

DATE: July 29, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-08623

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

Richard S. Thompson, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR), dated October 21, 2004, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guideline G (Alcohol Consumption). Administrative Judge Henry Lazzaro issued an unfavorable security clearance decision, dated March 1, 2005.

Applicant appealed the Administrative Judge's unfavorable decision. The Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant's appeal presents the following issues: (1) whether the Administrative Judge erred in applying Guideline G, Disqualifying Condition 1, (2) whether the Administrative Judge erred in not applying Guideline G, Mitigating Condition 1, (3) whether the Administrative Judge erred in not applying Guideline G, itigating Condition 3, and (4) whether the Administrative Judge erred in the application of the "whole person" concept as set forth in the Directive's Section 6.3 factors. 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⁾

1. Whether the Administrative Judge erred in applying Guideline G, Disqualifying Condition 1.⁽²⁾

Applicant contends that the Administrative Judge erred in applying Guideline G, Disqualifying Condition 1 (DC 1) because Applicant's December 13, 2003 conviction for Driving Under the Influence of Alcohol ". . . is not a 'criminal' incident in the classic sense."⁽³⁾

Applicant's argument does not persuade us that the Judge erred.

The Administrative Judge made uncontested findings that Applicant had convictions for Drunkenness and Permitting One Drive Vehicle Unlawfully [sic] in 1983, and Driving Under the Influence of Alcohol in 1992 and 2003. Considering that record, the Judge had a sufficient basis to conclude that Applicant's conduct involving excessive alcohol use raised security concerns under DC 1.

2. Whether the Administrative Judge erred in not applying Guideline G, Mitigating Condition 1.⁽⁴⁾

Applicant argues that the Administrative Judge erred in not applying Guideline G, Mitigating Condition 1 because "the 2003 DUI incident, which was the central focus of this matter, was the first incident in eleven years. Therefore, there was no pattern of alcohol abuse."⁽⁵⁾

In support of his contention, Applicant cites to several hearing office decisions in which Judge's had found no pattern. Applicant's argument does not persuade us that the Judge erred.

The decision in another DOHA Hearing Office case does not demonstrate error by the Administrative Judge in this case. A decision by a Hearing Office Judge is not legally binding precedent on that Judge's colleagues in other cases. Likewise, the cited cases are not legally binding precedent on the Board. *See* ISCR Case No. 01-22606 (June 30, 2003) at pp. 3-5 (discussing in detail the precedential value of decisions by Hearing Office Judges). Considering the record as a whole, it was not arbitrary, capricious or contrary to law for the Judge to conclude that MC 1 did not apply.

3. Whether the Administrative Judge erred in not applying Guideline G, Mitigating Condition 3. (6)

Applicant argues that the Administrative Judge erred in not applying Guideline G, Mitigating Condition 3 because the Administrative Judge did not give credit to the unfortunate circumstances weighing on Applicant's mind at the time of the most recent incident in December 2003--the recent death of his father and a business-related lawsuit. (7)

Applicant's argument does not persuade us that the Judge erred.

There is a rebuttable presumption that the Administrative Judge considered all the record evidence unless he specifically states otherwise. *See, e.g.*, DOHA Case No. 96-0228 (April 3, 1997) at p. 3; DISCR Case No. 93-1186 (January 5, 1995) at p. 5. Additionally, the Judge is not required to cite or discuss every piece of record evidence. *See, e.g.*, DISCR Case No. 90-1596 (September 18, 1992) at p. 5. The application of disqualifying and mitigating conditions does not turn simply on a finding that one or more of them applies 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 (January 15, 2003) at p. 7. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighed the unfavorable evidence or *vice versa*. Applicant's disagreement with the Judge's weighing of the evidence is not sufficient to demonstrate the Judge weighed that evidence in a manner that is arbitrary, capricious, or contrary to law. Considering the record as a whole, it was not arbitrary, capricious or contrary to law for the Judge to conclude that MC 3 did not apply.

4. Whether the Administrative Judge erred in the application of the "whole person" concept as set forth in the Directive's Section 6.3 factors. (8)

Applicant argues that the Administrative Judge erred in not applying the "whole person" concept in Applicant's favor. In support of that argument, Applicant contends that the security concerns raised by Applicant's history of alcohol-related incidents should have been mitigated because of the circumstances surrounding that conduct, the motivation for the conduct, its lack of recency, the presence of rehabilitation and other pertinent behavioral changes, and the reduced likelihood of a continuation or recurrence of adverse conduct. He also notes that he has had significant business accomplishments and no history of security breaches. (9)

Applicant cites to no cases in support of his positions. Instead, he essentially makes the same arguments that he made at the hearing regarding his view of the evidence.

After reviewing the Judge's decision in this case, the Board concludes that the Administrative Judge reasonably considered such "whole person" factors as the circumstances surrounding the conduct, the Applicant's motivation, and the likelihood of continuance or recurrence, and nevertheless concluded that evidence was insufficient to overcome the security concerns raised by Applicant's conduct. The Judge's conclusion that Applicant had not met his burden of presenting sufficient favorable evidence to demonstrate reform, rehabilitation, or changed circumstances to warrant a favorable security clearance decision is sustainable. Considering the record as a whole, the Judge's application of the relevant Section 6.3 factors and his weighing of the record evidence was not arbitrary, capricious, or contrary to law.

The federal government need not wait until an applicant actually mishandles or fails to properly handle classified information before it can deny or revoke access to such information. *See Adams v. Laird*, 420 F. 2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). An applicant with good or exemplary job performance may engage in conduct that has negative security implications. *See, e.g.*, ISCR Case No. 99-0123 (January 11, 2000) at p. 3. The Directive's Guidelines set forth a variety of examples of off-duty conduct and circumstances which are of security concern to the government and mandate a whole person analysis to determine an applicant's security eligibility. A whole

person analysis is not confined to the workplace. *See* ICR Case No. 03-11231 (June 4, 2004) at p.3. 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. *See, e.g., Cole v. Young*, 351 U.S. 536, 550 n.13 (1956); *Croft v. Department of Air Force*, 40 M.S.P.R. 320, 321 n.1 (1989). Therefore, Applicant's history of alcohol-related incidents was pertinent to a determination of the Applicant's judgment, trustworthiness, and reliability. Considering Applicant's burden of persuasion and the record as a whole, the Board finds that the Judge's adverse security clearance decision is sustainable.

Conclusion

Applicant has failed to demonstrate error below. Therefore, the Board affirms the Administrative Judge's adverse security clearance decision.

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

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge found in favor of Applicant with respect to SOR paragraph 1.c. That favorable findings are not at issue on appeal.

2. "Alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol use" Directive, Adjudicative Guidelines, Item E2.A7.1.2.1.

3. Applicant's Brief at p. 1.

4. "The alcohol related incidents do not indicate a pattern" Directive, Adjudicative Guidelines, Item E2.A7.1.3.1.

5. Applicant's Brief at p. 2.

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

7. Applicant's Brief at pp. 2-3.

8. Directive, Section 6.3 and Enclosure 2, Items E2.2.1.1 through E2.2.1.9.

9. Applicant's Brief at p. 3.