

DATE: September 11, 1997

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 96-0869

## **APPEAL BOARD DECISION AND REVERSAL ORDER**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Michael H. Leonard, Esq, Department Counsel

#### **FOR APPLICANT**

Joshua R. Treem, Esq.

Administrative Judge Robert R. Gales issued a decision, dated April 24, 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 reverses 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 was biased against Applicant; (2) whether the Administrative Judge misapplied the Directive by requiring abstinence; and (3) whether the Administrative Judge failed to apply pertinent provisions of the Adjudicative Guidelines.

### **Procedural History**

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated December 9, 1996. The SOR was based on Criterion G (Alcohol Consumption).

A hearing was held on March 20, 1997. The Administrative Judge subsequently issued a 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 was biased against Applicant. Applicant contends the Administrative Judge demonstrated bias against him because: (a) the Judge based his adverse decision, in part, on conduct that was not alleged in the SOR; (b) the Judge made a finding about a diagnosis of Applicant in contravention of the Judge's earlier ruling about that diagnosis; (c) the Judge acted as a prosecutor when questioning Applicant; and (d) the Judge rendered unsubstantiated medical opinions and analysis about Applicant that are not supported by the record evidence and are in contravention to the Directive. For the reasons that follow, the Board concludes that Applicant has demonstrated some errors by the Judge, but Applicant has failed to demonstrate bias by the Judge.

There is a rebuttable presumption that an Administrative Judge is impartial and unbiased, and the appealing party has a heavy burden when seeking to overcome that presumption. *See, e.g.*, ISCR Case No. 94-1055 (May 8, 1996) at p. 2 (citing federal cases). As will be discussed later in this decision, Applicant persuasively demonstrates the Judge committed several errors. However, bias is not shown merely because the appealing party can demonstrate the Judge committed legal error. *See, e.g.*, ISCR Case No. 95-0178 (September 4, 1996) at pp. 4-5 (citing federal case).

Nor has Applicant demonstrated the Administrative Judge was biased because of his questioning of Applicant in this case. The Board has previously addressed the issue of whether a Judge demonstrated bias by the questions asked of an applicant:

"An Administrative Judge may question any witness to clarify ambiguities, to better understand the evidence before him, or to facilitate the development of a more complete and accurate record. Although a Judge has discretion to question any witness at the hearing, the Judge must do so in a fair and impartial manner. On appeal, the Board will consider a Judge's questioning of witnesses as a whole, rather than focusing on individual questions in isolation." ISCR Case No. 94-1055 (May 8, 1996) at p. 2 (citations omitted)

In this case, the Judge questioned Applicant after he had been questioned by his counsel, cross-examined by Department Counsel, and re-questioned by his counsel. At no time did Applicant's counsel object to the Judge's questions, individually or collectively. Furthermore, the Judge gave both counsel the opportunity to question Applicant after the Judge finished with his questions. Considering the record as a whole, the Judge's questioning of Applicant was within the bounds of his discretion and does not demonstrate bias.

Applicant persuasively argues that the Administrative Judge erred by basing his decision, in part, on conduct that was not covered by the SOR. In this case, the SOR was based on Criterion G (Alcohol Consumption). In the decision, the Judge relied, in part, on record evidence that Applicant drank alcohol despite a probation order that directed he abstain from drinking. The Judge's reliance on that evidence is problematic because there is no evidence that Applicant's drinking in violation of the probation order was excessive or to the point of intoxication for purposes of Criterion G. Absent evidence that Applicant's drinking was excessive, the mere fact it was in violation of a condition of probation did not transform such drinking into alcohol abuse within the meaning of Criterion G. *See, e.g.*, DISCR Case No. 93-1050 (December 20, 1994) at p. 7 (noting that mere fact applicant continued to drink alcohol did not support finding of alcohol abuse); DISCR Case No. 92-0284 (April 12, 1993) at p. 4 ("Neither the Directive nor Executive Order 10865 makes the use of alcohol, by itself, a security concern."); DISCR Case No. 90-1054 (February 25, 1993) at p. 4 ("A person . . . *may* be engaging in alcohol abuse because the specific facts and circumstances of his drinking indicates actual abuse. But, it does not follow that *any* time the person drinks alcohol, regardless of quantity, he is drinking to excess within the meaning of Criterion M [predecessor to Criterion G].") (emphasis in original). Accordingly, there was no rational basis for the Judge to rely on that drinking to support his adverse conclusions under Criterion G. [\(1\)](#)

Applicant also persuasively argues that the Administrative Judge erred when he made a finding about a diagnosis of Applicant in contravention of the Judge's earlier ruling about that diagnosis. At the hearing, the Judge ruled that he would give no weight to any diagnosis or prognosis about Applicant contained in Government Exhibit 1 unless there was a showing that the person making such a diagnosis or prognosis was a qualified health care professional (TR at 72). No such evidence was presented during the hearing. Despite that, the Judge discussed the diagnosis and prognosis in his findings of fact. Although a Judge may reconsider and change a ruling made during a hearing, a Judge cannot do so at whim or without explanation. If a Judge decides, after reflection, that a ruling made during a hearing was wrong or improvident, the Judge can change that ruling. However, when doing so, the Judge must articulate in his or her decision clear and cogent reasons for changing the earlier ruling. Without an adequate explanation, the Judge's reversal of a ruling has the earmarks of arbitrary and capricious action.

Applicant also contends the Administrative Judge rendered unsubstantiated medical opinions and analysis about Applicant that are not supported by the record evidence and are in contravention to the Directive. This contention has some merit.

The Administrative Judge must make factual findings and reach conclusions about an applicant's case. *See* Directive, Additional Procedural Guidance, Item 25. In doing so, the Judge may need to make findings and reach conclusions

about an applicant's medical condition to the extent they are pertinent to the issues raised by SOR allegations. It is entirely proper for a Judge to make such findings and conclusions in an appropriate case, if they are supported by the record evidence. However, in this case, the Judge made some findings and conclusions about Applicant's medical condition that are not supported by the record evidence.

As discussed earlier, the Administrative Judge discussed the diagnosis and prognosis of Applicant despite his ruling at hearing that no weight would be given to the portion of Government Exhibit 1 that made such a diagnosis and prognosis. To the extent the Judge's decision relies on that diagnosis and prognosis to infer Applicant has a serious alcohol problem, it lacks support in the record evidence. Moreover, the Board cannot sustain the Judge's conclusion that Applicant has a continuing problem with alcohol. That conclusion is not tenable because the record lacks any evidence that Applicant abused alcohol after a March 1994 alcohol-related incident.

2. Whether the Administrative Judge misapplied the Directive by requiring abstinence. In the decision, the Administrative Judge acknowledged that the former Adjudication Policy language pertaining to completion of an alcohol rehabilitation program had been removed and was no longer in the current Adjudicative Guidelines. Despite that acknowledgment, the Judge concluded Applicant needed to demonstrate a period of abstinence and completion of an alcohol rehabilitation program before Applicant could be considered reformed and not likely to abuse alcohol in the future. Applicant persuasively contends the Judge erred by misapplying the Directive.

The mere presence or absence of a Disqualifying or Mitigating Guideline is not solely dispositive of the outcome of a case. *See, e.g.*, ISCR Case No. 96-0764 (June 5, 1997) at p. 3. However, the discretion that an Administrative Judge has to evaluate a case under Section F.3. is not unfettered. A Judge's application of Section F.3. is reviewable to determine whether "[t]he Administrative Judge's rulings or conclusions are arbitrary, capricious, or contrary to law." Directive, Additional Procedural Guidance, Item 32.c.

When the Department of Defense eliminates specific language from the Directive, neither an Administrative Judge nor this Board can simply ignore that fact when deciding an industrial security clearance case. Section F.3 of the Directive does not provide authority to apply defunct provisions to current cases. Also, the discretion afforded to Judges under Section F.3. of the Directive does not include the *de facto* imposition of a *per se* rule against alcohol consumption that is contrary to the plain language and meaning of Criterion G (Alcohol Consumption).<sup>(2)</sup> *See* DISCR Case No. 90-1054 (February 25, 1993) at pp. 3-5 (discussing predecessor to Criterion G). The Judge erred, as a matter of law, by imposing such a *per se* rule in Applicant's case. There may be cases in which a Judge may have a rational basis to conclude that an applicant's failure to abstain from alcohol warrants an adverse clearance decision under Section F.3 (*e.g.*, record evidence that an applicant was diagnosed as alcohol dependent by a credentialed medical professional and the applicant continued to drink despite being advised by such a professional to abstain from drinking alcohol, or record evidence that an applicant has repeatedly lapsed into alcohol abuse whenever failing to remain abstinent). The record evidence in this case does not present such a situation.

We do not find merit in Applicant's contention that the Administrative Judge erred by applying Alcohol Consumption Disqualifying Guideline 4 ("[H]abitual or binge consumption of alcohol to the point of impairment."). The Board need not agree with the Judge to conclude that it was within the bounds of his discretion to decide that Applicant's episodic abuse of alcohol was sufficient to warrant application of Alcohol Consumption Disqualifying Guideline 4.

3. Whether the Administrative Judge failed to apply pertinent provisions of the Adjudicative Guidelines. Applicant contends the Administrative Judge erred by concluding none of the Alcohol Consumption Mitigating Guidelines applied. Applicant argues that the record evidence supports application of Alcohol Consumption Mitigating Guidelines 1,<sup>(3)</sup> 2,<sup>(4)</sup> and 3.<sup>(5)</sup> These arguments have mixed merit.

Applicant persuasively argues that the December 1963 and March 1964 underage drinking incidents are so remote in time and qualitatively different<sup>(6)</sup> from the drinking incidents in the 1990s that they cannot reasonably be considered part of a pattern of conduct. However, the Board finds unpersuasive Applicant's argument that the June 1990 incident was so unique that it could not be fairly considered as part of a pattern with his March 1994 alcohol incident. Moreover, it was not arbitrary, capricious, or contrary to law for the Judge to conclude that Applicant's 1990 and 1994 alcohol incidents presented enough of a pattern to preclude application of Alcohol Consumption Mitigating Guideline 1.

Given the absence of record evidence that Applicant has abused alcohol since the 1994 incident, more than three years before the hearing, it was arbitrary and capricious for the Administrative Judge to not apply Alcohol Consumption Mitigating Guideline 2.

Based on the record evidence, Applicant's argument concerning Alcohol Consumption Mitigating Guideline 3 is persuasive. Accordingly, the Administrative Judge's failure to apply this mitigating guideline (without explanation) was error.

### **Conclusion**

Applicant has demonstrated several harmful errors by the Administrative Judge. The totality of the identified errors is sufficient to warrant reversal pursuant to Item 33.c. of the Directive's Additional Procedural Guidance. Accordingly, the Board reverses the Administrative Judge's April 24, 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. To the extent the Administrative Judge relied on Applicant's drinking in violation of a condition of probation, the Judge's decision appears to implicitly find against Applicant on the basis that Applicant's violation of a condition of probation demonstrated poor judgment and unreliability cognizable under Criterion E (Personal Conduct). Absent an amendment to the SOR with proper notice to Applicant, the Judge could not rely on such a finding to basis his adverse clearance decision. *See, e.g.*, ISCR Case No. 96-0608 (August 28, 1997) at pp. 2-3 (discussing earlier Board decisions).

2. "*Excessive* alcohol consumption often leads to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information due to carelessness." (Italics added)

3. "[T]he alcohol related incidents do not indicate a pattern."

4. "[T]he problem occurred a number of years ago and there is no indication of a recent problem."

5. "[P]ositive changes in behavior supportive of sobriety."

6. Even the Administrative Judge noted there is no record evidence that the 1963 and 1964 incidents involved Applicant drinking to excess.

