

DATE: October 7, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-18218

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

Michael F. Fasanaro, Jr., Esq.

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 Thomas M. Crean issued an unfavorable security clearance decision, dated July 28, 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 issue has been raised on appeal: whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law because there is no evidence showing that Applicant's history of episodic alcohol abuse poses a security risk. 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 Issue**

Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law because there is no evidence showing that Applicant's history of episodic alcohol abuse poses a security risk. Applicant does not challenge the Administrative Judge's findings of fact about his history of episodic alcohol abuse. Rather, Applicant contends that the Judge's unfavorable security clearance decision should not be sustained because: (1) there is no evidence that Applicant has ever violated security; (2) there is no evidence that Applicant's episodic alcohol abuse has ever impaired Applicant's conduct or performance on the job; and (3) the people responsible for his assignment recommend he be allowed to keep a security clearance. For the reasons that follow, the Board concludes Applicant's claim of error is not persuasive.

The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information.<sup>(1)</sup> In these proceedings, Department Counsel is not required to present direct or objective evidence of nexus.<sup>(2)</sup> The federal government is not required to wait until an applicant commits a security violation before it denies or revokes access to classified information.<sup>(3)</sup> Given the compelling government interest in protecting and safeguarding classified information,<sup>(4)</sup> it is permissible for the government to take steps to reduce risks to the security of classified information rather than wait for a security violation to occur and then take remedial steps to mitigate the damage.<sup>(5)</sup>

In evaluating an applicant's security eligibility, an Administrative Judge is not limited to considering an applicant's conduct on the job. Off-duty conduct can be considered in evaluating an applicant's security eligibility. Accordingly, an applicant with good or excellent job performance may nevertheless pose a security concern because of off-duty conduct.<sup>(6)</sup>

As a matter of common sense and practical experience, alcohol abuse raises security concerns.<sup>(7)</sup> A person who abuses alcohol is at risk of mishandling classified information, deliberately or inadvertently, as a result of his or her alcohol

abuse. As noted earlier in this decision, the federal government is not required to wait until an applicant commits a security violation before it denies or revokes access to classified information. Therefore, Department Counsel did not have to prove that Applicant has, in fact, committed a security violation as the result of his episodic alcohol abuse.

Applicant's reliance on the favorable evidence that his supervisors and coworkers recommend him for a security clearance does not demonstrate the Administrative Judge erred. The opinions of Applicant's supervisors and coworkers about his security eligibility are part of the evidence that the Judge had to consider in evaluating Applicant's security eligibility under the whole person concept,<sup>(8)</sup> but they are not binding on the Judge.<sup>(9)</sup> Applicant's belief that the Judge should have given more weight to the opinions of Applicant's supervisors and coworkers is not sufficient to demonstrate the Judge weighed that evidence in a manner that is arbitrary, capricious, or contrary to law.<sup>(10)</sup>

Given the Administrative Judge's unchallenged findings of fact about Applicant's history of episodic alcohol abuse, the Judge had a rational basis for concluding that Applicant's history of episodic alcohol abuse raised security concerns under Guideline G (Alcohol Consumption). Applicant's appeal arguments, viewed individually or collectively, do not demonstrate the Judge's unfavorable security clearance decision is arbitrary, capricious, or contrary to law.

### Conclusion

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

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). *See also Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 184 (D.C. Cir. 1960)(security requirements include consideration of a person's honesty, judgment, sobriety, and sense of his or her obligations), *cert. denied*, 367 U.S. 886 (1961).

2. *Gayer v. Schlesinger*, 490 F.2d 740, 750 (D.C. Cir. 1973). Furthermore, alcohol abuse is listed under Guideline G (Alcohol Consumption). There is a rebuttable presumption of nexus between admitted or proven conduct that falls under any of the Directive's Guidelines and an applicant's security eligibility. *See, e.g.*, ISCR Case No. 03-13281 (October 22, 2004) at p. 4.

3. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970).

4. *Department of Navy v. Egan*, 484 U.S. 518, 527 (1988).

5. *Cf. Department of Navy v. Egan*, 484 U.S. 518, 528 (1988)("A clearance does not equate with passing judgment upon an individual's character. Instead, it is only an attempt to predict his possible future behavior and to assess whether, under compulsion or circumstances or for other reasons, he *might compromise sensitive information.*")(italics added).

6. *See, e.g.*, ISCR Case No. 02-26685 (December 22, 2004) at p. 4; ISCR Case No. 01-26723 (November 30, 2004) at p. 3.

7. *See, e.g.*, *Cole v. Young*, 351 U.S. 536, 550 n.13 (1956); *Croft v. Department of Air Force*, 40 M.S.P.R. 320, 321 n. 1 (1989). *See also* footnote 2 of this decision.

8. Directive, Section 6.3 and Adjudicative Guidelines, Item E2.2.1.

9. *See, e.g.*, ISCR Case No. 02-11419 (August 27, 2003) at p. 3.

10. *See, e.g.*, ISCR Case No. 02-09892 (July 15, 2004) at p. 5.