

DATE: September 13, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-23380

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 December 10, 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 Joan Caton Anthony issued an unfavorable security clearance decision, dated June 3, 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 it was arbitrary, capricious, or contrary to law for the Administrative Judge to conclude that Applicant had failed to demonstrate sufficient evidence of reform and rehabilitation to warrant a favorable security clearance decision. 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

Applicant does not challenge the Administrative Judge's findings of fact about his history of alcohol abuse -- which included drinking to intoxication on various occasions during the period from 1970 to early 2002, and alcohol-related incidents in April 1994, March 1995, June 1998, and January 2002. However, Applicant does challenge the Judge's conclusion that he had not demonstrated reform and rehabilitation sufficient to warrant a favorable security clearance decision. [\(1\)](#)

On appeal, Applicant argues for an alternate interpretation of the record evidence, one that is favorable to his claim of reform and rehabilitation. However, Applicant's ability to make such an argument is not sufficient to demonstrate the Administrative Judge erred. It is not unusual for a Judge to be faced with a record containing evidence that does not point all in one direction, favorable or unfavorable. The presence of some favorable record evidence does not require a Judge to make a favorable security clearance decision. Rather, a Judge must consider the record as a whole, decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*, and reach a reasoned decision as to whether an applicant has met his or her burden of presenting evidence sufficient to warrant a favorable security clearance decision. In challenging a Judge's weighing of the record evidence, an appealing party must do more than just disagree with the Judge. An appealing party must be able to show that a Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law, or reached conclusions that are not supported by the record evidence. *See, e.g.*, ISCR Case No. 02-09892 (July 15, 2004) at p. 5.

Given the record evidence of Applicant's history of episodic alcohol abuse over a long period of time, the Administrative Judge properly concluded that Applicant had the burden of presenting evidence sufficient to rebut or overcome the security concerns raised by his history of alcohol abuse. The Judge noted the favorable evidence presented by Applicant, but concluded that it was not sufficient to outweigh the unfavorable record evidence. On appeal, the Board does not retry a case, but rather it reviews the decision below to determine whether an appealing party has raised

an issue that demonstrated factual or legal error by the Judge. *See* Directive, Additional Procedural Guidance, Item E3.1.32. The Board does not have to agree with the Judge's weighing of the record evidence to conclude that Applicant has not demonstrated that the Judge weighed it in a manner that is arbitrary, capricious, or contrary to law.

The absence of evidence that Applicant's alcohol abuse adversely affected his job performance does not have the significance Applicant places on it. Security clearance decisions are not limited to consideration of an applicant's job performance. *See, e.g.*, ISCR Case No. 01-23922 (October 2, 2003) at p. 4. Furthermore, the security concerns raised by alcohol abuse are not limited to alcohol abuse that occurs during an applicant's duty hours. *See, e.g.*, ISCR Case No. 02-07414 (March 3, 2004) at p. 3 n.2; ISCR Case No. 01-13906 (January 3, 2003) at p. 3. Therefore, the Administrative Judge was not required to make a favorable decision because Department Counsel did not present evidence showing Applicant's episodic alcohol abuse occurred during duty hours.

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: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. Applicant's appeal brief contains some arguments that are based on factual assertions that go beyond the record evidence that was before the Administrative Judge. Such factual assertions constitute new evidence, which the Board cannot consider on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. The Board will not address arguments made by Applicant that are based on a proffer of new evidence.