DATE: January 23, 2007

In re:

SSN: -------

Applicant for Security Clearance

ISCR Case No. 05-11367

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 December 7, 2005, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision-security concerns raised under Guideline G (Alcohol Consumption) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive). Applicant requested a hearing. On June 16, 2006, after the hearing, Administrative Judge Michael J. Breslin denied Applicant's request for a security clearance. Applicant timely appealed[(1)] pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant does not contest the adequacy of evidentiary support for any of the Administrative Judge's pertinent findings of fact.[(2)] Applicant simply restates three matters consistent with the record and the Judge's findings. He asks that the Judge's decision be reversed because: (1) he was in high school during the first three years of the period embraced in SOR ¶ 1.a,[(3)] and "drinking was strictly experimental and Very rare;" (2) his most recent alcohol related offense was nearly 7 years ago; and (3) he personally does not believe that 4 to 5 beers an evening is excessive. None of these asserted facts is inconsistent with the Judge's findings and conclusions, and each was considered by the Judge in reaching the decision.

To the extent Applicant means to assert that the Judge's failure to mitigate security concerns raised by Applicant's continuing habitual and excessive alcohol consumption was arbitrary and capricious in light of these facts, that argument is unpersuasive.[(4)] The Judge expressly considered each pertinent Guideline G Disqualifying Condition and Mitigating Condition, and articulated a rational connection between the facts and his conclusion that the evidence which Applicant presented in mitigation was insufficient to overcome the government's security concerns. Specifically, the Judge's conclusion that Applicant's admitted frequency and quantity of current alcohol consumption precluded application of those Mitigating Conditions is sustainable.[(5)]

Applicant submitted two "additional comments," which we will treat as assertions of procedural error. The first was that his witnesses were unable to attend the hearing due to work commitments. That fact was discussed during the hearing, and the Judge admitted written statements from each of these witnesses, considered them, and made proper findings of fact consistent with their high opinions of Applicant's character and work performance.[(6)] The second was that Applicant felt that being a veteran who served six years on active duty should entitle him to free counsel. This issue was

not raised during the hearing, and in any event no law or regulation provides free counsel to any applicant in DOHA proceedings.

The Judge's findings of fact are supported by record evidence. No procedural error was committed. The Judge's conclusions that the evidence raised security concerns under Guideline G that were not mitigated by Applicant are supported by the record, and are neither arbitrary and capricious, nor otherwise contrary to law.

Order

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

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

Signed: David M. White

David M. White

Administrative Judge

Member, Appeal Board

1. The Judge found in Applicant's favor under Guideline E and with respect to ¶¶ 1.g and 1.h under Guideline G. Those findings were not appealed by the Government, and are not at issue on appeal.

2. Applicant asks the Board to note that the Judge incorrectly stated his year of birth as being 1961 when, in fact, it was 1959. That factual inaccuracy has no bearing on the Judge's conclusions and is harmless error.

3. SOR ¶ 1.a. reads, "You have consumed alcohol, at times to excess and to the point of intoxication, from about 1973 until at least November 2005."

4. An Administrative Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Appeal Board may reverse or remand the Judge's decision to grant, deny or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. Our scope of review under this standard is narrow and we may not substitute our judgment for that of the Judge. We may not set aside a Judge's decision "that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency . . ." *Motor Vehicle Mfrs. Ass'n.*, 463 U.S. at 42.

5. 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. The Board does not review a case *de novo*. *See* ISCR Case No.

02-28041 at 4 (App. Bd. June 29, 2005).

6. At the hearing, Applicant stated that he did not intend to call any witnesses during the hearing. Tr. at 5. Applicant also responded, "yes," when the Judge inquired if he was prepared for the hearing and wanted to proceed. Tr. at 6-7. Applicant did not request a continuance, or otherwise object to the absence of his character references for live testimony. Instead, in response to the Judge's questions, Applicant said they were unavailable due to prior work commitments and their written statements were accordingly offered in evidence. Tr. at 53-54.