

DATE: November 8, 1999

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 98-0128

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Peregrine D. Russell-Hunter, Chief Department Counsel

**FOR APPLICANT**

*Pro Se*

Administrative Judge Jerome H. Silber issued a decision dated July 20, 1999, 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 appeal presents the issue of whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious or contrary to law.

**Procedural History**

The Defense Office of Hearings and Appeals issued a Statement of Reasons dated February 12, 1998 to Applicant. The SOR was based on Criterion J (Criminal Conduct), Criterion H (Drug Involvement) and Criterion G (Alcohol Consumption).

Applicant submitted an answer to the SOR in which he requested a hearing. On May 24, 1999 a hearing was held in Applicant's case. On July 20, 1999, the Administrative Judge 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 Issue**

Applicant raises several matters on appeal, all of which come under the general argument of asserting that the Administrative Judge's decision was arbitrary, capricious and contrary to law. The Appeal Board is not persuaded by that argument.

Applicant says that he "has been free of alcohol for almost five months." If Applicant means to include time passed since the close of the record that is new evidence which the Board is not permitted to consider on appeal. (Additional Procedural Guidance, Item 29). Applicant testified at the hearing that his last drink was two or three weeks earlier, so

the Administrative Judge's finding that he continues to drink is supported by the record evidence. In any case, the Administrative Judge found for Applicant on the paragraph alleging Applicant continued consumption of alcohol despite attending Alcoholics Anonymous (paragraph 3.c. of the SOR).

Applicant notes that his alcohol-related criminal incident was in 1997. While the Board recognizes that recency is a factor to be considered in analyzing the whole person under the Directive, it can not conclude that as a matter of law the Administrative Judge must have decided to mitigate Applicant's five alcohol-related criminal incidents because of time that had passed. The Board need not agree with the Administrative Judge's conclusion in order to find it sustainable.

Applicant raises his role as a father as an argument to be considered in mitigation. Given the totality of the record in this case it is not clear that Applicant's role as a father is necessarily mitigating. Thus, Applicant's argument is not persuasive.

Applicant argues that he is now "more mature." Applicant did introduce some record evidence of his recent maturation which the Administrative Judge apparently considered in concluding other allegations in Applicant's favor (The Administrative Judge specifically refers to Applicant's maturation in support of findings for Applicant under Criteria J and H). However, given the nature of Applicant's track record with alcohol, the Board cannot conclude as a matter of law that the Judge erred by not finding Applicant's maturity dispositive on the alcohol allegations.

Applicant argues that he has not been intoxicated since October 1997. Our analysis is similar to our analysis on the passage of time since Applicant's last alcohol-related criminal incident. Here, as there, recency is pertinent, but given Applicant's total record with alcohol, the Board cannot conclude that the Administrative Judge as a matter of law must have found all of Applicant's alcohol history mitigated. Again, the Board need not agree with the Administrative Judge's conclusions to find them sustainable. Thus, Applicant's argument is unpersuasive.

### **Conclusion**

Applicant has failed to meet his burden on appeal of demonstrating error. Therefore the Board affirms the Administrative Judge's decision.

See dissenting opinion

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

**Dissenting Opinion of Chairman Emilio Jaksetic**

Given the limits of the Board's authority under the Directive and the procedural posture of this case on appeal, I am constrained to decide whether the Administrative Judge's adverse decision can be affirmed under Criterion G (Alcohol Consumption).

Given the record evidence in this case, the Administrative Judge's adverse conclusions do not follow rationally from his findings about Applicant's alcohol consumption. In addition, the Judge seems to be finding against Applicant based on alcohol consumption that, for more than a year, has no indication of being alcohol abuse. The Judge's conclusions under Criterion G are arbitrary and capricious in light of the record evidence as a whole and some of the Judge's own findings. Accordingly, I cannot agree with my colleagues' decision to affirm the Judge's decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board