

DATE: December 30, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-22912

## APPEAL BOARD DECISION

### APPEARANCES

#### FOR GOVERNMENT

Kathryn A. Trowbridge, Esq., Department Counsel

#### FOR APPLICANT

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated July 27, 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 James A. Young issued a favorable security clearance decision, dated June 2, 2005.

Department Counsel appealed the Administrative Judge's favorable 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 application of Alcohol Consumption Mitigating Condition 3 is not supported by the record evidence. 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<sup>(1)</sup>

Whether the Administrative Judge's application of Alcohol Consumption Mitigating Condition 3 is not supported by the record evidence. Department Counsel does not challenge the Administrative Judge's findings of fact about Applicant's history of alcohol abuse, or the Judge's finding that Applicant had maintained sobriety for 21 months (as of the date of the hearing). Because there is no presumption of error below, the Board need not review the Judge's unchallenged findings of fact.

Department Counsel does contend that the Administrative Judge's application of Alcohol Consumption Mitigating Condition 3<sup>(2)</sup> is not supported by the record evidence as a whole, and that it was arbitrary and capricious for the Judge to conclude that Applicant's 21 months of sobriety were sufficient to warrant application of Alcohol Consumption Mitigating Condition 3. For the reasons that follow, the Board concludes Department Counsel has not demonstrated the Judge acted in an arbitrary or capricious manner.

Department Counsel's brief argues for a plausible, alternate interpretation of the record evidence in this case. However, the Board does not re-try a case on appeal and make a decision as to an applicant's security eligibility as if it were deciding the case in the first instance. In this case, the Board does not have to agree with the Administrative Judge's favorable conclusions under Guideline G (Alcohol Consumption) to decide that Department Counsel has not demonstrated that they are arbitrary, capricious, or contrary to law. Department Counsel's ability to argue for a different weighing of the evidence falls short of demonstrating the Judge's conclusions are arbitrary, capricious, or contrary to law. Considering the record as a whole, there is sufficient evidence to permit the Judge to conclude that Applicant had demonstrated changes in his behavior to warrant application of Alcohol Consumption Mitigating Condition 3.

### Conclusion

The Board affirms the Administrative Judge's decision because Department Counsel has failed to demonstrate 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. On appeal, Department Counsel states it is not challenging the Administrative Judge's favorable formal finding under Guideline J (Criminal Conduct), but takes exception to the Judge's application of Criminal Conduct Mitigating Condition 6 ("There is clear evidence of successful rehabilitation"). Because Department Counsel states it is not challenging the Judge's favorable formal finding under Guideline J, Department Counsel's argument about Criminal Conduct Mitigating Condition 6 is moot.

2. "Positive changes in behavior supportive of sobriety" (Directive, Adjudicative Guidelines, Item E2.A7.1.3.3).