DATE: May 10, 2006

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 03-16251

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Daniel Crowley, Esq, Department Counsel

FOR APPLICANT

Maurice J. Ringel, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 3, 2004, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision--security concerns raised under Guideline K (Security Violations) and Guideline G (Alcohol Consumption), of Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive). Applicant requested a hearing. On October 17, 2005, after the hearing, Administrative Judge Elizabeth M. Matchinski denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

The dispositive findings of fact by the Administrative Judge that are relevant to this appeal are as follows:

On July 11, 2002, Applicant was interviewed by two company security officials about another matter when Applicant exhibited signs of being under the influence of alcohol, although he was steady on his feet. It was determined Applicant should be evaluated by a medical professional for the presence of alcohol. After a company nurse administered a sobriety test, Applicant was transported to an outside clinic for testing. He was determined to be under the legal limit, although there was alcohol in his system.[(1)] Applicant, who had initially denied any consumption of alcohol that day, admitted to company security officials that he had consumed two beers, one in the morning and one with lunch, before reporting for work that day.[(2)] He also admitted drinking one beer at lunch frequently, although not on company property. Since testing was positive for alcohol, although under the legal limit for drunk driving, he could not return to work, but was permitted by human resources to drive himself home despite concerns of the security department. An inspection of Applicant's vehicle determined there were eight unopened beers in a cooler in the back of his truck and four empty cans in the truck bed. On his way home, Applicant purchased a six-pack of beer.

The company required him to submit to a medical evaluation through the company's employee assistance program (EAP). The EAP's designated medical mental health professional, a psychiatrist who evaluated Applicant on or before August 12, 2002, found no significant problems, alcohol or otherwise, to prevent Applicant's return.

Concerning his drinking before reporting to work on July 11, 2002, Applicant indicated he felt completely comfortable with his ability to perform his work duties. Applicant detailed his history of alcohol consumption, admitting he consumes beer, which he enjoys, on a regular basis--one beer about twice weekly before reporting to work, one beer almost daily during lunch, two to three beers most evenings after work, and a case of beer on weekends. He denied

drinking on company property or having an alcohol problem.

Applicant has two general claims of error: (a) the Administrative Judge's finding that Applicant was "under the influence of alcohol" during an incident at work in July 2002, is arbitrary, capricious, or contrary to law; and (b) the Administrative Judge's conclusion that Applicant's alcohol consumption poses a security concern is arbitrary, capricious or contrary to law, and is inconsistent with a "whole person" analysis.

Since the Administrative Judge found in Applicant's favor with regard to Guideline K, that Guideline is not at issue on appeal. With regard to Guideline G, Applicant raises numerous objections to the Judge's conclusions[(3)] as to his consumption of beer and the security concerns raised by that consumption. Among the issues Applicant raises are the following: (1) the Judge's characterization of Applicant's drinking habits, (2) the Judge's application of Guideline G disqualifying conditions in Applicant's case, (3) the Judge's failure to apply mitigating conditions in Applicant's situation, (4) the Judge's conclusions that future alcohol-related incidents at work cannot be ruled out and that Applicant has failed to meet his "burden of reform," and (5) the Judge's failure to apply or properly apply the relevant factors under the "whole person" analysis required by the Adjudicative Guidelines.

Applicant claims that the Administrative Judge erred in finding in the synopsis of her decision that Applicant was "under the influence of alcohol" during an incident at work on July 11, 2002. Even if we assume, solely for purposes of this appeal, that the language "under the influence of alcohol" did not accurately describe Applicant's situation on July 11, 2002, the Board has held that a flaw or failing in the synopsis of a decision is unlikely to be harmful error. *See*, *e.g.*, ISCR Case No. 02-23336 at 3-4 (App. Bd. May 10, 2004). In the body of her decision, the Judge more specifically described the situation as Applicant having "exhibited signs of being under the influence of alcohol, although he was steady on his feet." Decision at 6. The Judge's focus was not on intoxication, but on whether there was substantial record evidence to conclude that Applicant had reported to work on July 11, 2002, in an impaired condition.[(4)] The Judge concluded that Applicant's conduct on July 11, 2002 fell within Disqualifying Condition 2. Applicant offers a plausible alternative interpretation of the record evidence. But Applicant's ability to offer such an interpretation does not prove that the Judge's conclusion was arbitrary, capricious or contrary to law, and it is sustainable given the record evidence.

Similarly, the Judge's conclusion that Applicant's conduct fell within Alcohol Consumption Disqualifying Condition 5 [(5)] is sustainable. Applicant stated that he drinks a case of beer on the weekends, and indicated that he feels "buzzed" if he drinks four to five beers on any given occasion. The Judge reasonably concluded that Applicant's weekend activity falls within the disqualifying condition.

Applicant contends that the Administrative Judge's failure to fully mitigate the security significance of his conduct, or even consider mitigation, is arbitrary, capricious, or contrary to law. Applicant claims that over his 36-year career with his company, there was only "one, single, isolated allegation of an alcohol-related incident," which, by definition, cannot indicate a pattern of behavior. Therefore, Alcohol Consumption Mitigating Condition 1[(6)] "must apply." Applicant also contends that Alcohol Consumption Mitigating Condition 2[(7)] must be applied because nearly three years elapsed between the "one, single, isolated allegation" in July 2002 and the hearing. The Board's review of the Judge's decision indicates that she did consider mitigation, and given the record evidence, she was not legally required to mitigate the security concerns in this case. While the Judge did not specifically refer to the enumerated mitigating conditions under Guideline G, a fair reading of the decision indicates that she did look at factors that, if applicable, might have mitigated the circumstances of the case (*e.g.*, Applicant's drinking habits since 2002, and the absence of an evaluation that Applicant suffers from alcohol abuse or dependence). There is no basis to suggest that the Judge ignored the possibility of mitigation under the enumerated Guideline G mitigating conditions because she applied the enumerated mitigating conditions (in Applicant's favor) under Guideline K when considering conduct under that Guideline. The fact that the Judge did not discuss the enumerated conditions under Guideline G is consistent with the view that none apply. The Judge set forth a plausible rationale which sees a reasonable security concern from Applicant's actual alcohol consumption pattern, even though there is no substantial evidence that Applicant suffers from a medically diagnosed alcohol problem. In this rationale, the 2002 incident was not the single, isolated event that Applicant portrays it to be, but part of Applicant's drinking habits, unchanged since 2002, that are not reasonably consistent with sobriety.

Applicant cites other miscellaneous errors by the Administrative Judge. Many of these claims of error are actually related to the Judge's proper weighing of factors under the "whole person" concept in the Adjudicative Process provisions of the Directive. The decision indicates that it focused on such factors as the individual's age and maturity (Directive ¶ E2.2.1.4), the presence or absence of rehabilitation and other pertinent behavioral changes (Directive ¶ E2.2.1.6), and the likelihood of continuation or recurrence (Directive ¶ E2.2.1.9). The most colorable of Applicant's claims of error is the conclusion that Applicant "has failed to meet his burden of reform." We agree with Applicant that the Directive does not describe such a burden. However, a fair reading of the decision indicates that, in this context, the Judge clearly meant that Applicant had not changed his behavior. As in 2002, when Applicant reported for work in an impaired state, Applicant continues to consume about a case of beer each weekend and continues to drink prior to arrival at work and during lunch. Accordingly, Applicant has failed to demonstrate harmful error. The Board does not review a case *de novo*. It need not agree with the Judge's decision to conclude that it is sustainable.

Order

This decision of the Administrative Judge denying Applicant a clearance is AFFIRMED.

Signed Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. [0]Applicant admitted to human resources personnel on July 18, 2002, that he blew a .047 on the first test. (Ex. 16) Acknowledging that Applicant did not have the opportunity to assess the accuracy of the test instrumentation, Applicant does not deny that he had a couple of beers before reporting to work that day.

2. [0]Applicant's ex-wife (now deceased) had been rushed to the hospital that morning. He drank one beer while discussing her medical situation with his two children at his son's place, and another beer just before arriving at work around 11:30 a.m. (Tr. 202)

3. Applicant refers to the Judge's findings and/or conclusions; but with the exception of one statement in the Judge's synopsis, his objections relate primarily to her conclusions.

4. [0]"Alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition or drinking on the job" (Directive ¶ E2.A7.1.2.2).

5. [0]"Habitual or binge consumption of alcohol to the point of impaired judgment" (Directive ¶ E2.A7.1.2.5).

6. "The alcohol-related incidents do not indicate a pattern" (Directive ¶ E2.A7.1.2.1).

7. "The problem occurred a number of years ago and there is no indication of a recent problem" (Directive ¶ E2.A7.1.2.2).