

DATE: May 16, 1997

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 95-0705

APPEAL BOARD DECISION

Appearances

FOR GOVERNMENT

Carla Conover, Esq.

Department Counsel

FOR APPLICANT

David M. Ferrara, Esq.

Administrative Judge Paul J. Mason issued a decision, dated December 31, 1996, in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance

for Applicant. Department Counsel appealed. For the reasons set forth below, the Board affirms the Administrative Judge's decision.

This Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992.

Department Counsel's appeal presents the following issues: (1) whether the Administrative Judge made certain factual findings that are not supported by the record evidence; (2) whether the Administrative Judge erred by not applying certain Adjudication Policy factors; and (3) whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated September 20, 1995 to Applicant. The SOR was based on Criteria M (alcohol abuse) and I (poor judgment, unreliability, or untrustworthiness).

A hearing was held on April 4, 1996. The Administrative Judge subsequently issued a decision in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Department Counsel's appeal from that favorable decision.

Appeal Issues

1. Whether the Administrative Judge made certain factual findings that are not supported by the record evidence.

Department Counsel contends the Administrative Judge made three factual findings that are not supported by the record evidence. Specifically, Department Counsel argues the Judge erred by finding: (a) there is no evidence indicating Applicant used or abused alcohol between August 19, 1994 and February 1995; (b) most of Applicant's support structure was in place by April 1995; and (c) Applicant's contact with a recommended men's group and Alcoholics Anonymous was very abbreviated.

(a) Department Counsel's first argument fails to demonstrate the Administrative Judge committed harmful error. As Department Counsel's appeal brief notes, the Administrative Judge found that Applicant used alcohol three weeks after his release from a treatment program in August 1994 and drank some wine in February 1995. Department Counsel's argument is similar to others that the Board has rejected in the past. *See, e.g.*, DISCR Case No. 90-1874 (July 30, 1993) at p. 4 ("Furthermore, the Board will review a determination as a whole, rather than focus on isolated sentences or passages in it, to discern what the Judge meant."). The Judge's decision is not a model of clarity with respect to his findings concerning Applicant's drinking between August 1994 and February 1995, inclusive. However, the Board does not review a Judge's decision against a standard of perfection. *See, e.g.*, ISCR Case No. 96-0522 (May 1, 1997) at p. 3. Although Department Counsel has demonstrated the Judge used a single sentence that, viewed in isolation, is not sustainable, the error is harmless in light of the Judge's decision as a whole.

(b) There is conflicting record evidence as to when most of Applicant's support structure was in place. The Administrative Judge is responsible for weighing conflicting evidence and making factual findings. *See, e.g.*, ISCR Case No. 95-0576 (May 7, 1996) at p. 3. Absent a showing that the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law, the Board will not disturb the Judge's findings. *See, e.g.*, 94-0544 (June 24, 1996) at p. 3. Here, the Judge's challenged finding reflected a plausible interpretation of the record evidence as a whole. Accordingly, the ability of Department Counsel to cite to conflicting record evidence is not sufficient, by itself, to demonstrate the Administrative Judge erred. Thus, Department Counsel's second argument is not persuasive.

(c) Department Counsel's third argument demonstrates the Administrative Judge committed harmless error. Although the specific finding challenged by Department Counsel is in error, it is not a significant error that warrants remand or reversal. Like Department Counsel's first argument, this argument seeks to hold the Judge to a standard of perfection that is not legally required.

2. Whether the Administrative Judge erred by not applying certain Adjudication Policy factors. Department Counsel contends the Administrative Judge misapplied pertinent Adjudication Policy factors. Specifically, Department Counsel argues: (a) the Judge erred by not applying Alcohol Abuse Disqualifying Factor 4,⁽¹⁾ and (b) the Judge erred by applying Alcohol Abuse Mitigating Factor 3⁽²⁾ instead of Alcohol Abuse Mitigating Factor 4.⁽³⁾ For the reasons that follow, the Board concludes Department Counsel's arguments lack merit.

(a) There is record evidence that the Administrative Judge could have relied on to find that Applicant engaged in drinking that falls within the scope of Alcohol Abuse Disqualifying Factor 4. However, there also is record evidence that Applicant did not engage in such drinking. As discussed earlier, the ability of a party to cite to conflicting evidence is not sufficient, by itself, to demonstrate the Judge erred. Because the Judge's challenged finding reflects a plausible interpretation of the record evidence, the Board concludes the Judge did not act in an arbitrary or capricious manner by not applying Alcohol Abuse Disqualifying Factor 4.

(b) Department Counsel's arguments concerning Alcohol Abuse Mitigating Factors 3 and 4 fail for two reasons. First, as Applicant notes on appeal, at the hearing Department Counsel argued that Applicant did not satisfy Alcohol Abuse Mitigating Factor 3 and never mentioned Alcohol Abuse Mitigating Factor 4. Judicial estoppel bars a party from taking inconsistent positions in the same litigation. *Robertson Oil Co., Inc. v. Phillips Petroleum Co.*, 14 F.3d 360, 369 n.11 (8th Cir. 1992), *cert. denied*, 114 S.Ct. 2120 (1994). We can apply that doctrine in these proceedings by analogy. *Data General Corp. v. Johnson*, 78 F.3d 1556, 1565 (Fed. Cir. 1996). Having argued at the hearing that Applicant must satisfy Alcohol Abuse Mitigating Factor 3, Department Counsel cannot simply change its position on appeal and argue Applicant must satisfy Alcohol Abuse Mitigating Factor 4 instead.⁽⁴⁾

Second, even if Department Counsel were not estopped from arguing that the Judge should have applied Alcohol Abuse Mitigating Factor 4, its argument still fails to demonstrate the Judge erred. Given the record evidence in this case, the

Judge had a rational basis to conclude that Applicant's situation fell within the scope of Alcohol Abuse Mitigating Factor 3. [\(5\)](#)

3. Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. Department Counsel makes several arguments in support of its contention that the Administrative Judge's decision is arbitrary, capricious, or contrary to law: (a) the Judge made factual findings that are unsupported by the record evidence; (b) the Judge impermissibly deviated from pertinent Adjudication Policy factors; (c) the Judge failed to consider record evidence that is contrary to his favorable decision; and (d) there is no rational relationship between the Judge's findings and his conclusions.

Department Counsel's first two arguments are merely variations of the appeal arguments that the Board has already decided either lack merit or fail to demonstrate harmful error. Accordingly, the Board need not address those arguments again.

Department Counsel's third argument runs afoul of the rebuttable presumption that the Administrative Judge is presumed to consider all the record evidence unless the Judge specifically states otherwise. Apart from that rebuttable presumption, a reading of the Judge's decision persuades the Board that the Judge considered the record evidence as a whole in making his findings and conclusions. A Judge cannot simply ignore evidence that detracts from the Judge's factual findings (Directive, Additional Procedural Guidance, Item 32.a.). However, when faced with conflicting record evidence, a Judge must weigh the conflicting evidence and make factual findings. The Board will not conclude the Judge ignored the record evidence cited by Department Counsel merely because the Judge found the favorable evidence, on balance, to be more persuasive or weighty than the unfavorable evidence cited by Department Counsel.

Finally, the Board does not have to agree with the Administrative Judge to conclude that there is a rational relationship between the Judge's findings and his conclusions. Reading the Judge's decision as a whole, the Board is able to discern a rational relationship between the Judge's findings and his favorable security clearance decision. Department Counsel's ability to argue for an alternative interpretation of the record evidence is insufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law.

Conclusion

Department Counsel has failed to meet its burden on appeal of demonstrating error that warrants remand or reversal. Accordingly, the Board affirms the Administrative Judge's December 31, 1996 decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

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

1. "Drinking on the job, reporting for work in an intoxicated or 'hungover' condition, tardiness, or absences caused by or related to alcohol abuse, and impairment or intoxication occurring during, and immediately following, luncheon breaks."
2. "Whenever one of the situations listed below occurs, the individual must have successfully completed an alcohol rehabilitation or detoxification program and totally abstained from alcohol for a period of approximately two years:
 - a. The individual has had one previously failed rehabilitation program and subsequent alcohol abuse or alcohol related incidents.
 - b. The individual has been diagnosed by competent medical or health authority as an alcoholic, alcoholic dependent or chronic abuser of alcohol."
3. "Whenever the individual has had repeated unsuccessful rehabilitation efforts and has continued drinking or has been involved in additional alcohol related incidents then the individual must have successfully completed an alcohol rehabilitation or detoxification program, totally abstained from alcohol for a period of at least three years and maintained regular and frequent participation in meetings of Alcoholics Anonymous or similar organizations."
4. The fact that the Department Counsel who handled the hearing is not the same one as the Department Counsel handling the appeal is legally irrelevant.
5. Department Counsel's reliance on the Board's decision in ISCR Case No. 94-1081 (August 17, 1995) is misplaced. In that case, the Board held the Administrative Judge erred because he did not apply Alcohol Abuse Mitigating Factor 4 despite his own findings that the applicant had several failed rehabilitation efforts. Here, there were no findings of multiple failed rehabilitation efforts.