

DATE: December 31, 1996

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 96-0299

APPEAL BOARD DECISION

Appearances

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq.

Chief Department Counsel

FOR APPLICANT

Pro se

Administrative Judge Kathryn M. Braeman issued a decision, dated September 12, 1996, in which she concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant 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, as amended.

Applicant's appeal presents the issues of (1) whether Government Exhibit 5 should have been admitted into evidence, and (2) whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated April 30, 1996. The SOR was based on Criterion G (alcohol consumption). A hearing was held on August 6, 1996. The Administrative Judge subsequently issued a written decision in which she concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

The case is now before the Appeal Board on Applicant's appeal from the Administrative Judge's adverse security clearance decision.

Appeal Issues⁽¹⁾

(1) Whether Government Exhibit 5 should have been admitted into evidence. Applicant argues that Government Exhibit 5 should not have been admitted into evidence because results of psychological testing referenced in Government

(2)

Exhibit 5 were unreliable. This objection was not raised in the proceedings below. Inasmuch as Applicant, who had the benefit of counsel at hearing, did not proffer the specific objection to the Government Exhibit 5 below that he now raises on appeal, he has waived the objection. Even if the issue had been properly preserved for appeal, Applicant's concerns about the reliability of the psychological testing evidence go essentially to the weight of the evidence, not to its admissibility. Under the circumstances, it was not error for the Judge to consider Government Exhibit 5.

(2) Whether the Administrative Judge' adverse security clearance decision is arbitrary, capricious, or contrary to law. Applicant makes several arguments in challenging the Judge's findings against him under SOR subparagraphs 1.e., 1.h., and 1.i. The Board construes Applicant's arguments as raising the issue of whether the Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. For the reasons that follow, the Board concludes Applicant has failed to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law.

SOR subparagraph 1.e. Applicant asserts that he was not convicted of public intoxication in November 1991. There is record evidence that Applicant appeared in court and was fined in connection with the November 1991 incident. In the absence of a guilty plea or a judicial finding that Applicant was guilty of the offense charged, the state court would normally have had no basis to fine Applicant. Given the record evidence that Applicant appeared in court and was fined, the Administrative Judge had a rational basis to conclude that Applicant had been convicted. Alternatively, even if the Board assumes that the Judge's conclusion was in error, it was inconsequential to the ultimate result of the case because of the other evidence of Applicant's history of alcohol abuse.

SOR subparagraph 1.h. Applicant challenges the Judge's adverse finding under this subparagraph by arguing that there is insufficient evidence to support a conclusion that Applicant has a continuing domestic problem, and asserting he and his wife are communicating better than ever before. Applicant's argument fails to demonstrate the Judge's adverse decision is arbitrary, capricious, or contrary to law.

There is sufficient record evidence to support the Administrative Judge's finding that Applicant's alcohol abuse had contributed to domestic problems in the past. The Judge also found Applicant had made positive changes in his life-style and had maintained sobriety since May 1996. However, the Judge concluded that (in light of Applicant's overall history of alcohol abuse, including past relapses after earlier periods of sobriety) it was too soon to conclude that Applicant would continue to maintain sobriety in the future. Considering the record as a whole, the Judge's analysis and her finding under SOR subparagraph 1.h. are sustainable. Moreover, the Board reads the Judge's decision as finding against Applicant based on her findings and conclusions about his overall history of alcohol abuse, not merely or primarily on her finding against Applicant under SOR subparagraph 1.h.

SOR subparagraph 1.i. Applicant challenges the Judge's adverse finding under this subparagraph arguing: (a) his past relapses are not unusual for an alcoholic beginning the Alcoholics Anonymous program; (b) his relapses have been learning experiences for him; and (c) the Judge should have applied Alcohol Consumption Mitigating Factor 3 (" [P]ositive changes in behavior supportive of sobriety") to his case.

The Administrative Judge found, on the basis of the record evidence, that Applicant had relapses after periods of sobriety in 1995 and 1996.⁽³⁾ The Judge also concluded that Applicant's most recent period of sobriety (which began in May 1996) was too brief to demonstrate a sufficient track record of alcohol rehabilitation to warrant a favorable security clearance at this time. Considering the record of Applicant's overall history of alcohol abuse (including his relapses after earlier periods of sobriety), the Judge's reasoning is not arbitrary, capricious, or contrary to law.

The United States must be able to repose a high degree of trust and confidence in persons granted access to classified information. When an applicant has a history of alcohol abuse, that history poses a risk that the applicant may be unable to properly handle or safeguard classified information. Here, the Administrative Judge's findings are supported by the record evidence and her conclusions reflect a reasonable and plausible interpretation of the evidence. Furthermore, the Judge's decision reflects a reasonable application of pertinent provisions of the Directive. None of Applicant's arguments demonstrate factual or legal error by the Judge, or any abuse of discretion. Accordingly, the Board concludes the Judge's decision is not arbitrary, capricious, or contrary to law.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's September 12, 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. Attached to Applicant's appeal brief is an extract from "The Big Book of Alcoholics Anonymous." That extract constitutes new evidence, which the Board cannot consider. Directive, Additional Procedural Guidance, Item 29.
2. An objection to Government Exhibit 5 was raised at hearing but it was an objection to admission based on the perception that the government had not received a valid release from Applicant to obtain Government Exhibit 5, a confidential medical record. That objection did not preserve Applicant's current objection for purposes of appeal.
3. Given the record evidence concerning Applicant's relapses and the fact that he continued to drink until at least May 7, 1996, the allegation in SOR subparagraph 1.i. was literally correct at the time the SOR was issued.