

DATE: July 25, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-12237

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Chief Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On April 5, 2004, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision--security concerns raised under Guideline J (Criminal Conduct), pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 23, 2006, after the hearing, Administrative Judge Michael J. Breslin denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Administrative Judge's unfavorable clearance decision under Guideline J is arbitrary, capricious, and contrary to law.

Whether the Record Supports the Administrative Judge's Factual Findings

A. The Administrative Judge made the following pertinent findings of fact:

Applicant was born in January 1960. When he was 17 years old, he left high school and enlisted in the U.S. Marine Corps, where he served from August 1977 to July 1979. Applicant held a security clearance while in the Marine Corps.

Applicant began working for his current employer, a defense contractor, in May 1980. In June 1981, Applicant was married and two children were born of the marriage.

In October 1986, while driving home after drinking alcohol during an evening in a club, Applicant allowed the vehicle he was driving to cross the center line and side-swipe another car. The police responded and Applicant was arrested and charged with Driving Under the Influence of Alcohol (DUI) and Driving on the Wrong Side of the Road.

Applicant and his wife had a troubled marriage. They argued often and at times their disputes became violent. In May 1989, Applicant's wife filed a complaint with authorities, who arrested Applicant for Simple Battery and Contempt of Court. The charge was later dismissed.

Similar problems with his wife led to an arrest for Disorderly Conduct in November 1989. Applicant was found guilty and required to pay a \$55.00 fine.

Later that same month, Applicant was again involved in an argument with his wife at their home, and she called the police. A witness reported that shots were fired, although Applicant denies this. The police officers told Applicant to step into the yard, but he refused to leave his home. As the police approached Applicant, he grabbed one of the officers, dragged him into the house, and scuffled with him. A second officer entered the home to assist. Applicant struck and hit the police officers before he was physically subdued and placed under arrest. Authorities charged Applicant with two counts of Aggravated Assault on a Police Officer, Aggravated Assault on his wife, and two counts of Obstruction of a Police Officer. In April 1990, pursuant to a plea agreement, Applicant pled guilty to two counts of Obstruction of a Police Officer. The court sentenced him to five years confinement to be served on probation, a \$1,000.00 fine, and 250 hours of community service.

Applicant was arrested again in December 1989 for Simple Battery and Contempt of Court. The court later dismissed the charges.

In August 1996, Applicant and his wife got into an argument. His wife smashed the car windshield. He asserted she got their pistol, but he took it from her. Applicant took the pistol and a half-pint bottle of whiskey and went out to his car. When the police arrived, they attempted to restrain Applicant, but he resisted, leading to a scuffle. Applicant broke free of the police and ran into his house. They later apprehended and handcuffed Applicant; he threatened to harm the arresting officers. Authorities charged Applicant with two counts of Obstruction of Police Officers, making Terroristic Threats, Interference with Government Property, Possession of a Firearm by a convicted felon, Escape, Simple Battery, and creating a Public Disturbance. Applicant negotiated a plea agreement to Obstruction of Police Officers and Possession of a Firearm by a Felon; the remaining charges were not prosecuted. The court sentenced Applicant to five years confinement to be served on probation, a \$1,500.00 fine, and payment of court fees. The court also required Applicant to submit to an alcohol/drug assessment.

Applicant enrolled in counseling to help with his marital problems, focusing on depression and anger management. He continued the counseling for about one year.

On January 24, 1999, Applicant consumed several drinks of whiskey while watching a football game, and then drove to visit a friend. He saw a female acquaintance and stopped to pick her up. A police officer in a nearby patrol car pulled Applicant over for stopping his vehicle suddenly. The patrolman administered a field sobriety test, then took Applicant to the police station for a Breathalyzer test. Applicant coughed into the machine; the officers concluded he refused to take the test. Authorities charged Applicant with DUI.

In April 1999, Applicant pled guilty to the DUI charge. The court sentenced him to pay a \$645.00 fine or serve six months in jail, and to perform community service. He was also required to attend Alcoholics Anonymous meetings for six months. Applicant indicated he didn't learn anything from the program.

Applicant's last arrest for DUI occurred while he was still on probation for the incident in August 1996. As a result, on February 1, 1999, authorities revoked Applicant's probation. He was required to spend ten days in confinement.

Applicant divorced his wife in September 1998 and was awarded custody of their children.

Applicant still works for the defense contractor. He began as a drill press operator in the fabrication shop. He then worked as a composite fabricator, and later as a mechanic on experimental aircraft. In about April 1996, Applicant received a Secret clearance. Subsequently, he was considered for a Special Access Program to work on a classified project; the military service involved denied his access. Applicant also worked as a material review board investigator in the Quality Control area. In August 1999 he received a commendation for outstanding job performance. At the time of the hearing, Applicant had successfully held a security clearance for about nine years.

Presently, Applicant stills consumes alcoholic beverages regularly. He drinks whiskey on the average of three or four days each week. He estimates his consumption at about one-half to one pint of whiskey each week. He denies drinking to the point of intoxication.

B. Discussion

The Judge's findings of fact are not challenged on appeal.

Whether the Record Supports the Administrative Judge's Ultimate Conclusions

An Administrative Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Appeal Board may reverse the Administrative Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. Our scope of review under this standard is narrow, and we may not substitute our judgment for that of the Administrative Judge. We may not set aside an Administrative Judge's decision "that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency. . ." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42. We review matters of law *de novo*.

Applicant seeks reversal of the Administrative Judge's adverse clearance decision based upon the fact that the disqualifying conduct is not recent and is not likely to recur. In support of his argument, Applicant notes that the last incident occurred in January 1999 and that his criminal behavior was due in whole or in part to the domestic situation arising out his failed marriage for which his divorce was finalized in September 1998. Applicant's arguments have merit.

In his decision, the Administrative Judge found that Applicant had been involved in no criminal incidents for about seven years and specifically concluded that his criminal conduct was not recent under Guideline J Mitigating Condition 1, ⁽¹⁾ and that potential mitigating condition applied. The Judge also found that it was Applicant's repeated arguments with his wife that gave rise to the offenses that resulted in violence or public disturbance, and that since his divorce in 1998 Applicant has had little regular contact with her. As a result, the Judge specifically concluded that the factors leading to Applicant's violent offenses were not likely to recur. Although the Judge entered adverse formal findings as to those incidents, reading his decision as a whole the Board concludes the Judge considered those offenses mitigated. ⁽²⁾ However, the Judge went on to conclude that neither Mitigating Conditions 4-⁽³⁾ or 6-⁽⁴⁾ applied to Applicant's alcohol related offenses because Applicant had derived little benefit from previous alcohol counseling and continued to drink alcohol. In a separate paragraph, the Judge then abruptly stated that Applicant had not mitigated the security concerns arising from his history of criminal conduct. The Judge never explained why itigating Condition 1, which he had previously stated applied, was insufficient to mitigate the security concerns given the facts in the case. ⁽⁵⁾

The Directive is silent on what constitutes a sufficient period of reform and rehabilitation. However, such silence does not mean an Administrative Judge has unfettered discretion in deciding what period of time is sufficient to demonstrate reform and rehabilitation. The sufficiency or insufficiency of an applicant's period of conduct without recurrence of past misconduct does not turn on any bright-line rules concerning the length of time needed to demonstrate reform and rehabilitation, but rather a reasoned analysis of the facts and circumstances of an applicant's case based on a careful evaluation of the totality of the evidence record within the parameters set by the Directive. However, the Board has repeatedly held that if the record evidence shows that a significant period of time has passed without evidence of misconduct by an applicant, then the Judge must articulate a rational basis for concluding why that significant period of time does not demonstrate changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation. *See, e.g.*, ISCR Case No. 98-0394 at 4 (App. Bd. Jun. 10, 1999). In this case, the Judge specifically concluded that Applicant's conduct was not recent, and made significant findings which indicated that the disqualifying conduct was not likely to recur. ⁽⁶⁾ Given those favorable findings and conclusions, the Judge did not articulate a sufficient rationale for discounting the mitigating effect of Mitigating Condition 1. *See, e.g.*, ISCR Case No. 02-23352 at 5-7 (App. Bd. Aug. 4, 2004).

The Board construes the Administrative Judge's decision as relying on Applicant's current level of alcohol consumption as the basis for denying Applicant a security clearance. This is a problem in this case for several reasons. There is no evidence in the record that Applicant currently consumes alcohol in excess or to the point of intoxication, and the government did not allege that Applicant's alcohol consumption was of current security concern under Guideline G. Nor did the Judge amend the SOR on his own motion to include Guideline G. ⁽⁷⁾ The record indicates that Applicant has ⁽⁸⁾

consumed alcohol at a relatively moderate and decreasing level since his last alcohol related criminal incident. The Judge found that Applicant has successfully held a security clearance for nine years and has been commended for outstanding job performance. The Judge offered no analysis or explanation as to why at this juncture Applicant's current diminished level of alcohol consumption places Applicant at risk of resuming the type of disqualifying conduct that Applicant has not engaged in since 1999. The lack of such an analysis or explanation renders the Judge's adverse decision arbitrary and capricious.

Order

The Administrative Judge's unfavorable security clearance is REVERSED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman (Acting), Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

Separate Opinion of Member Jeffrey D. Billett

I agree entirely with my fellow Board member's conclusion that the Administrative Judge erred in his treatment of Guideline J Mitigating Condition 1 in this case. However, I disagree that the Judge's analysis of Applicant's alcohol related offenses and Applicant's current consumption of alcohol was arbitrary and capricious. The government chose to allege two alcohol related incidents that resulted in arrests under Guideline J as opposed to Guideline G. I think the Judge properly treated the alcohol incidents as criminal under Guideline J, and he was not required as a matter of law to amend the SOR to afford analysis of the incidents under Guideline G. I do not agree with my colleagues' assertion that failure to allege the alcohol-related arrests under Guideline G did not place Applicant on reasonable notice that Applicant's current alcohol consumption had the potential to be an issue in the case.

Applicant's current level of alcohol consumption affected the case only insofar as the Administrative Judge used it as a basis for not applying Guideline J Mitigating Conditions 4 and 6. I think the Judge's analysis was reasonable on this point. While Applicant has never been diagnosed as alcohol dependent and does not now drink to intoxication, he did volunteer in his testimony that he didn't learn anything from his court-ordered attendance at Alcoholics Anonymous and he continues to drink significant amounts of alcohol on a regular basis. I do not have to agree with the Judge's resolution of this issue to conclude that these facts, coupled with Applicant's history of alcohol-related arrests, provides a reasonable basis for the Judge's conclusion that Guideline J Mitigating Conditions 4 and 6 do not apply.

With regard to Guideline J Mitigating Condition 1, the Administrative Judge's conclusion that it applied, without any further analysis as to how that conclusion related to his ultimate disposition of the case, is problematic. The Board has long held that any single Adjudicative Guidelines Disqualifying or Mitigating Condition is not solely dispositive of a case. That being said, once an administrative judge applies a mitigating factor, it is incumbent upon the Judge to offer some explanation as to why that factor does not result in a favorable outcome. This is particularly true in the instant case where the most recent incident of criminal conduct predated the hearing by more than six years.

I would remand the case to the Administrative Judge with instructions to more fully articulate his analysis of the case under Guideline J Mitigating Condition 1.

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

1. E2.A10.1.3.1 ("The criminal behavior was not recent").
2. *See, e.g.*, ISCR Case No. 02-29608 at 3-4 (App. Bd. Dec. 17, 2003).
3. E2.A10.1.3.4 ("The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur").
4. E2.A10.1.3.6 ("There is clear evidence of successful rehabilitation").
5. Decision at 6.
6. Decision at 4 & 6.
7. The SOR may be amended at the hearing by an Administrative Judge on his own motion, or upon motion by Department Counsel or the applicant, so as to render it in conformity with the evidence admitted, or for other good cause. *See* Directive ¶ E3.1.17. More importantly, an unfavorable clearance decision cannot be made unless the applicant has been provided with an SOR that is as detailed and comprehensive as the national security permits. *See* Directive ¶ E3.1.3. Here, the SOR did not place this *pro se* Applicant on reasonable notice that his current level of alcohol consumption, which based on the Judge's findings appeared to be both moderate and legal, would be the real issue of paramount concern in determining the outcome of his case. An SOR issued under Guideline G would have made it clear to the Applicant that the government had concerns as to whether there was a nexus between Applicant's prior alcohol related offenses and his current level of alcohol consumption.
8. The record evidence cited by the Administrative Judge indicates that Applicant consumes alcohol three to four days a week and does not consume alcohol to the point of intoxication. Decision at 4. The record also shows that Applicant consumes only one to two drinks a day, weighs 270 lbs, and his level of alcohol consumption has decreased since 2002. The Judge made no findings which would indicate that evidence is not credible or accurate. Additionally, the Judge did not find Applicant had ever been diagnosed as alcohol dependent or as an alcohol abuser.