

DATE: July 22, 1997

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 96-0575

APPEAL BOARD DECISION

Appearances

FOR GOVERNMENT

Michael H. Leonard, Esq.

Department Counsel

FOR APPLICANT

Charles M. Shaw, Esq.

Administrative Judge Paul J. Mason issued a decision, dated March 18, 1997, in which he 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 by admitting various documents into evidence over Applicant's objections; 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 August 13, 1996 to Applicant. The SOR was based on Criterion G (Alcohol Consumption).

A hearing was held on December 16, 1996. The Administrative Judge later issued a written decision in which he 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 by admitting various documents into evidence over Applicant's objections. At the hearing, Applicant objected to the admission of Government Exhibits 4 through 11 on various grounds. On appeal, Applicant contends the Administrative Judge erred by admitting Government Exhibits 4, 6, 7, 8, 10, and 11 into evidence over his objections. The Board will discuss the challenged exhibits by category.

(a) Government Exhibits 4, 6, 7, and 8. Government Exhibits 4, 6 and 8 are medical records pertaining to treatment Applicant received for alcohol abuse. Government Exhibit 7 is a medical questionnaire that a physician (who had treated Applicant) filled out in response to a request from the Defense Investigative Service. At the hearing, Applicant objected to these exhibits on the grounds that they were hearsay and they were privileged. The Judge admitted these exhibits over Applicant's objections. On appeal, Applicant contends the Judge erred because admission of these exhibits deprived Applicant of his right to confrontation and cross-examination with respect to the opinions of two doctors concerning their diagnosis of Applicant.⁽¹⁾ For the reasons that follow, the Board concludes Applicant's contention lacks merit.

The right to confrontation and cross-examination pertains solely to controverted issues. *See* Executive Order 10865, Section 4.(a) ("An applicant shall be afforded an opportunity to cross-examine persons who have made oral or written statements adverse to the applicant relating to a *controverted issue* . . . ") (emphasis added). Accordingly, an applicant is not entitled to claim that right with respect to SOR allegations that have not been controverted. In this case, Applicant's answer to the SOR did not controvert SOR ¶1.c. (which alleged that he received treatment in January 1995 for a condition diagnosed, in part, as Alcohol Dependence) or that portion of SOR ¶1.d. that alleged he received treatment in January-February 1996 for a condition diagnosed, in part, as Alcohol Dependence, Alcohol Withdrawal Syndrome, and Alcohol Liver Disease. By not controverting those allegations, Applicant effectively waived his right to confrontation and cross-examination with respect to the diagnoses made by the health care professionals involved in his treatments. Accordingly, the Administrative Judge did not err by admitting these exhibits into evidence over Applicant's objections.

Apart from the issue of waiver, Government Exhibits 4, 6 and 8 contain information that would be admissible under the well-established hearsay exception for medical records. *See, e.g.*, ISCR Case No. 94-1185 (September 13, 1995) at p. 4; DISCR Case No. 93-1050 (December 20, 1994) at p. 5. *See also* Fed. R. Evid. 803(4) and 803(6). Although Government Exhibit 7 is not a traditional medical record, it contains information about Applicant's medical treatment and diagnosis that is largely duplicative of information contained in Government Exhibits 4, 5 and 8. (The Board need not decide at this time whether a medical questionnaire such as Government Exhibit 7 would be admissible, over an applicant's objection, if it pertained to a controverted issue and was not duplicative of other admissible exhibits.)

(b) Government Exhibit 10. In response to Applicant's objections, the Administrative Judge severed Government Exhibit 10 and did not admit into evidence three pages from that exhibit which contained written remarks of the police officer who arrested Applicant in November 1994. On appeal, Applicant contends the Judge erred because Government Exhibit 10 is hearsay and contains the opinions and conclusions of the arresting officer and is not limited to the arresting officer's identification of Applicant. For the reasons that follow, Applicant's contention fails to demonstrate the Judge committed error that prejudiced Applicant.

Department Counsel must present witnesses and other evidence to prove controverted facts. *See* Directive, Additional Procedural Guidance, Item 14. When Department Counsel relies on third party statements adverse to an applicant to prove controverted facts, an applicant has the right to cross-examine the authors of those third party statements. However, documents that fall within recognized exceptions to the hearsay rule are an exception to an applicant's right to cross examination. *See, e.g.*, DISCR Case No. 90-2069 (March 25, 1992) at pp. 7-8 (applicant's right to confront adverse witnesses is not more expansive than the right to confrontation protected by the Sixth Amendment to the U.S. Constitution; therefore applicant's right to confrontation not violated by admission of documents that fall within well-established exceptions to hearsay rule); DISCR Case No. 88-2173 (September 14, 1990) at pp. 4-5 (same). *Accord* ISCR Case No. 96-0277 (July 11, 1997) at p. 3.

Government Exhibit 10 pertained to the November 1994 driving while intoxicated incident covered by SOR ¶1.b. The material contained in Government Exhibit 10 to which Applicant objected contained the observations and impressions of the reporting police officer. Police reports are admissible in civil proceedings as evidence of matters personally observed by the reporting police officer, as well as factual findings resulting from an investigation made pursuant to lawful authority. *See* Fed. R. Evid. 803(8)(B) and 803(8)(C). Such material was admissible in these proceedings as an exception to the hearsay rule. *See, e.g.*, DISCR Case No. 92-0113 (January 22, 1993) at p. 3. Accordingly, Applicant was not entitled to have the Judge exclude that material. Furthermore, Applicant's appeal argument is further undercut

by the fact that the Judge excluded three pages of Government Exhibit 10 in response to Applicant's objection. Department Counsel, not Applicant, was prejudiced by the Judge's action.

(c) Government Exhibit 11. Applicant's appeal argument concerning Government Exhibit 11 is not well-founded. The Administrative Judge excluded Government Exhibit 11 in response to Applicant's objection to it. There is a rebuttable presumption that the Judge is capable of disregarding evidence that the Judge rules is not admissible. *See, e.g.*, ISCR Case No. 94-0845 (October 18, 1995) at p. 6 (citing federal case and Board decision). Apart from that presumption, our reading of the decision persuades us that the Judge did not rely on Government Exhibit 11 in making his findings and conclusions in this case.

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

Applicant also contends: (a) the record evidence does not support the Administrative Judge's finding that Applicant abused alcohol in excess and to the point of intoxication and blackouts from about 1966 to at least January 1996; (b) there is no credible evidence to support the Judge's finding that Applicant did not attend an aftercare program; (c) there is no nexus or rational basis between Applicant's alcohol consumption and the Judge's adverse security clearance decision. The Board construes these contentions as raising the issue of whether the Judge's adverse decision is arbitrary, capricious, or contrary to law.

(a) As Department Counsel correctly notes in its reply brief, the Administrative Judge found Applicant's excessive alcohol consumption began in 1990, not in 1966 as alleged by the SOR. Considering the record as a whole, there is sufficient record evidence to support the Judge's challenged findings that Applicant engaged in alcohol abuse during the period 1990-January 1996 and that such alcohol abuse included drinking to the point of intoxication and blackouts. Despite Applicant's denials of alcohol abuse, there is sufficient record evidence to support the Judge's findings to the contrary.

(b) There is conflicting evidence whether Applicant failed to complete an aftercare program or was permitted to attend three Alcoholics Anonymous meetings in lieu of completing the aftercare program. As the trier of fact, the Administrative Judge has the responsibility to weigh the record evidence, assess the credibility of Applicant's testimony, and make findings of fact. The Judge's credibility determinations are entitled to deference on appeal. *See Directive, Additional Procedural Guidance, Item 32.a*. Considering the record as a whole, the Board cannot conclude the Judge acted in an arbitrary or capricious manner or contrary to law by rejecting Applicant's testimony on this point. Accordingly, the Board finds sustainable the Judge's challenged finding concerning Applicant's failure to complete the aftercare program.

(c) Applicant also contends that he has not abused alcohol on the job and his drinking has never impaired his job performance. The Board construes this contention as raising the issue of whether there is a nexus or rational basis between Applicant's alcohol consumption and the Judge's adverse security clearance decision. Alcohol abuse, even if it occurs during off-duty hours, poses 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). Given the overall record evidence of Applicant's history of alcohol abuse, the Judge had a rational basis for his negative conclusions about Applicant's security eligibility.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's March 18, 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. The Board reads Applicant's appeal brief as dropping the claim (raised at hearing) that these documents were privileged.