

DATE: May 16, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-08134

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 August 31, 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 E (Personal Conduct). Administrative Judge James A. Young issued an unfavorable security clearance decision, dated January 14, 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 failed to consider record evidence favorable to Applicant; (2) whether the Administrative Judge erred by making an unfavorable credibility determination; and (3) whether the Administrative Judge's adverse conclusions about Applicant's history of alcohol abuse are arbitrary or capricious. 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. Whether the Administrative Judge failed to consider record evidence favorable to Applicant. Applicant contends the Administrative Judge's decision does not reflect consideration of evidence favorable to him, including evidence that he has been seeking treatment for his alcoholism and has reduced his level of alcohol consumption over the years. For the reasons that follow, the Board concludes this claim of error is not persuasive.

There is no legal requirement that an Administrative Judge must mention or discuss each and every piece of record evidence when making a decision. *See, e.g.*, ISCR Case No. 02-30929 (January 7, 2004) at p. 3. Furthermore, there is a rebuttable presumption that an Administrative 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. A Judge is not always faced with a case where the record evidence points all in one direction. To the contrary, it is not unusual for a Judge to be faced with mixed record evidence, some favorable and some unfavorable. In such situations, the Judge must consider the record evidence as a whole, decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*, and reach a conclusion as to whether an applicant has met his or her burden of persuasion under Directive, Additional Procedural Guidance, Item E3.1.15. ⁽¹⁾ *See, e.g.*, ISCR Case No. 02-09892 (July 15, 2004) at p. 5. Accordingly, Applicant's ability to identify record evidence that is favorable to him -- standing alone -- is not sufficient to rebut or overcome the presumption that the Judge considered all the record evidence.

2. Whether the Administrative Judge erred by making an unfavorable credibility determination. The Administrative Judge stated "I found [Applicant's] excuses to lack credibility and his testimony disingenuous" (Decision at p. 5). Applicant asserts the Judge's unfavorable credibility determination is "offensive" and "accuses me of lying." The Board construes Applicant's assertion as challenging the Judge's unfavorable credibility determination.

The Board must give deference to an Administrative Judge's credibility determinations. *See* Directive, Additional

Procedural Guidance, Item E3.1.32.1. Such deference is consistent with the traditional practice in American jurisprudence of allowing the trier of fact latitude to draw inferences and reach conclusions about the credibility of witnesses based on the trier of fact's ability to personally observe the demeanor of witnesses during their testimony. As noted earlier in this decision, a Judge's credibility determination is not immune from review, but the party challenging a Judge's credibility determinations has a heavy burden of persuasion on appeal. The Board does not have to agree with the Judge's characterization of Applicant's testimony to conclude that Applicant has not met his heavy burden of showing that the Judge's unfavorable credibility determination is unsustainable.

3. Whether the Administrative Judge's adverse conclusions about Applicant's history of alcohol abuse are arbitrary or capricious. The Administrative Judge made findings of fact about Applicant's history of episodic alcohol abuse, which included: drinking to intoxication on various occasions; one alcohol-related blackout; inpatient and outpatient treatment for alcoholism; a recommendation from his personal physician that he stop drinking because alcohol was affecting his liver; and attendance problems at work that were related to his episodic alcohol abuse. On appeal, Applicant does not challenge the Judge's findings of fact about his overall history of alcohol abuse.⁽²⁾ However, Applicant argues about the facts and circumstances surrounding his drinking history and contends the Judge's adverse conclusions about his history of alcohol abuse are not warranted because: (a) alcoholism is a disease of relapse and recovery; (b) his struggles with alcohol are typical of people suffering from alcoholism; (c) his drinking has never resulted in any involvement with law enforcement authorities; (d) he has been honest and open about his drinking history; (e) his manager considers him to be a valuable employee; (f) he has held a security clearance for many years without any security violations; and (g) it is late in his career, he still has much to contribute to the defense effort, and he should be allowed to retain a security clearance. For the reasons that follow, the Board concludes Applicant has not demonstrated that the Judge's adverse conclusions under Guideline G (Alcohol Consumption) are arbitrary or capricious.

The federal government has a compelling interest in protecting classified information. *Department of Navy v. Egan*, 484 U.S. 518, 527 (1988). The federal government is not required to wait until an applicant commits a security violation before it can deny or revoke access to classified information. Rather, the federal government can deny or revoke access to classified information based on proof of conduct or circumstances that raise security concerns that fall short of presenting a clear and present danger or imminent threat to the national security. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). Given the Administrative Judge's findings of fact about Applicant's episodic alcohol abuse, the Judge had a rational basis for concluding Applicant's overall history of alcohol abuse raised security concerns under Guideline G. *See, e.g.*, ISCR Case No. 02-07414 (March 3, 2004) at p. 3 n.2 (noting that alcohol abuse poses a security risk because it raises the potential for deliberate or inadvertent disclosure of classified information while an applicant is under the influence of alcohol). Even though there is no evidence that Applicant's alcohol abuse resulted in any arrests or other involvement with law enforcement authorities, there is sufficient record evidence to warrant the Judge's conclusion that Applicant's alcohol abuse was serious and raised security concerns.

Applicant's candor and honesty with the federal government about his drinking did not preclude the Administrative Judge from considering the security implications of Applicant's overall history of alcohol abuse. *See, e.g.*, ISCR Case No. 01-22170 (October 2, 2003) at p. 5. Moreover, Applicant's value to his employer does not negate or diminish the security implications of his history of alcohol abuse.

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: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. "The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."

2. Applicant does challenge the Administrative Judge's finding that he began drinking at age 18. Considering the record as a whole, the particular age at which Applicant began drinking is largely immaterial to the Judge's evaluation of Applicant's overall history of alcohol abuse.