

DATE: June 3, 1997

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 96-0371

**APPEAL BOARD DECISION**

Appearances

**FOR GOVERNMENT**

Peregrine D. Russell-Hunter, Esq.

Chief Department Counsel

**FOR APPLICANT**

Robert J. Fiore, Esq.

Administrative Judge Elizabeth M. Matchinski issued a decision, dated January 27, 1997, 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 following issues: (1) whether the Administrative Judge erred in applying the Adjudicative Guidelines; 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 a Statement of Reasons (SOR) dated July 15, 1996 to Applicant. The SOR was based on Criterion G (Alcohol Consumption). A hearing was held on October 16, 1996. The Administrative Judge subsequently issued a 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 before the Board on Applicant's appeal from that adverse decision.

**Appeal Issues**

1. Whether the Administrative Judge erred in applying the Adjudicative Guidelines. Applicant does not challenge the Administrative Judge's application of the Alcohol Consumption Disqualifying Guidelines to his case. However, Applicant does contend the Administrative Judge erred by applying only Alcohol Consumption Mitigating Guideline 1 to him in a limited fashion, arguing that the record evidence supports application of all the Alcohol Consumption Mitigating Guidelines. For the reasons that follow, the Board finds Applicant's argument unpersuasive.

An Administrative Judge must consider and apply pertinent Adjudicative Guidelines. Directive, Section F.3. Our review of the Judge's decision shows the Judge fulfilled her responsibility in this regard. The Judge made detailed factual findings about Applicant's history of alcohol abuse that are essentially unchallenged on appeal. Those factual findings provide a rational basis for the Judge's decision to apply only Alcohol Consumption Mitigating Guideline 1<sup>(1)</sup> to Applicant's single alcohol-related incident that occurred away from work in 1977.

A review of the decision shows the Administrative Judge engaged in a careful consideration of the record evidence, including the favorable evidence submitted on Applicant's behalf. The fact that the Judge did not find the evidence cited by Applicant to be more persuasive than the other record evidence does not demonstrate the Judge failed to consider the evidence or weighed it in an arbitrary or capricious manner. Moreover, the conclusions drawn by the Judge from the record evidence reflect a reasonable, plausible interpretation of the evidence. Given those conclusions, the Judge's application of the Alcohol Consumption Adjudicative Guidelines is rational and sustainable.

Applicant makes an argument about Alcohol Consumption Mitigating Guideline 4<sup>(2)</sup> that warrants further discussion. Specifically, Applicant argues the Judge erred by not applying Mitigating Guideline 4 because the Judge failed to give due consideration to the evidence that Applicant continues to drink in the context of: (a) on-going counseling; (b) a favorable prognosis from a medical professional, (c) a demonstrated maturity and understanding by Applicant about alcohol abuse and his treatment; and (d) a demonstrated track record of moderate drinking by Applicant in recent years. A review of the decision persuades the Board that the Judge's reasoning concerning Alcohol Consumption Mitigating Guideline 4 is sustainable.

Because of Applicant's continued drinking, Alcohol Consumption Mitigating Guideline 4 does not apply to him by virtue of its plain language. In an appropriate case, an Administrative Judge has discretion to deviate from the literal terms of a pertinent Adjudicative Guideline, provided the Judge articulates a rational basis for doing so. *See, e.g.*, ISCR Case No. 95-0912 (February 27, 1997) at p. 5. However, an applicant is not entitled, as a matter of right, to have a Judge deviate from the literal language of pertinent Adjudicative Guidelines. *See, e.g.*, ISCR Case No. 94-1137 (March 27, 1996) at p. 4. Accordingly, the Judge's decision not to apply Alcohol Consumption Mitigating Guideline 4 is neither legally erroneous nor an abuse of discretion in light of Applicant's continued drinking.

The Administrative Judge discussed the favorable evidence presented by Applicant about his on-going counseling, the favorable prognosis by one medical professional, and Applicant's rehabilitation efforts. The Judge weighed that evidence in light of Applicant's overall history (including the evidence that Applicant has had relapses of alcohol abuse after earlier periods of no abuse) and explained why she had doubts about Applicant's ability to continue drinking without lapsing into future alcohol abuse. The Judge's analysis of this aspect of the case demonstrates she had a rational basis for not applying Alcohol Consumption Mitigating Guideline 4.

## 2. Whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

Applicant makes several arguments to support his contention the Judge's decision should be reversed: (a) Applicant has never violated security despite his history of drinking; (b) Applicant's history of alcohol abuse is not a secret and he cannot be blackmailed over it; (c) given his conscientious security practices in the past, there is no good reason why Applicant's alcohol abuse should be a security risk today; (d) no one has ever questioned Applicant's loyalty or integrity; (e) even if Applicant's drinking has posed a flight-safety risk, it does not pose a security risk in the office environment; (f) Applicant has demonstrated sincere efforts at rehabilitation by voluntarily seeking treatment; (g) Applicant has successfully modified his drinking behavior over the last three years; (h) there is no basis for the Judge to have any doubts about Applicant's loyalty, judgment, reliability, trustworthiness, or security suitability; and (i) the Judge's decision does not properly apply the "whole person" concept to Applicant's case. The Board construes these arguments as raising the issue of whether the Judge's adverse decision is arbitrary, capricious, or contrary to law.

As a preliminary matter, the Board notes that industrial security clearance decisions are not loyalty determinations. *See* Executive Order 10865, Section 7. Nothing in the decision below indicates or suggests that the Administrative Judge made any loyalty determination with respect to Applicant. To the contrary, a reading of the decision shows the Judge based her decision on the appropriate standard of whether or not it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

There is no merit to Applicant's argument that he cannot be considered a security risk today because his security clearance was renewed in 1991. The government is not equitably estopped from denying or revoking a security clearance. *See, e.g.*, DISCR Case No. 91-0775 (August 25, 1992) at p. 3. Moreover, Applicant's argument ignores the record evidence that he engaged in alcohol abuse after 1991. Even if the Board assumes solely for purposes of deciding this appeal that the government affirmatively concluded Applicant did not pose a security risk in 1991, the government is not estopped from deciding that evidence of subsequent drinking warranted a reevaluation of Applicant's security eligibility. *Id.*

Security clearance decisions are not an exact science, but rather are predictive judgments about a person's security suitability in light of that person's past conduct and present circumstances. *Department of Navy v. Egan*, 484 U.S. 518, 528-29 (1988). Directive or objective evidence of nexus is not required before the government can deny or revoke access to classified information. *Gayer v. Schlesinger*, 490 F.2d 740, 750 (D.C. Cir. 1973). Furthermore, the government need not wait until an applicant actually mishandles or fails to properly safeguard classified information before it can deny or revoke that person's access to classified information. *Adams v. Laird*, 420 F.2d 230, 238-39 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). All that is required is proof of facts and circumstances that indicate a particular applicant is at risk for mishandling classified information, or does not demonstrate the high degree of judgment, reliability, and trustworthiness required of persons granted access to classified information. Accordingly, the absence of any security violations by Applicant does not preclude an adverse decision in his case.

Moreover, an adverse security clearance decision can be based on an applicant's conduct or present circumstances that have security significance independent of any coercion or blackmail possibilities. *See, e.g.*, ISCR Case No. 96-0505 (May 2, 1997) at p. 3. Therefore, the Administrative Judge's adverse decision is not rendered arbitrary, capricious, or contrary to law by the fact that Applicant's history of alcohol abuse is not a secret and cannot be used to blackmail or coerce him.

In addition, security clearance decisions are not limited to consideration of an applicant's conduct during duty hours. Any admitted or proven conduct that has security significance, whether it occurs during duty hours or not, may be considered by the Administrative Judge in deciding an applicant's security eligibility. *Id.* Even off-duty alcohol abuse can pose a security risk. *See 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).<sup>(3)</sup> Accordingly, there is no merit to Applicant's argument that the Judge should have made a favorable decision because he can be trusted to properly handle classified information in the office environment.<sup>(4)</sup> The Board also rejects Applicant's argument that there are no doubts to be resolved against Applicant. Applicant's alcohol history is a significant issue which rises at least to the level of doubt about his security suitability.

The favorable evidence cited by Applicant on appeal does not demonstrate the Administrative Judge's decision is arbitrary, capricious, or contrary to law. The Judge must consider all the evidence, both favorable and unfavorable, in deciding whether a particular applicant is security eligible. Directive, Section F.3. When considering the record evidence, the Judge has to decide whether the favorable evidence outweighs the unfavorable evidence, or vice versa. *Cf. Carosella v. U.S. Postal Service*, 816 F.2d 638, 643 (Fed. Cir. 1987)(agency has discretion to balance the seriousness of employee's conduct against applicable mitigating factors). Here, the Judge considered the record evidence and concluded the favorable evidence presented by Applicant was not sufficient to overcome the negative security implications of his overall history of alcohol abuse. Applicant's arguments do not demonstrate the Judge's analysis was arbitrary, capricious, or contrary to law.

We do not find merit in Applicant's "whole person" argument. The Administrative Judge considered the facts and circumstances of Applicant's alcohol abuse history, his rehabilitation efforts, and the favorable evidence presented by Applicant. Such an approach is consistent with the "whole person" approach to security clearance decisions.

### **Conclusion**

Applicant has failed to meet his burden on appeal of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's January 27, 1997 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. "[T]he alcohol related incidents do not indicate a pattern."
2. "[F]ollowing diagnosis of alcohol abuse or alcohol dependence, the individual has successfully completed inpatient or outpatient rehabilitation along with aftercare requirements, participates frequently in meetings of Alcoholics Anonymous or a similar organization, abstained from alcohol for a period of at least 12 months, and received a favorable prognosis by a credentialed medical professional."
3. The record evidence shows that Applicant's alcohol abuse has led, on occasions, to blackouts. Such blackouts pose a security risk.
4. The Board notes there is a tension, if not outright inconsistency, between Applicant's concession that his drinking could raise legitimate flight safety concerns and his argument that his drinking does not raise legitimate concerns about his ability to properly handle and safeguard classified information during duty hours.