

DATE: December 11, 1997

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0299

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Matthew E. Malone, Esq., Department Counsel

FOR APPLICANT

Francis J. Flanagan, Esq.

Administrative Judge Elizabeth M. Matchinski issued a decision, dated July 31, 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 issue of whether he was denied due process and a fair hearing.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated April 21, 1997 to Applicant. The SOR was based on Criterion G (Alcohol Consumption).

A hearing was held on June 26, 1997. 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 before the Board on Applicant's appeal from that adverse decision.

Appeal Issue⁽¹⁾

Applicant does not challenge the Administrative Judge's findings about his history of alcohol abuse. However, Applicant contends he was denied due process and a fair hearing because: (1) the Administrative Judge erred by permitting Department Counsel to make arguments not based on facts in evidence; (2) the Administrative Judge erred by basing her decision on Department Counsel's objectionable arguments; and (3) the Administrative Judge's errors precluded Applicant from having the opportunity to confront witnesses and challenge the evidence against him. For the reasons that follow, the Board concludes Applicant's arguments lack merit.

Strict application of formal rules of evidence is not required in DOHA proceedings. *See* Directive, Additional Procedural Guidance, Item 19. In addition, DOHA proceedings are civil in nature, involve hearings held before an

Administrative Judge (who is a lawyer), and do not involve juries. Accordingly, there is no need to apply rules of evidence and procedures intended to protect lay jurors from being confused or improperly influenced by arguments made by lawyers. This is because there is a rebuttable presumption that a Judge will consider all the record evidence,⁽²⁾ and is capable of disregarding incompetent or inadmissible matters.⁽³⁾ Accordingly, the Judge has broad latitude in permitting counsel to make closing arguments. Having reviewed the hearing transcript and considered the record evidence as a whole, the Board concludes that the Administrative Judge acted within the bounds of her discretion when she permitted Department Counsel's arguments despite the objection by Applicant's counsel.

Of course, even though an Administrative Judge has the discretion to give counsel broad latitude in making arguments at the hearing, the Judge must base his or her findings and conclusions on the record evidence and reasonable inferences drawn from that evidence. In this case, a reading of the decision shows the Judge based her findings and conclusions on the record evidence, not Department Counsel's arguments. Viewed in its entirety, the Judge's decision does not support Applicant's appeal argument.

The Board rejects Applicant's contention that he was denied the opportunity to confront witnesses and challenge the evidence against him. Department Counsel must present evidence to support controverted facts. Directive, Additional Procedural Guidance, Item 14. Once SOR allegations have been admitted by an applicant or proven by Department Counsel, the burden shifts to the applicant to present evidence to rebut, explain, extenuate, or mitigate those facts. Directive, Additional Procedural Guidance, Item 15. Considering the record evidence, Department Counsel met its burden of proof concerning Applicant's history of alcohol abuse. The burden then shifted to Applicant to present evidence to rebut, explain, extenuate, or mitigate the case against him. The record shows that Applicant was provided a full and fair opportunity to present evidence in support of his position that the Judge should make a favorable security clearance decision in his case.

Once Applicant presented his case, Department Counsel had the right --- within the bounds of zealous advocacy --- to argue that Applicant's evidence of reform and rehabilitation was insufficient to warrant a favorable security clearance decision. Department Counsel's argument was not evidence and nothing in the Judge's decision indicates the Judge considered that argument to be evidence. Accordingly, there is no basis to conclude Department Counsel's closing argument infringed, in any way, Applicant's right to confront witnesses and challenge the evidence against him.

Conclusion

There is no presumption of error below and the appealing party has the burden of demonstrating error. Because Applicant has failed to demonstrate any error below, the Board affirms the Administrative Judge's July 31, 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. Attached to Applicant's appeal brief is a magazine article. The Board cannot consider new evidence on appeal. Directive, Additional Procedural Guidance, Item 29.
2. *See* ISCR Case No. 96-0811 (August 21, 1997) at p. 2.
3. *See* ISCR Case No. 96-0575 (July 22, 1997) at p. 4. *Cf. Multi-Medical Convalescent & Nursing Center v. N.L.R.B.*, 550 F.2d 974, 977 (4th Cir. 1977), *cert. denied*, 434 U.S. 835 (1977).