

DATE: August 5, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-15139

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated April 12, 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 Darlene Lokey Anderson issued an unfavorable security clearance decision, dated February 22, 2005.

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 some of the Administrative Judge's findings of fact are not supported by the record evidence; (2) whether the Administrative Judge erred by concluding Applicant had not mitigated his conduct under Guideline G (Alcohol Consumption); and (3) whether the Administrative Judge erred by concluding Applicant had not mitigated his conduct under Guideline J (Criminal Conduct). 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 some of the Administrative Judge's findings of fact are not supported by the record evidence. On appeal, Applicant concedes that he was intoxicated on the three occasions covered by SOR paragraphs 1.c (January 2003), 1.d (September 1995), and 1.e (July 1991), but contends those three incidents demonstrate only "isolated alcohol abuse," not "a history of drinking to excess." Applicant also contends: (a) the Administrative Judge erred by finding he was found guilty of driving under the influence in connection with the January 2003 incident; (b) the Judge erred by drawing an adverse inference from the fact that he continued to drink after participating in an Addictions Awareness Program (AAP) as a condition of probation arising out of the January 2003 incident; and (c) the Administrative Judge erred by finding he has "an alcohol problem that must be addressed" and has exhibited an "abusive drinking pattern."

Given the record evidence, the Administrative Judge erred by finding Applicant was found guilty of driving under the influence (DUI) in connection with the January 2003 incident. However, Applicant does not dispute that the incident was alcohol-related and that he was intoxicated when the January 2003 incident occurred. For the purposes of Guideline G (Alcohol Consumption), the formal disposition of the DUI charge against Applicant is irrelevant to the evidence that the January 2003 incident involved alcohol abuse. For the purposes of Guideline J (Criminal Conduct), the formal disposition of the DUI charge against Applicant is not irrelevant. But the fact that Applicant's case involved a form of deferred adjudication instead of a final adjudication of the charges against him did not preclude the Judge from finding that the record evidence showed Applicant engaged in the conduct that formed the basis of the DUI charge against him.

Considering the record as a whole, it was not arbitrary or capricious for the Administrative Judge to draw an adverse inference from the evidence that Applicant continued to drink after participating in the AAP. The Board does not have to agree with the Judge to conclude the inference drawn by the Judge is legally permissible in light of the record as a

whole. Applicant's ability to argue for an alternate interpretation of the record evidence is not sufficient to demonstrate the Judge's challenged inference is an impermissible one.

Applicant also argues that he presented evidence that alleviated any concerns under Alcohol Consumption Disqualifying Conditions 3, 4, 5, and 6. The Administrative Judge did not conclude that Alcohol Consumption Disqualifying Conditions 3, 4 or 6 applied to Applicant's case.<sup>(1)</sup> Therefore, Applicant's argument concerning those three disqualifying conditions is moot. However, Applicant's argument concerning Alcohol Consumption Disqualifying Condition 5 has merit. Given the record evidence in this case, the Administrative Judge failed to articulate a discernible basis for her conclusion that Applicant's episodic alcohol abuse warranted application of Alcohol Consumption Disqualifying Condition 5.<sup>(2)</sup> Although there is record evidence that Applicant has consumed alcohol to the point of impaired judgment, the Judge failed to explain why she concluded Applicant's episodic alcohol abuse was "habitual" or "binge" in nature. However, this error is harmless because the Judge's application of Alcohol Consumption Disqualifying Condition 1<sup>(3)</sup> is supported by the evidence concerning Applicant's three alcohol-related incidents.

Similarly, considering the record as a whole, it was not arbitrary or capricious for the Administrative Judge to find that Applicant's episodic alcohol abuse indicated the existence of a drinking problem that falls under Guideline G (Alcohol Consumption). The Board does not have to agree with the Judge to conclude the Judge's finding that Applicant has a drinking problem is legally permissible in light of the record as a whole. Applicant's ability to argue for an alternate interpretation of the record evidence is not sufficient to demonstrate the Judge's finding is not sustainable.<sup>(4)</sup>

2. Whether the Administrative Judge erred by concluding Applicant had not mitigated his conduct under Guideline G (Alcohol Consumption). Applicant contends that the Administrative Judge should have concluded his alcohol-related incidents were mitigated because: (a) those three incidents did not constitute a history of drinking to excess; and (b) the three incidents are mitigated by application of Alcohol Consumption Mitigating Condition 1<sup>(5)</sup> and Alcohol Consumption Mitigating Condition 3<sup>(6)</sup> and the "whole person" concept.

As discussed earlier in this decision, the Administrative Judge had sufficient record evidence to conclude that Applicant had abused alcohol within the meaning of Guideline G.

Applicant is correct in arguing that the passage of time between the alcohol-related incidents that occurred in 1991 and 1995 and the alcohol-related incident in 2003 is a relevant consideration. However, considering the record as a whole, the Administrative Judge had sufficient evidence to conclude Applicant had exhibited a pattern of alcohol-related incidents. Accordingly, the Judge's decision to not apply Alcohol Consumption Mitigating Condition 1 is not arbitrary or capricious.

Applicant presented evidence that the Administrative Judge could have concluded was sufficient to support application of Alcohol Consumption Mitigating Condition 3. However, the Board need not agree with the Administrative Judge to conclude it was not arbitrary or capricious for the Judge to decide that Applicant had not presented enough evidence to warrant application of that mitigating condition.

Considering the decision below in its entirety, the Board does not have to agree with the Administrative Judge's conclusions to decide that the Judge considered Applicant's case under the "whole person" concept. Applicant has not demonstrated that the Judge's overall unfavorable conclusions under Guideline G were inconsistent with a "whole person" evaluation of his case.

3. Whether the Administrative Judge erred by concluding Applicant had not mitigated his conduct under Guideline J (Criminal Conduct). Applicant contends the Administrative Judge should have concluded his conduct was mitigated under Guideline J because: (a) the passage of time since the 1991 and 1995 incidents means they are not recent; and (b) his alcohol-related incidents do not constitute a pattern because of the passage of time.

The Administrative Judge was not required to consider the 1991 and 1995 incidents in isolation from the 2003 incident. The Judge was not required to evaluate Applicant's case in a piecemeal manner.

As discussed earlier, the passage of time between the alcohol-related incidents that occurred in 1991 and 1995 and the alcohol-related incident in 2003 is a relevant consideration. However, considering the record as a whole, the Administrative Judge had sufficient evidence to conclude the three incidents were evidence of a pattern of conduct. Moreover, the Applicant's argument addresses only one of the components articulated in the Concern section of Guideline J ("A history *or* pattern of criminal activity . . . .")(italics added). The Judge reasonably could consider Applicant's three alcohol-related incidents as constituting a history of criminal conduct.

### Conclusion

The Board affirms the Administrative Judge's decision because Applicant has not demonstrated harmful error below.

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: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge quoted the language of Alcohol Consumption Disqualifying Condition 5, but gives it the number "4" (Decision at p. 3). Reading the decision in its entirety, the Board concludes the number "4" is a typographical error.
2. "Habitual or binge consumption of alcohol to the point of impaired judgment" (Directive, Adjudicative Guidelines, Item E2.A7.1.2.5).
3. "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).
4. Applicant asserts the Administrative Judge should not have considered the evidence that a doctor recommended he refrain from further alcohol use as evidence against him, arguing that evidence was offered to show a change in his behavior supportive of Alcohol Consumption Mitigating Condition 3 ("Positive changes in behavior supportive of sobriety"). The particular reason that a party has for offering certain evidence does not restrict the Judge's authority to consider that evidence in light of the record as a whole and draw reasonable inferences about it.
5. "The alcohol related incidents do not indicate a pattern" (Directive, Adjudicative Guidelines, Item E2.A7.1.3.1).
6. "Positive changes in behavior supportive of sobriety" (Directive, Adjudicative Guidelines, Item E2.A7.1.3.3).