

DATE: January 5, 2005

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 03-11548

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Edward W. Loughran, Esq., Department Counsel

#### **FOR APPLICANT**

Karen A. O'Neil, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated December 5, 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 E (Personal Conduct). Administrative Judge James A. Young issued an unfavorable security clearance decision, dated August 10, 2004.

Applicant appealed the Administrative Judge's 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.

The following issues have been raised on appeal: (1) whether Applicant was denied effective assistance of counsel; (2) whether the Administrative Judge's adverse conclusions about Applicant's alcohol consumption are rational in light of the record evidence; (3) whether the Administrative Judge erred by failing to apply mitigating conditions under Guideline E (Personal Conduct); and (4) whether the Administrative Judge applied a "whole person" analysis to Applicant. For the reasons that follow, the Board affirms the 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 [\(1\)](#)**

(1) Whether Applicant was denied effective assistance of counsel. Government Exhibit 2 contains a letter, dated December 5, 2003, from DOHA addressed to Applicant which states in the paragraph discussing a hearing: "You may appear without counsel or with an attorney or personal representative." Applicant chose a determination without a hearing. In a letter apparently delivered to Applicant on May 7, 2004, the DOHA Department Counsel advised Applicant:

"Although it is not required that you be represented or assisted by an attorney to prepare your response to the Government's File of Relevant material, you have the right to be represented by counsel, and your careful attention to this matter is important, since any determination that may be made by the Administrative Judge to deny or revoke your security clearance will be reported to your employer and could affect your current employment and your future employability."

Applicant submitted a response to the Government's File of Relevant Material, dated June 21, 2004. Nowhere in that response, or at any other time in the record prior to the Administrative Judge's decision, did Applicant discuss either the question of legal representation or his decision to seek counsel from his supervisor.

On appeal, Applicant raises for the first time a claim that DOHA's notice to Applicant regarding his right to representation was negated because Applicant twice sought advice from his supervisor who told Applicant that he did not need an attorney. The Board can not consider new evidence on appeal. *See*, Directive, Additional Procedural Guidance, Item E3.1.29. Furthermore, Applicant's claim asks DOHA to correct Applicant's decisions to seek and heed the advice of his supervisor. Even if we could consider Applicant's claims, DOHA cannot be responsible for an applicant's decisions. Finally, the Board has previously rejected the proposed application of the ineffective assistance of

counsel doctrine to DOHA cases. *See, e.g.*, ISCR Case No. 01-07629, April 5, 2002. Applicant's argument is not a basis to remand the case for a full hearing on the merits, as Applicant requests.

(2) Whether the Administrative Judge's adverse conclusions about Applicant's alcohol consumption are rational in light of the record evidence. Applicant argues that there is no record evidence of current excessive alcohol consumption and that Applicant's past problems with alcohol have been mitigated. Applicant believes that the Judge's adverse findings about Applicant's alcohol consumption are not rational in light of the record evidence.

The Board need not agree with a Judge's findings in order to determine that the findings were not arbitrary, capricious or contrary to law. Given the record evidence in this case, including Applicant's two convictions for Driving Under the Influence and the evidence of his overall drinking pattern since 1983, there was sufficient evidence to support the Judge's adverse findings. While the record evidence would have permitted the Administrative Judge to consider applying additional mitigating conditions, beyond the one condition he applied (Alcohol Consumption Mitigating Condition 1), (2) the record evidence did not require the Judge to apply any additional mitigating conditions. Applicant cites a previous Board decision (ISCR Case No. 96-0869) for the proposition that the passage of time since the last alcohol-related incident combined with the lack of evidence of a recent problem mandates the application of Alcohol Consumption Mitigating Condition 2. (3) The conclusions reached by the Board in the cited case are not controlling in the present case. Applicant bears the burden of proof to produce evidence that supports the application of mitigating conditions. Given the state of evidence in this case, the Administrative Judge was not required to apply Mitigating Condition 2 as a matter of law.

(3) Whether the Administrative Judge erred by failing to apply mitigating conditions under Guideline E (Personal Conduct). Applicant argues that his July 2000 falsification and his 1988 failure to pay a fine should have been found mitigated. (4) On appeal, Applicant cites two Guideline E (Personal Conduct) mitigating conditions which he argues should have been applied to his case. Neither of the cited mitigating conditions is applicable to the government's security concern regarding Applicant's falsification of a security clearance application and Applicant's failure to pay a court-ordered fine. (5) Applicant has failed to demonstrate error by the Judge.

(4) Whether the Administrative Judge applied a "whole person" analysis to Applicant. Applicant argues that the Judge failed to do a "whole person" analysis of Applicant's conduct and circumstances. The Board finds Applicant's assertion unpersuasive. Applicant's arguments in support of his contention that the Judge failed to apply a "whole person" analysis parallel arguments that he made elsewhere in his brief and which have been discussed in other parts of this decision. Applicant suggests that the Judge's evaluation was "piecemeal." The Judge's opinion cannot be fairly read as a piecemeal analysis of Applicant's conduct and circumstances. It is Applicant who is seeking a piecemeal analysis of his case to the extent that he asks the Board to review the Judge's analysis of some of the acts with security implications listed in the SOR, without reference to other acts in the SOR that are also of security significance.

### Conclusion

Applicant has failed to demonstrate error warranting remand or reversal. Therefore, the Administrative Judge's August 10, 2004 decision is affirmed.

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

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge made Formal Findings For Applicant under SOR paragraphs 1.b., 1.d., 2.a., 2.b., and 2.d. Those findings are not issue on appeal.

2. "The alcohol related incidents do not indicate a pattern."

3. "The problem occurred a number of years ago and there is no indication of a recent problem."

4. Applicant argues and the Board agrees that the Administrative Judge made a harmless error in the formal finding for SOR paragraph 2.e., where he mistakenly found against Applicant. The Judge's analysis in the body of his opinion is clearly favorable to Applicant on that paragraph.

5. Applicant cites Mitigating Condition 1, "The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability," and Mitigating Condition 5, "The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress."