

DATE: July 7, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-07874

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated June 4, 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 Joseph Testan issued a favorable security clearance decision dated December 8, 2004.

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 favorable security clearance determination is 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) are 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⁽¹⁾

Whether the Administrative Judge's favorable security clearance decision is arbitrary, capricious, or contrary to law. The Administrative Judge found that Applicant's consumption of alcohol resulted in citations or arrests in 1996, 1997, 1998 and 2002. The Judge also found that although Applicant had significantly reduced his alcohol consumption, he still consumed it, on occasion, to the point of intoxication. The Judge concluded that Applicant's 1998 and 2002 alcohol-related incidents were security significant and required application of Guideline G Disqualifying Condition 1.⁽²⁾ The Judge then concluded that although Applicant continues to consume alcohol, it has been years since he consumed it to excess (*i.e.*, to the point his ability to safeguard classified information would be adversely affected). He also concluded that the fact that Applicant no longer drives after consuming alcohol ensures there will be no additional alcohol-related driving incidents, thus eliminating that security concern. The Judge concluded that Applicant qualified for Guideline G Mitigating Conditions 2⁽³⁾ and 3.⁽⁴⁾

On appeal, Department Counsel asserts the Administrative Judge's favorable security clearance decision is arbitrary, capricious, or contrary to law for the following reasons: (a) the Judge's failure to mention or consider the fact that Applicant was on court-ordered probation at the time of the hearing and would remain on probation until January 2005 reflected arbitrary and capricious action under the particular circumstances of this case; and (b) the Judge's application of Guideline G Mitigating Conditions 2 and 3 in Applicant's favor was error. Department Counsel's assertions have merit.

The Administrative Judge's decision makes no mention of the fact that, at the time of the close of the record in the case, Applicant was still under court-imposed probation for his 2002 alcohol-related incident (a DUI). An administrative judge is not required to discuss each and every piece of evidence before him in his decision. However, failure to discuss an important aspect of a case is error. Nothing in the Directive indicates that an applicant's current probationary status is a *per se* bar to a favorable security clearance decision. *See, e.g.*, ISCR Case No. 96-0710 (June 20, 1997) at p. 3.

However, given the fact that in this case the Judge's evaluation of Applicant's more recent pattern of alcohol consumption after his earlier alcohol-related incidents was critical to his resolution of the case, the fact that Applicant has been on probation during the more recent period cannot simply be disregarded. *See* DISCR Case No. 90-1115 (October 6, 1992) at p. 3. Under the circumstances of this case, the Judge's failure to consider and discuss the fact that Applicant was on probation indicates arbitrary and capricious action by the Judge.

The Administrative Judge found that Applicant still consumes alcohol occasionally to the point of intoxication.⁽⁵⁾ The Judge then concluded that Applicant's drinking was no longer excessive and applied Guideline G Mitigating Condition 2. The Judge's conclusion that Applicant's alcohol consumption is no longer excessive is not sustainable in light of his finding that Applicant still drinks to intoxication. Given Applicant's admission that he still drinks to intoxication, the Judge did not have a rational basis for concluding Applicant's alcohol abuse was sufficiently dated to warrant application of Mitigating Condition 2. *See, e.g.*, ISCR Case No. 98-0676 (August 15, 2000) at p. 4 (Applicant's admission that he drinks to intoxication several times a year precluded application of Guideline G Mitigating Condition 2). Similarly, Department Counsel is correct in arguing that the record evidence of Applicant's alcohol abuse since his last alcohol-related incident in 2002 undercuts the Judge's stated rationale for his application of Mitigating Condition 3. As Department Counsel notes, the arbitrary and capricious nature of the Judge's analysis is shown when the Judge concludes that Applicant's current consumption level is not excessive in the face of record evidence establishing that Applicant still drinks to intoxication once or twice a month, and drank to intoxication on an evening approximately one week before the hearing. Furthermore, as part of his rationale for applying Mitigating Condition 3, the Judge concluded that because Applicant no longer drives after consuming alcohol, he has insured that no additional alcohol-related incidents will occur. The Judge then concluded that the security concern expressed under Guideline G Disqualifying Condition 1 had been eliminated. Such analysis is error. Even if Applicant has not had alcohol-related incidents (as enumerated in Disqualifying Condition 1) since 2002, the record evidence of subsequent alcohol abuse by Applicant precludes application of Mitigating Condition 3. The Judge's reasoning is arbitrary and capricious because it focuses on the absence of one symptom (*i.e.*, alcohol-related incidents) and ignores the record evidence of security significance (*i.e.*, Applicant's continued drinking to intoxication).

Moreover, the Administrative Judge at one point stated that, despite his finding that Applicant still consumed alcohol occasionally to the point of intoxication, there was no evidence that Applicant's use of alcohol during the past several years reached the point that it would have adversely affected his ability to safeguard classified information. The Judge offers no discernible basis for this conclusion. Department Counsel need not prove that Applicant's alcohol abuse has resulted in a security violation⁽⁶⁾ or that Applicant's alcohol abuse poses a clear and present danger or imminent threat to national security.⁽⁷⁾ The Judge is articulating a standard for establishing a nexus between alcohol abuse and security eligibility that exists neither in the Directive nor under existing case law, and which runs contrary to the language of the Concern section of Guideline G.

Conclusion

Department Counsel has met its burden on appeal of demonstrating that the Administrative Judge erred. Considering the Judge's errors in their totality, correction of those errors warrants reversal. Accordingly, pursuant to Item E3.1.33.3. of the Additional Procedural Guidance, the Board reverses the Judge's December 8, 2004 decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. In responding to Department Counsel's appeal brief, Applicant makes assertions about his drinking since the hearing. Such assertions constitute new evidence, which the Board cannot consider. *See* Directive, Additional Procedural Guidance, Item E3.1.29.
2. "Alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol use" (Directive, Adjudicative Guidelines, Item E2.A7.1.2.1).
3. "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)
4. "Positive changes in behavior supportive of sobriety" (Directive, Adjudicative Guidelines, Item E2.A7.1.3.3).
5. The record evidence contains Applicant's admission that he drinks to intoxication once or twice a month. Hearing Transcript at p. 38.
6. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970).
7. *Smith v. Schlesinger*, 513 F.2d 462, 476 n.48 (D.C. Cir. 1975).