

DATE: January 26, 2007

In Re:

SSN:-----

Applicant for Security Clearance

ISCR Case No. 04-04132

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 13, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline G (Alcohol Consumption) and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On May 31, 2006, after the hearing, Administrative Judge LeRoy F. Foreman denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge's findings are supported by substantial evidence; and whether the Judge's unfavorable clearance decision under Guidelines G and J is arbitrary, capricious, or contrary to law.

(1) Applicant argues, in part, that the Judge's adverse clearance decision should be reversed because it contains minor errors with respect to the Judge's findings and some internal inconsistencies. ⁽¹⁾ The Board does not find this argument persuasive.

The Board does not review a Judge's decision against a standard of perfection. *See, e.g.*, ISCR Case No. 95-0319 at 3 (App. Bd. Mar. 18, 1996). It reviews a decision as a whole, rather than focusing on isolated sentences or passages in it, to discern what the Judge meant. *See, e.g.*, DISCR Case No. 90-1874 at 4 (App. Bd. July 30, 1993). The Board's review of a Judge's findings is limited to determining if they are supported by substantial evidence--such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record. Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620, (1966). In this case, the Judge's material findings with respect Applicant's conduct of security concern reflect a reasonable or plausible interpretation of the record evidence. The Board does not review a case *de novo*. Considering the record evidence as a whole, the Judge's material findings of security concern are sustainable. *See, e.g.*, ISCR Case No. 96-0461 at 3 (App. Bd. Dec. 31, 1997).

(2) Applicant also argues that the Judge should have concluded that the security concerns raised by Applicant's alcohol consumption had been mitigated, as a matter of law, because Applicant's alcohol related incidents did not indicate a

pattern, there was no indication of a recent problem, and Applicant had demonstrated changes in behavior supportive of sobriety and rehabilitation. The Board does not find this argument persuasive.

The application of disqualifying and mitigating conditions and whole person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 01-14740 at 7 (App. Bd. Jan.15, 2003). Thus, the presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. An applicant's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law.

In this case, the Judge made sustainable findings that Applicant had a serious history of excessive alcohol consumption that ran over a 20 year period from 1984 to late 2004. That history included arrests for Driving Under the Influence (DUI) in 1991, 1992, 1995, 2000, and 2004, and an instance of nonjudicial punishment under Article 15, UCMJ, 10 U.S.C. § 815, for wrongful use of cocaine after consuming alcohol. Applicant's 2004 DUI incident had involved an accident and Applicant had registered a blood alcohol content of .24. Although the Judge found Applicant had been sober for more than two years, he noted that one year of that sobriety had been in a carefully controlled environment⁽²⁾ and the remaining time had been during the pendency of Applicant's security clearance application. The Judge also noted that Applicant had not obtained formal rehabilitative treatment and had chosen not to follow a recommendation for AA participation. The Judge weighed the mitigating evidence offered by Applicant against the length and seriousness of the disqualifying conduct, and considered the possible application of relevant mitigating conditions. The Judge reasonably explained why the evidence Applicant had presented in mitigation was insufficient to overcome all of the government's security concerns. Given the record that was before him, the Judge's unfavorable clearance decision under Guidelines G and J is not arbitrary, capricious, or contrary to law.

Order

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

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

Signed: James E. Moody

James E. Moody

Administrative Judge

Member, Appeal Board

1. For example, Applicant argues that the Judge erred in stating Applicant had six arrests for Driving Under the

Influence (DUI), when in fact he had five arrests, one of which had been dismissed. The Judge's statement in that regard appears only in the decision's Statement of the Case. The Judge's more detailed findings of fact accurately reflect Applicant's five DUI arrests. Given the record in this case, the error identified by Applicant is minor, and therefore harmless.

2. Applicant was on probation for his most recent DUI offense, was required to remain sober and file monthly reports, and was deployed overseas at a location where alcohol was prohibited.