

DATE: May 28, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0551

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Martin H. Mogul, Esq., Department Counsel

FOR APPLICANT

Renee L. Stasio, Esq.

Administrative Judge Joseph Testan issued a decision dated February 2, 1998, 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.

The 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 issues of whether the Administrative Judge's adverse security clearance decision properly applied the Directive or was arbitrary, capricious or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated August 5, 1997. The SOR was based on Criterion G (Alcohol Consumption).

A hearing was held on January 8, 1998. The Administrative Judge subsequently issued a written decision dated February 2, 1998 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

Applicant raises two arguments in support of his contention that the Administrative Judge's decision should not be affirmed: (a) the Administrative Judge did not properly apply the Directive and (b) the Administrative Judge's decision is arbitrary, capricious and contrary to law. The Board concludes that Applicant's arguments fail to prove error.

Applicant asserts that the Administrative Judge failed to properly apply the Directive in Applicant's case. Specifically, he cites the Judge's failure to apply Alcohol Consumption Mitigating Condition 2 ("the problem occurred a number of years ago and there is no indication of a recent problem") and contends the Judge did not use the whole person concept.

The record evidence shows Applicant had a twenty-three year history of alcohol excess (1972-1995) that included seven

DUI convictions. The Administrative Judge explicitly cited Applicant's testimony that he had consumed alcohol to the point of intoxication "zero to five" times in the period April 1995 to July 1997⁽¹⁾ as preventing the Judge from making the necessary finding (to apply mitigating Condition 2) that the problematic conduct occurred a number of years ago and there is no indication of a recent problem. The Administrative Judge's analysis is a plausible interpretation of the record evidence. Although Applicant may interpret the record differently, he has not demonstrated error in the Judge's decision. Similarly, the Administrative Judge's reference to Applicant's recent progress toward reform and his concerns about Applicant's lengthy history of alcohol consumption to excess are sufficient indicators that the Judge applied the whole person concept even if he did not explicitly cite that language.

Applicant also argues that the Administrative Judge's decision was arbitrary, capricious and contrary to law. In support of his argument, Applicant asserts 1) that the Administrative Judge relied solely on facts alleged in the SOR, 2) the Judge disregarded positive evidence and 3) the Judge disregarded a majority of relevant evidence. None of these assertions is persuasive.

The Judge had to make findings⁽²⁾ on the alleged conduct cited in the SOR which was the basis for the Government's concerns. *See* Directive, Additional Procedural Guidance, Item 25. Having made adverse findings on those allegations, it is logical that he relied on them, in the absence of mitigation, to conclude that Applicant was not eligible for a security clearance. The Judge did not disregard his positive findings regarding Applicant. He did conclude that the positive findings are currently insufficient to mitigate Applicant's disqualifying conduct. As noted earlier, the Judge's analysis is a plausible reading of the record evidence.

Applicant also refers to the evidence concerning his job performance and the successful execution of his responsibilities as a security manager, contending the Administrative Judge failed to give that evidence sufficient weight. Applicant's contention fails to show the Judge erred. Security clearance decisions are not limited to consideration of an applicant's job performance. *See, e.g.*, ISCR Case No. 97-0591 (March 25, 1998) at p. 2. Furthermore, the government need not wait until an applicant has violated security before it can deny or revoke that applicant'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). Accordingly, the favorable evidence cited by Applicant did not preclude the Judge from making an adverse security clearance decision based on Applicant's history of episodic alcohol abuse.

The decision below is not a model one. However, an Administrative Judge's decision is not measured against a standard of perfection. *See, e.g.*, ISCR Case No. 97-0351 (December 22, 1997) at p. 3. Furthermore, there is no presumption of error below and the appealing party has the burden of demonstrating harmful error. Absent a showing of such error, the Board will affirm a decision on appeal.

Conclusion

Applicant has failed to meet his burden of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's February 2, 1998 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. Applicant's answer to Department Counsel's ambiguously worded question about whether he had drunk to intoxication after the April 1995 incident is problematic. However, Applicant's other testimony (that he could remember a "a couple" of instances of drinking to intoxication after that incident) was sufficient to enable the Administrative Judge to find Applicant abused alcohol after that incident.

2. The Administrative Judge's decision contains some references to Applicant's testimony and at least one exhibit without indicating what findings the Judge made about the matters covered by that testimony and exhibit. Summarizing record evidence is not a substitute for fact finding. *See, e.g.*, DISCR Case No. 92-0284 (April 12, 1993) at p. 2 n. 1 (" [The Administrative Judge's] summary of Applicant's testimony does not amount to fact finding."). In this case, however, the Judge made sufficient findings of fact elsewhere in the decision to enable the Board to discern what he found about the matters relevant to the case.