

DATE: January 7, 1999

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0825

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Martin H. Mogul, Department Counsel

**FOR APPLICANT**

Gene A. Leposki, Esq.

Administrative Judge Barry M. Sax issued a decision, dated August 5, 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 raises three issues on appeal: whether the Administrative Judge's findings of fact were supported by substantial record evidence, whether the Administrative Judge properly applied the Directive, and whether the Administrative Judge's decision was arbitrary, capricious, and contrary to law?

**Procedural History**

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) to Applicant on March 31, 1998. The SOR was based on Criterion G (Alcohol Consumption) and Criterion E (Personal Conduct). A hearing was conducted on June 23, 1998. The Administrative Judge issued a written decision on August 5, 1998 in which he concluded it was not clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on appeal from that unfavorable decision.

**Appeal Issues**

1. Whether the Administrative Judge's findings of fact were supported by substantial record evidence? Applicant challenges the Administrative Judge's findings from seven passages in the Judge's decision. The board will analyze each challenge separately.

Applicant alleges that the Judge erred when he wrote that Applicant "used alcohol, at times to excess and to the point of intoxication, from approximately 1982 to the present, with occasional periods of abstinence." There is substantial record evidence in the form of documentary evidence and Applicant's testimony supporting those findings. Applicant gave inconsistent statements about his alcohol consumption. The Administrative Judge made plausible findings of fact based

on credible record evidence. Applicant has not demonstrated judicial error by virtue of pointing out that Applicant's own testimony was at times inconsistent.

Applicant correctly notes that the Administrative Judge wrote 1998 in a place where the correct year was 1996. There is no indication that this error had any substantive impact on the Administrative Judge's decision, therefore, it is merely harmless error that does not warrant remand or reversal.

Applicant also correctly notes that the Judge mis-described a university alcohol treatment program as being Navy sponsored. Again there is no basis to conclude that the Judge's error had a substantive impact on the ultimate outcome of the case. Therefore, this error also is harmless.

Applicant twice contests the Administrative Judge's finding that Applicant was arrested on October 25, 1997. There is ample record evidence supporting the Judge's finding. Applicant himself wrote in his answer to the SOR, "I was arrested with a group of individuals and I was never charged. In fact, the policemen who arrested everyone, are under investigation for their conduct." Also Government Exhibit 5, the arrest report, describes Applicant's arrest.

Applicant contests the Administrative Judge's description of the Navy's decision to revoke Applicant's security clearance. A review of the language in the Navy's July 19, 1996 letter to Applicant is sufficiently consistent with the Administrative Judge's description to support the conclusion there was no error.

Applicant contests the Administrative Judge's assertion that Applicant continued to abuse alcohol after a January 29, 1996 court order for Applicant to abstain from alcohol consumption for five years. The Board concludes that there was sufficient evidence concerning the October 25, 1997 arrest for the Administrative Judge to infer that Applicant abused alcohol on that occasion.

2. Whether the Administrative Judge properly applied the Directive? Applicant argues that the Administrative Judge failed to apply Alcohol Consumption mitigating conditions to Applicant's conduct. The Board is not persuaded that harmful error has been demonstrated.

Given Applicant's overall history of alcohol abuse, it was not arbitrary and capricious for the Administrative Judge to not apply Alcohol Consumption Mitigating Conditions 1<sup>(1)</sup> and 2.<sup>(2)</sup> Furthermore, given the fact that Applicant abused alcohol after an earlier period of abstinence and given the relative brevity of Applicant's abstinence from alcohol after the October 1997 incident, it was not arbitrary and capricious for the Judge to not apply Alcohol Consumption Mitigating Condition 4.<sup>(3)</sup> The Judge erred by not applying Alcohol Consumption Mitigating Condition 3<sup>(4)</sup> or failing to explain his reason(s) for not applying that mitigating condition. A Judge must apply pertinent Adjudicative Guidelines. Directive, Section F.3. If a provision of the Adjudicative Guideline appears to apply to the facts of a particular case, then the Judge is obligated to apply that provision or give a rationale explanation for not doing so. *See, e.g.*, ISCR Case No. 97-0803 (June 19, 1998) at p. 2. Here, Alcohol Consumption Mitigating Condition 3 appears to be supported by the record evidence, yet the Judge did not apply it and did not give any explanation for not applying it. Accordingly, the Judge erred.

However, the Administrative Judge's error with respect to Alcohol Consumption Mitigating Condition 3 does not warrant remand or reversal. The presence or absence of a factor for or against clearance is not solely dispositive of a case. Rather, applicable factors must be considered in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 97-0765 (December 1, 1998) at p. 6; ISCR Case No. 98-0111 (November 13, 1998) at p. 4. Therefore, even if the Board were to conclude that the Judge should have applied Alcohol Consumption Mitigating Condition 3, it would not follow, as a matter of law, that the Judge would have been obligated to make a favorable security clearance decision. Considering the record evidence as a whole, the Board concludes that there is not a significant chance that but for the Judge's error concerning Alcohol Consumption Mitigating Condition 3 the outcome would have been different. Accordingly, the Judge's error is harmless. *See, e.g.*, ISCR Case No. 97-0765 (December 1, 1998) at p. 6; ISCR Case No. 97-0707 (September 1, 1998) at p. 3.

3. Whether the Administrative Judge's decision was arbitrary, capricious and contrary to law? Applicant contends that the Administrative Judge relied on the Navy's 1996 adverse security clearance decision. In fact the Administrative Judge

did ample analysis of his own including considering Applicant's conduct since the Navy's decision. Applicant again raises his disagreement with the Judge's findings on the October 1997 arrest. As noted earlier, the Administrative Judge had sufficient record evidence on which to base his findings as to the October 1997 arrest. Applicant has not demonstrated that the Administrative Judge's decision was arbitrary, capricious or contrary to law.

## **Conclusion**

Applicant has failed to demonstrate harmful error below. Therefore the Administrative Judge's decision is affirmed.

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. "[T]he alcohol related incidents do not indicate a pattern."
2. "[T]he problem occurred a number of years ago and there is no indication of a recent problem."
3. "[F]ollowing diagnosis of alcohol abuse or alcohol dependence, the individual has successfully completed inpatient or outpatient rehabilitation along with aftercare requirements, participates frequently in meetings of Alcoholics Anonymous or a similar organization, abstained from alcohol for a period of at least 12 months, and received a favorable prognosis by a credentialed medical professional."
4. "[P]ositive changes in behavior supportive of sobriety."