DATE: March 16, 2006

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 04-05673

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) declined to grant Applicant a security clearance. On April 25, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline G (Alcohol Consumption), of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On November 23, 2005, 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 issue on appeal: whether the Administrative Judge's findings of fact about his history of alcohol consumption are erroneous.

The Administrative Judge made the following material findings of fact:

Applicant began consuming alcohol in high school when he was 15 years old. At that time, he was consuming five to six beers once a week at parties. While in college, he consumed seven to eight beers twice a week with friends.

In May 1999, Applicant was arrested for driving while under the age of 21 with a blood alcohol concentration of more than .02%. He was convicted of reckless driving.

In October 1999, Applicant was arrested for underage possession of alcohol, use of a false driver's license used to obtain alcohol, and intoxication.

In December 2001, he was arrested for driving under the influence. He pleaded guilty. After this incident, Applicant reduced his customary consumption to about three or four beers once a week, usually on Fridays after work.

In June 2002, Applicant was arrested for being drunk in public. Applicant was found not guilty.

Applicant attended two Alcoholics Anonymous meetings in early 2002. He then decided he had already taken the right steps to control his drinking and did not attend any further meetings.

Applicant testified that he still drinks beer about once a week, and estimated he becomes intoxicated two or three times

a year. He starts to feel intoxicated at about four beers and at six beers he starts to "zone out." On occasion, he has been out of control after drinking, yelling, screaming and doing things he normally wouldn't do.

On appeal, Applicant challenges some of the Administrative Judge's findings of fact and the conclusions that follow from those findings, arguing that: (1) during his testimony he misstated his condition when he drinks, did not mean to use the word "intoxicated" when he testified about his condition when he drinks; (2) the Judge's finding of fact about the level of his drinking when he was in high school is not supported by the record evidence; and (3) the Judge's finding about his current level of drinking is mistakenly based on testimony about the level of his drinking during his college days and not his current level of drinking.

Considering the record as a whole, the Administrative Judge's challenged findings of fact about Applicant's alcohol consumption are sustainable. Similarly, the adverse conclusions which rely on the challenged findings are also sustainable.

Thus, the Administrative Judge did not err in denying Applicant a clearance.

Order

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

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Concurring Opinion by Chairman Emilio Jaksetic:

When considering whether an Administrative Judge's challenged findings of fact are supported by the record evidence, I do not have to decide whether I agree with the Judge's particular findings of fact. Rather, what I have to do is consider whether the record evidence, as a whole, provides a sufficient evidentiary basis for a reasonable trier of fact to make findings of fact like those the Judge did make. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1. There is no simple formula or rule of law on how a Judge must weigh record evidence. Subject to review for action that is arbitrary, capricious, or contrary to law, the Judge has discretion to weigh the record evidence. Furthermore, a Judge is not always faced with a case where the record evidence points all in one direction. It is not unusual in these cases for the record evidence to be susceptible to more than one plausible interpretation. As long as a Judge's challenged findings of fact reflect a reasonable interpretation of the record evidence as a whole, the Board should not disturb those findings of fact on appeal.

Applicant's challenge to the Administrative Judge's reliance on Applicant's hearing testimony is not well founded. For all practical purposes, Applicant is: (a) trying to repudiate portions of his hearing testimony on appeal, and (b) asking the Board to accept his appeal statements about what he meant to say during his hearing testimony as a substitute for his actual testimony. Applicant cannot fairly challenge the Judge's reliance on his hearing testimony based on his claim that he really did not mean to give the testimony that he actually gave. Furthermore, Applicant does not have the right to offer factual assertions about his alcohol consumption that seek to supplement the record evidence. Such assertions

constitute a proffer of new evidence, which the Board cannot consider on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29.

I agree with my colleagues that the Administrative Judge's finding of fact about Applicant's drinking when he was in high school is sustainable in light of the record evidence in this case. Apart from Applicant's hearing testimony, the Judge had available Applicant's March 2004 written statement (Government Exhibit 2), which contained admissions about his level of drinking when he was in high school. Moreover, even if I were to conclude that Applicant's claim of error about that challenged finding of fact had any merit, such a conclusion would not warrant remand or reversal in this case. The Judge's adverse conclusions under Guideline G (Alcohol Consumption) are rationally supported by the Judge's findings of fact about Applicant's overall history of alcohol consumption, including Applicant's history of alcohol consumption after his time in high school.

Applicant's last claim of error reflects a disagreement with the Administrative Judge's interpretation of the record evidence. However, Applicant's disagreement with the Judge is not sufficient to demonstrate the Judge erred. Applicant has not made a persuasive argument that shows the Judge's findings reflect a failure to weigh the evidence in a reasonable or common sense manner, or that they do not reflect a reasonable interpretation of the record evidence as a whole.

For all these reasons, I conclude Applicant has not demonstrated the Administrative Judge erred. Accordingly, the decision below should be affirmed.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board