

DATE: November 28, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-21761

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated January 14, 2005, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline J (Criminal Conduct), Guideline G (Alcohol Consumption), and Guideline E (Personal Conduct). Administrative Judge James A. Young issued an unfavorable security clearance decision, dated June 7, 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 the Administrative Judge ignored record evidence favorable to Applicant; (2) whether the Administrative Judge erred by finding Applicant falsified a security clearance application; (3) whether some of the Administrative Judge's findings and conclusions under Guideline J (Criminal Conduct) are erroneous; and (4) whether some of the Administrative Judge's findings and conclusions under Guideline G (Alcohol Consumption) are erroneous. 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⁾

1. Whether the Administrative Judge ignored record evidence favorable to Applicant. On appeal, Applicant contends the Administrative Judge ignored record evidence that is favorable to him. This claim of error is not persuasive. There is a rebuttable presumption that a Judge considered all the record evidence, unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. That presumption is not rebutted by Applicant's reliance on a memorandum which was apparently referred to but never introduced in the record and thus constitutes new evidence on appeal (*see* footnote 1). Nor is that presumption rebutted by Applicant's disagreement with the Judge's weighing of the record evidence.

2. Whether the Administrative Judge erred by finding Applicant falsified a security clearance application. The Administrative Judge found that Applicant falsified a security clearance application by failing to list all of his alcohol-related incidents in response to Question 24 on that application, which "asked if he had ever been charged with or convicted of any offenses related to alcohol" (Decision at p. 4). Applicant challenges the Judge's finding of falsification, arguing he did not disclose incidents that involved cases that were dismissed, deemed to be not alcohol-related, or more than 30 years old. Applicant's claim of error is not persuasive.

Nothing in the wording of Question 24 indicates or suggests that alcohol-related incidents can be omitted because of their dated nature or because the charges were later dropped or dismissed. Moreover, all of the incidents Applicant omitted from the security clearance application involved arrests and charges for conduct which was alcohol-related on its face (intoxication, driving under the influence, driving while intoxicated, and drunk and disorderly). Furthermore, at the time Applicant completed the security clearance application (March 2003), none of the alcohol-related incidents he

omitted were "over 30 years old." None of Applicant's appeal arguments show that the Judge was precluded from making a finding of falsification in this case.

The record evidence of Applicant's explanations for why he failed to disclose most of his alcohol-related incidents in response to Question 24 on the security clearance application was relevant and material to the falsification allegation (SOR paragraph 3.a). However, the Administrative Judge was not bound by Applicant's explanations. Rather, the Judge could consider Applicant's explanations in light of the record evidence as a whole (including the wording of Question 24, the evidence of the alcohol-related incidents that Applicant omitted, and any other record evidence that shed light on Applicant's intent or state of mind when he completed the security clearance application), and his assessment of Applicant's demeanor during his hearing testimony. *See, e.g.*, ISCR Case No. 01-19278 (April 22, 2003) at pp. 6-7; ISCR Case No. 99-0194 (February 29, 2000) at p. 3. Considering the record below, and giving deference to the Judge's credibility determination,⁽²⁾ the Board concludes the Judge had a sufficient basis for concluding that the falsification allegation had been proven.

Applicant's appeal brief lists the citations to all five Personal Conduct mitigating conditions.⁽³⁾ As discussed earlier in this decision, there is no presumption of error below and the appealing party must raise claims of error with specificity. Applicant's mere listing of the citations for Personal Conduct mitigating conditions -- without any argument, discussion, or elaboration -- is insufficient to raise a claim of error with sufficient specificity that would warrant further discussion.

3. Whether some of the Administrative Judge's findings and conclusions under Guideline J (Criminal Conduct) are erroneous. The Administrative Judge found that Applicant was involved in lengthy history of criminal conduct that included incidents in 1975, 1977, 1987, 1991, 1995, 1997, 1999, and 2001 (twice).⁽⁴⁾ Although the Judge noted the last incident occurred in March 2001 and was not recent, the Judge concluded Applicant had not demonstrated clear evidence of rehabilitation because his lengthy record of criminal conduct was fueled by alcohol, he does not recognize he has a problem with his drinking, he continues to drink to the point of intoxication, and he refuses to undergo treatment for his alcohol problem.

On appeal, Applicant: (a) challenges the Administrative Judge's findings that he committed domestic violence or assault; (b) states he has not been arrested or charged since March 2001; (c) contends the Judge contradicted himself by stating he would have found clear evidence of rehabilitation if Applicant had obtained alcohol treatment and not been involved in criminal conduct in four year because Applicant has committed no criminal conduct since March 2001 and he was never required to undergo alcohol treatment; and (d) asserts he has complied with all court-ordered requirements.

Although Applicant was not convicted of domestic violence or assault, the Administrative Judge properly concluded it was legally permissible for him to consider the record evidence to determine whether there was sufficient evidence to find that Applicant engaged in criminal conduct during the incidents that led to his being arrested and charged with assault in May 1999 and arrested and charged with domestic violence and assault in February 2001. *See, e.g.*, ISCR Case No. 02-22240 (July 16, 2004) at p. 4 (an Administrative Judge can find that an applicant has engaged in criminal conduct even if the criminal charges against an applicant were later dropped).

Given the record evidence in this case, it was not arbitrary or capricious for the Administrative Judge to find that Applicant's episodic abuse of alcohol contributed to his criminal conduct, and to conclude that because Applicant did not accept that he had an alcohol abuse problem Applicant had not shown sufficient rehabilitation under Guideline J (Criminal Conduct). Given totality of Applicant's long history of criminal conduct (including the record evidence showing that the passage of several years between some of the incidents), the Judge's finding that alcohol abuse was a significant contributing factor to Applicant's criminal conduct, and the Judge's findings about Applicant's episodic alcohol abuse, it was not arbitrary or capricious for the Judge to conclude that the passage of time since the March 2001 incident -- standing alone -- was not sufficient to warrant a conclusion that Applicant had demonstrated sufficient rehabilitation under Guideline J. Applicant's appeal arguments do not demonstrate the Judge's findings and conclusions under Guideline J are arbitrary, capricious, or contrary to law.

4. Whether the Administrative Judge's findings and conclusions under Guideline G (Alcohol Consumption) are erroneous. The Administrative Judge found that Applicant had a lengthy history of episodic alcohol abuse spanning a

period of more than 25 years, which included drinking to intoxication, multiple alcohol-related incidents, diagnoses of alcohol abuse in August 2001 and April 2004, and drinking to intoxication on various occasions up to three weeks before the hearing. The Judge concluded that the evidence of Applicant's overall history of alcohol abuse raised security concerns under Guideline G (Alcohol Consumption) and that Applicant had not presented evidence that extenuated or mitigated those security concerns.

On appeal, Applicant makes several arguments that challenge some of the Administrative Judge's findings and conclusions under Guideline G. Applicant argues: (a) the Judge erred by finding that a May 1999 incident and a February 2001 incident were alcohol-related; (b) the doctor who made the April 2004 evaluation (Government Exhibit 13) was not asked for a diagnosis based on any current incident and was not asked to make a treatment recommendation, rather the doctor was asked for a prognosis about Applicant's alcohol usage and was not asked for a diagnosis based on any current incident; (c) Applicant's last alcohol-related arrest occurred in March 2001, which is not frequent or recent; (d) Applicant always complied with court-ordered obligations to attend alcohol abuse classes; (e) no court ever ordered Applicant to undergo alcohol rehabilitation beyond attending alcohol abuse classes; (f) there is no evidence that shows Applicant has refused alcohol rehabilitation; and (g) there is no evidence that shows Applicant needs alcohol rehabilitation.

Given the record evidence in this case, the Administrative Judge had a sufficient basis for finding that alcohol was a factor in the May 1999 and February 2001 incidents. Applicant's strong disagreement with those findings is not sufficient to demonstrate the Judge erred.

Concerning Government Exhibit 13, there is no record evidence as to what the clinical psychologist who evaluated Applicant in April 2004 was asked to include in his evaluation. Regardless of what the clinical psychologist was asked to include in his evaluation of Applicant, it was not arbitrary or capricious for the Administrative Judge to consider the April 2004 evaluation and make findings of fact based on it. Applicant's disagreement with some of the contents of the April 2004 evaluation does not show the Judge erred by considering it and relying on it to make his findings and reaching his conclusions under Guideline G.

In evaluating the recency and frequency of Applicant's alcohol abuse, the Administrative Judge was not limited to considering just the passage of time since the arch 2001 alcohol-related incident. Given Applicant's testimony about drinking to intoxication on various occasions after that incident -- including drinking to intoxication about three weeks before the hearing -- it was not arbitrary or capricious for the Judge to conclude Applicant's alcohol abuse was recent in nature. Furthermore, given the record evidence of Applicant's episodic alcohol abuse over a period of many years, it was not arbitrary or capricious for the Judge to conclude Applicant's alcohol abuse was serious and occurred with some frequency.

Given the record evidence in this case, the Administrative Judge had a sufficient basis to find that Applicant has a problem controlling his drinking, that competent professionals have concluded Applicant should undergo treatment for alcohol abuse, that Applicant fails to understand the seriousness of his alcohol abuse, and that Applicant has refused to seek treatment for his alcohol abuse. Those findings reflect a reasonable interpretation of the record evidence in this case, and Applicant's disagreement with those findings is not sufficient to demonstrate they are erroneous.

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: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. Attached to Applicant's appeal brief are copies of three documents. One of the documents is a copy of Government Exhibit 13. Another document is an undated statement by a woman that makes factual assertions about the incidents covered by SOR paragraphs 1.b and 1.c. That undated statement was not offered by Applicant during the proceedings below. The undated statement constitutes new evidence, which the Board cannot consider on appeal. *See Directive, Additional Procedural Guidance, Item E3.1.29.* The third document is an April 30, 2003 memorandum from a DoD component to Applicant. Although the hearing transcript contains an apparent reference to that document (Transcript at p. 46), there is no indication in the hearing transcript that the document was offered as an exhibit. Accordingly, the April 30, 2003 memorandum constitutes new evidence, which the Board cannot consider.

2. *See Directive, Additional Procedural Guidance, Item E3.1.32.1.*

3. Directive, Adjudicative Guidelines, Items E2.A5.1.3.1 through E2.A5.1.3.5.

4. The Administrative Judge entered a formal finding in favor of Applicant with respect to SOR paragraph 1.f. That favorable formal finding is not at issue on appeal.