evidence.

6. Whether the Administrative Judge's choice to apply Criminal Conduct Mitigating Condition 5 was not supported by the record evidence. The Administrative Judge applied Criminal Conduct Mitigating Condition 5 <sup>(11)</sup> (Decision at p. 7), apparently based on his conclusion that the charge of false imprisonment was dropped or dismissed because there was no basis for a prosecution (Decision at pp. 7-8). Department Counsel challenges the Judge's application of Criminal Conduct Mitigating Condition 5, arguing: (a) there is no record evidence that Applicant was acquitted; and (b) the Judge erred by speculating about the reason(s) the false imprisonment charge was dropped or dismissed by state authorities. Applicant contends the Judge did not err by applying Criminal Conduct Mitigating Condition 5, arguing: (i) the Judge did not rely solely on the evidence that the false imprisonment charge was dropped or dismissed; (ii) the Judge did not specifically find that Applicant was acquitted of the charge; and (iii) given the record evidence it was reasonable for the Judge to conclude Applicant did not engage in criminal conduct in connection with the incident that led to his arrest for false imprisonment. Department Counsel's claims have merit.

There is no record evidence that Applicant was acquitted -- a requirement for the application of Criminal Conduct Mitigating Condition 5. <sup>(12)</sup> Absent such evidence, it was arbitrary and capricious for the Judge to apply this mitigating condition. As noted earlier in this decision, a Judge cannot construe or interpret Adjudicative Guidelines disqualifying or mitigating conditions in a manner contrary to their plain language. Given the record evidence in this case and the plain language of Criminal Conduct Mitigating Condition 5, it was arbitrary and capricious for the Judge to apply that mitigating condition. However, given the Judge's sustainable findings and conclusions under Guideline J, this error is harmless.

### Conclusion

The Board affirms the Administrative Judge's decision because Department Counsel has not demonstrated error below that warrants remand or reversal.

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: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. "Consumption of alcohol, subsequent to a diagnosis of alcoholism by a credentialed medical professional and following completion of an alcohol rehabilitation program" (Directive, Adjudicative Guidelines, Item E2.A7.1.2.6).
2. *See* Directive, Section 6.3 and Additional Procedural Guidance, Item E3.1.25.
3. *See, e.g.*, ISCR Case No. 02-05110 (March 22, 2004) at pp. 4-6.
4. *See, e.g.*, ISCR Case No. 02-02892 (June 28, 2004) at p. 4.
5. *See, e.g.*, ISCR Case No. 00-0489 (January 10, 2002) at p. 10.
6. "The problem occurred a number of years ago and there is no indication of a recent problem" (Directive, Adjudicative Guidelines, Item E2.A7.1.3.2).
7. "Positive changes in behavior supportive of sobriety" (Directive, Adjudicative Guidelines, Item E2.A7.1.3.3).
8. "The criminal behavior was not recent" (Directive, Adjudicative Guidelines, Item E2.A10.1.3.1).
9. *See, e.g.*, ISCR Case No. 99-0018 (December 9, 1999) at p. 3.
10. Applicant also contends Department Counsel's citation of the state statute constitutes new evidence on appeal. That contention is not persuasive. The record below contains citations to the state statute under which Applicant was charged. It is permissible for a party can ask the Board to take administrative notice of the text of a statute identified or referred to in the record evidence or during the proceedings below.
11. "Acquittal" (Directive, Adjudicative Guidelines, Item E2.A10.1.3.5).
12. *See, e.g.*, ISCR Case No. 00-0016 (October 23, 2000) at pp. 2-3 ("The term 'acquittal' as it is commonly understood in legal terms connotes an adjudication on the merits of a criminal case that results in a finding of not guilty. . . . The Board will not construe the term 'acquittal' as it is used in [Criminal Conduct itigating Condition 5] in a manner that deviates from the commonly understood meaning of the term.")