

DATE: January 20, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0202

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Matthew E. Malone, Esq., Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Roger C. Wesley issued a decision, dated September 11, 1997, 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, as amended.

Department Counsel's appeal presents the issue of 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 March 19, 1997 to Applicant. The SOR was based on Criterion G (Alcohol Consumption).

Applicant initially requested a hearing, but later indicated that he wanted a decision made in his case without a hearing. A File of Relevant Material (FORM) was prepared, and a copy provided to Applicant. After Applicant's response to the FORM was received, the case was assigned to the Hearing Office for determination.

The Administrative Judge issued a written 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 Issue

Department Counsel makes several arguments to support its contention that the Administrative Judge's decision is arbitrary, capricious, and contrary to law: (1) the Administrative Judge erred by relying on evidence that was not admissible; (2) the Administrative Judge erred by overlooking evidence showing that a 1991 incident alleged in the SOR was alcohol-related; (3) the Administrative Judge did not properly weigh the record evidence and gave undue

weight to evidence concerning Applicant's character and job performance; (4) the record evidence does not support the Administrative Judge's finding that Applicant has demonstrated positive changes supportive of sobriety; and (5) the favorable evidence presented by Applicant is insufficient to warrant a favorable decision. For the reasons that follow, the Board concludes Department Counsel's arguments are not persuasive.

Inadmissible evidence. Applicant attached several documents to his answer to the SOR. In connection with the FORM, Department Counsel objected to three of those documents: letters from two supervisors, each dated April 7, 1997, and an undated memorandum from an alcohol counselor. In responding to the FORM, Applicant gave reasons why he felt the Administrative Judge should consider the three documents to which Department Counsel objected. On appeal, Department Counsel contends the Judge erred by not excluding the three documents to which it objected. Department Counsel's contention lacks merit.

Department Counsel seeks to fault the Administrative Judge for not strictly applying the Federal Rules of Evidence to the undated letter from the alcohol counselor. That argument is not well-founded because the Federal Rules of Evidence are only a guide (Directive, Additional Procedural Guidance, Item 19) and an Administrative Judge does not commit error by not strictly applying the Federal Rules of Evidence in these proceedings. *See, e.g.*, ISCR Case No. 96-0461 (December 31, 1997) at p. 3; ISCR Case No. 96-0360 (September 25, 1997) at p. 5; DISCR Case No. 94-0033 (January 11, 1995) at p. 3. At most, the issues raised by Department Counsel's objection went to the weight of the alcohol counselor's undated letter, not to its admissibility. (Indeed, in the decision below, the Judge specifically addressed Department Counsel's objection and properly concluded that any deficiencies went to the weight of the document, not its admissibility.) Accordingly, the Judge committed no error by admitting and considering the letter from the alcohol counselor.

In the decision, the Administrative Judge noted Department Counsel's objection to the two supervisor letters and indicated that revised versions of those two letters submitted by Applicant removed language that had been objected to by Department Counsel. On appeal, Department Counsel argues the Judge erred by admitting the two letters from supervisors because they offered opinions as to Applicant's security eligibility, an issue that goes to the ultimate issue the Judge is to decide. Moreover, Department Counsel's appeal brief states "Department Counsel is not aware of a 'revised' version of the letters to which an objection was raised. Department Counsel stands by its original objection." For the reasons that follow, Department Counsel's argument concerning the two supervisor letters is frivolous.

First, Department Counsel's appeal argument overlooks the fact that both of the original supervisor letters contain statements about relevant matters unrelated to the "security risk" opinions to which Department Counsel objected. Second, Department Counsel's objection was unduly technical. Item 19 of the Additional Procedural Guidance specifically provides that "technical rules of evidence may be relaxed, except as otherwise provided herein, to permit the development of a full and complete record." Moreover, there is a rebuttable presumption that a Judge is capable of ignoring or disregarding incompetent or irrelevant evidence. *See, e.g.*, ISCR Case No. 96-0461 (December 31, 1997) at p. 3; ISCR Case No. 97-0299 (December 11, 1997) at p. 2. Accordingly, there was a rebuttable presumption that the Judge would not base his clearance decision on the statements by the supervisors that Applicant was not a security risk. Third, Department Counsel's argument totally collapses in the face of two simple procedural facts: (a) Applicant submitted new versions of those two supervisor letters when he responded to the FORM, new versions which deleted the "security risk" opinions to which Department Counsel had objected, and (b) Department Counsel was provided a copy of Applicant's response to the FORM and affirmatively indicated that there was no objection to it.

1991 incident. SOR ¶1.c. alleged that Applicant had consumed alcohol prior to a May 1991 incident for which he was arrested, charged with several military offenses, and received a letter of reprimand. The Administrative Judge noted there was no record evidence as to the amount of alcohol Appellant drank prior to that incident and concluded that he could not infer "any causal connections between [Applicant's] drinking sufficient to warrant characterization of this incident as alcohol-related." Department Counsel contends the Judge erred because FORM Item 9 has a notation that alcohol was involved in the 1991 incident.

Considering the record as a whole, the Administrative Judge did not act in an arbitrary and capricious manner by concluding there was insufficient record evidence to find the 1991 incident was alcohol-related. Apart from a perfunctory mark in a box on the second page of a military police report (FORM Item 9), there is **no** record evidence

about the amount of alcohol Applicant drank before the incident, no personal observations by the arresting officer concerning Applicant's appearance or conduct at the time, nor any other evidence that would have probative value with respect to whether alcohol was involved in the incident.⁽¹⁾ Under these circumstances, the Judge's finding is not arbitrary, capricious, or contrary to law.

Weighing the evidence. Several arguments made by Department Counsel fault the Administrative Judge for the weight that he gave to various portions of the record evidence. For the reasons that follow, the Board concludes Department Counsel has failed to demonstrate the Judge erred in his weighing of the evidence.

The Administrative Judge must weigh the record evidence and make findings and draw conclusions. Directive, Additional Procedural Guidance, Item 25. Although the Judge has broad discretion in weighing the evidence, that discretion is not unfettered and can be challenged on appeal. *See* Directive, Additional Procedural Guidance, Item 32 ("The Appeal Board shall . . . determine whether or not: a. The Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record.").⁽²⁾ However, a Judge's weighing of the evidence will not be disturbed by the Board unless the appealing party demonstrates the Judge acted in an arbitrary or capricious manner or contrary to law in weighing the evidence. *See, e.g.*, ISCR Case No. 95-0705 (May 16, 1997) at p. 2 ("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.").

The Board need not agree with the Administrative Judge's factual findings to conclude Department Counsel has failed to demonstrate the Judge acted in an arbitrary or capricious manner when weighing the record evidence. The ability of Department Counsel to argue for an alternate interpretation of the record evidence is insufficient, standing alone, to demonstrate the Judge's factual findings are unsustainable. *See, e.g.*, ISCR Case No. 96-0457 (December 8, 1997) at p. 3.

Department Counsel also contends the Administrative Judge erred by referring to certain evidence presented by Applicant and stating it was "not controverted in the record and [is] entitled to acceptance." Department Counsel argues the Judge's language suggests the Judge might have applied an improper burden of persuasion with respect to Applicant's evidence. The Board concludes Department Counsel has failed to demonstrate the Judge committed harmful error.

Merely because evidence has been admitted without objection or rebuttal does not relieve the Judge of the responsibility to weigh that evidence. *See, e.g.*, ISCR Case No. 96-0277 (July 11, 1997) at p. 4 ("[T]he absence of any objection by Applicant to Government Exhibit 6 did not relieve the Administrative Judge from her obligation to consider what weight, if any, the Judge reasonably could give to that document."); DISCR Case No. 90-2069 (March 25, 1992) at p. 10 ("The Administrative Judge need not accept Applicant's testimony at face value even if it is un rebutted.") (citing federal case). Therefore, the mere fact that evidence is not objected to or rebutted does not mean the Judge must accept it at face value. However, nothing in Department Counsel's appeal brief states or suggests any reason why the Judge should have rejected the evidence in question or found it not worthy of belief. There is nothing inherently suspect or unreliable about this evidence (assessments of Applicant's character by his supervisors) that places it beyond the bounds of what the Judge could properly consider.

Favorable security clearance decision. Department Counsel contends the record evidence does not support the Administrative Judge's finding that Applicant has demonstrated positive changes supportive of sobriety, and the favorable evidence presented by Applicant is insufficient to warrant a favorable decision. Department Counsel has failed to demonstrate the Judge erred.

The Board need not agree with the Administrative Judge's findings and conclusions in order to conclude that Department Counsel has failed to demonstrate the Judge's favorable security clearance decision is arbitrary, capricious, or contrary to law. The fact that Department Counsel demonstrated Applicant had been involved in three alcohol-related incidents and had received alcohol counseling was not dispositive of the case. The Judge evaluated that negative information in light of the record evidence as a whole (Directive, Section F.3.) and pertinent Adjudicative Guidelines, and concluded Applicant had presented sufficient evidence in extenuation and mitigation to warrant a favorable security

clearance decision. The Board need not agree with the Judge to conclude his analysis reflects a plausible, reasonable interpretation of the record evidence and is consistent with pertinent provisions of the Directive.

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 September 11, 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. Certain passages in the Administrative Judge's decision suggest that only scientifically measured methods are sufficient to prove that alcohol was involved in Applicant's behavior. As the examples cited above show, other evidence can be sufficient to reach such a determination.
2. Whether there is sufficient record evidence to support an Administrative Judge's findings is a question of law, not a question of fact. *See, e.g.*, ISCR Case No. 96-0525 (June 17, 1997) at p. 6 n.8; ISCR Case No. 95-0912 (February 27, 1997) at p. 2.