

DATE: December 28, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-01240

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Constantine Bardis, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated December 15, 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). Administrative Judge James A. Young issued an unfavorable security clearance decision, dated September 2, 2004.

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 failed to consider evidence favorable to Applicant; (2) whether the Administrative Judge erred by finding Applicant abused alcohol in February 2004; (3) whether the Administrative Judge failed to consider and apply pertinent provisions of the Adjudicative Guidelines; and (4) whether the Administrative Judge erred by concluding that Applicant had not demonstrated mitigation of his history of alcohol abuse. 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 failed to consider evidence favorable to Applicant. Applicant contends the Administrative Judge failed to consider evidence favorable to him. In support of that contention, Applicant argues the Judge failed to consider his un rebutted testimony. This claim of error is not persuasive.

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. Because there is no legal requirement that a Judge specifically discuss or refer to every piece of evidence, the presumption that the Judge considered all the record evidence is not rebutted by an appealing party's ability to cite to record evidence that was not mentioned in the Judge's decision. *See, e.g.*, ISCR Case No. 00-0621 (January 30, 2002) at p. 3. Moreover, a party's strong disagreement with the Judge's weighing of the record evidence is not sufficient to rebut that presumption. *See, e.g.*, ISCR Case No. 00-0633 (October 24, 2003) at p. 5.

There is no legal requirement that an Administrative Judge must accept a witness's testimony merely because it is un rebutted. *See, e.g.*, ISCR Case No. 99-0005 (April 19, 2000) at p. 3. As the trier of fact, the Judge must assess the credibility of a witness's testimony, and apart from such a credibility determination, the Judge must consider and weigh a witness's testimony in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 02-14995 (July 26, 2004) at pp. 6-7. Applicant is not entitled to have the Judge consider his testimony without regard to the Judge's assessment of the credibility of his testimony, or in isolation from other record evidence.

2. Whether the Administrative Judge erred by finding Applicant abused alcohol in February 2004. With one exception, Applicant does not challenge the Administrative Judge's findings of fact about his history of alcohol abuse. Applicant

strongly challenges the Judge's finding that he was involved in a three-day bender in February 2004, asserting that finding reflects a "biased" view that is not supported by the record evidence.

Applicant's suggestion of bias lacks merit. There is a rebuttable presumption that an Administrative Judge is impartial and unbiased, and a party seeking to overcome that presumption has a heavy burden on appeal. *See, e.g.*, ISCR Case No. 01-04713 (March 27, 2003) at p. 3. Bias is not established merely because a Judge makes a finding or reaches a conclusion that weighs against a party. Moreover, an appealing party's personal belief that a Judge is biased is not sufficient to rebut the presumption. Rather, the standard is whether the record of the proceedings below contains anything that would provide a basis for a disinterested party to reasonably question the fairness and impartiality of the Judge. *See, e.g.*, ISCR Case No. 02-10215 (January 30, 2004) at p. 3; ISCR Case No. 01-04713 (March 27, 2003) at p. 3. Applicant's claim of bias in this case is nothing more than bare assertion without any support in the record.

The Board need not decide whether it agrees with the Administrative Judge's characterization of the February 2004 matter as a "three-day drinking bender." Considering the record as a whole, the Judge had sufficient evidence to make a finding that Applicant was abusing alcohol when he took off three days from work in February 2004 to drink because of stress. Whether Applicant's drinking during that three-day period was a "bender" or something less than a full-blown "bender," the Judge had a rational basis to conclude that the Applicant's drinking in February 2004 raised a serious question about the efficacy and likelihood of success of Applicant's efforts at alcohol reform and rehabilitation. The security significance of the February 2004 drinking episode under Guideline G (Alcohol Consumption) is not reduced or diminished merely because it did not result in an arrest or other involvement with law enforcement officials.

3. Whether the Administrative Judge failed to consider and apply pertinent provisions of the Adjudicative Guidelines. Applicant asserts the Administrative Judge failed to consider and apply Alcohol Consumption Mitigating Conditions 2 (1) and 3. (2) This claim of error is not persuasive. Given the Judge's sustainable finding that Applicant abused alcohol in February 2004, the Judge's decision to not apply these two mitigating conditions was a reasonable and legally permissible one.

4. Whether the Administrative Judge erred by concluding that Applicant had not demonstrated mitigation of his history of alcohol abuse. Applicant also contends the Administrative Judge should have concluded his alcohol abuse history was mitigated, and made a favorable security clearance decision because Hearing Office Judges in other cases have rendered favorable decisions in similar cases. This argument fails to demonstrate the Judge erred.

The decision of a Hearing Office Administrative Judge in one case is not legally binding precedent on the Judge's colleagues in other cases. *See, e.g.*, ISCR Case No. 01-22606 (June 30, 2003) at pp. 3-5 (discussing precedential value of decisions by Hearing Office Administrative Judges, and the burden of persuasion that a party has when citing such decisions on appeal). Applicant's citation of two decisions by Hearing Office Judges in other Guideline G cases, standing alone, fails to demonstrate the Judge's decision in this case is arbitrary, capricious, or contrary to law.

Conclusion

The Board affirms the Administrative Judge's decision because Applicant has failed to demonstrate error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. "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).

2. "Positive changes in behavior supportive of sobriety" (Directive, Adjudicative Guidelines, Item E2.A7.1.3.3).