DATE: November 30, 1999

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 99-0068

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Jerome H. Silber issued a decision, dated July 16, 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.

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 following issues: (1) whether Applicant was denied a fair hearing; (2) whether Applicant was prejudiced by the timing of the issuance of the Administrative Judge's decision; (3) whether the Administrative Judge erred by failing to consider information submitted by Applicant; (4) whether the Administrative Judge erred by finding Applicant had engaged in a felony; (5) whether the Administrative Judge erred by finding Applicant used alcohol to excess for 20 years; (6) whether the Administrative Judge's adverse decision is arbitrary and capricious because there was no showing that Applicant is a security risk; and (7) whether the Administrative Judge's adverse decision is in violation of the Americans with Disabilities Act.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated February 3, 1999 to Applicant. The SOR was based on Criterion G (Alcohol Consumption) and Criterion J (Criminal Conduct).

A hearing was held on April 20, 1999. The Administrative Judge subsequently issued a written 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 the Administrative Judge's adverse decision.

Appeal Issues

1. Whether Applicant was denied a fair hearing. Applicant contends he was denied a fair hearing. In support of this contention, Applicant argues: (a) it is not possible to obtain legal representation when dealing with DOHA; (b) DOHA operates under "laws, rulings, and jargon that are not accessible, to the general public"; (c) Applicant felt his hearing was a "kangaroo court," a "horror show," and "a complete farce." Applicant also asserts, without elaboration or

explanation, that (d)"[I]t is also incorrect to assume that an individual has a chance in this so called appeals process."

An applicant has a right to a fair and impartial adjudication of his or her security clearance case. Directive, Section D.1. The right to a fair and impartial adjudication is an important one, and any action that could impair that right must be scrutinized closely to determine whether the applicant suffered any prejudice. *See, e.g.*, ISCR Case No. 97-0409 (April 29, 1998) at p. 2. These principles frame the Board's analysis of Applicant's claims that he was denied a fair hearing.

(a) Applicant's appeal brief contains statements about his problems in getting a lawyer to represent him. Those statements go beyond the record evidence, and constitute new evidence that the Board cannot consider. Directive, Additional Procedural Guidance, Item 29. And, in any event, any difficulty an applicant may have in obtaining a lawyer to represent him or her in these proceedings is a matter outside the authority and jurisdiction of DOHA Administrative Judges and this Board.

(b) There is no merit to Applicant's argument about the inaccessibility of DOHA's rules and procedures. Applicant was provided a copy of the Directive and given a four-page "Prehearing Guidance for DOHA Hearings." Furthermore, at the beginning of the hearing, the Administrative Judge explained how the hearing would be conducted. In addition, the record evidence does not support Applicant's suggestion that he was incapable of understanding the guidance provided to him. At the hearing, Applicant indicated that he had been unsuccessful in getting a lawyer to represent him. The Judge then asked Applicant some questions to ascertain his educational background and assess his ability to understand the proceedings. Given Applicant's age (41 at the time of the hearing) and educational experience (three aster's degrees), the Judge had a rational basis for concluding Applicant was competent to proceed without a lawyer. Furthermore, a review of the hearing transcript shows that the Judge gave Applicant explanations about various procedural and evidentiary matters that arose during the hearing.

(c) A review of the record below does not support Applicant's characterization of his hearing as a "kangaroo court," a "horror show," or "a complete farce." There is a rebuttable presumption that an Administrative Judge is fair and impartial. *See, e.g.*, ISCR Case No. 98-0515 (March 23, 1999) at p. 5. Applicant's generalized, unsubstantiated assertions of denial of a fair hearing fall far short of rebutting that presumption. The hearing was not made a "kangaroo court" merely because an Administrative Judge presided, there was a court stenographer present, the hearing room had "official looking seals and emblems," and Department Counsel is a government lawyer. The hearing was not a "horror show" merely because the Administrative Judge and Department Counsel were familiar with the Directive and routine hearing procedures. And, none of the matters cited by Applicant on appeal supports a characterization of the hearing as "a complete farce."

(d) Applicant may sincerely believe his conclusory assertion that a person does not have a chance on appeal. As an expression of Applicant's personal belief, it is incapable of being addressed by the Board. The Board merely notes that applicants have been successful on appeal by winning a reversal of an adverse decision,[(1)] or having the Board affirm a favorable decision that was appealed by Department Counsel.[(2)]

2. Whether Applicant was prejudiced by the timing of the issuance of the Administrative Judge's decision. Applicant contends DOHA is "cruel in their dealings with accused individuals." In support of this contention, Applicant: (a) notes he received correspondence that told him he had to respond in a timely manner, but argues DOHA does not apply that standard to itself; (b) asserts that when he left the hearing room he "was told I would receive a decision in two to four weeks"; (c) states he did not receive the decision "until almost August of 1999"; and (d) asserts he lost sleep, suffered enormous stress, and "experienced tangible physical and mental trauma" while waiting to get the decision in his case. Applicant also asserts (e) "it is cruel to simply revoke the clearance without any specification whatsoever of the criteria for reinstatement" and, accordingly, he is left "in limbo" by an adverse decision.

At the end of the hearing, the Administrative Judge told Applicant "Within a reasonable period of time after receipt of the transcript, which is currently running about 30 days I might add, after I get the transcript I will issue a written decision of the case" (Hearing Transcript at p. 162). There is no record of what, if anything, Applicant was told after the hearing about when he could expect to receive a decision in his case. In the decision, the Judge noted he received the hearing transcript on July 9, 1999. The decision was issued on July 16, 1999. Accordingly, the Judge issued the decision within a reasonable time after his receipt of the hearing transcript.

Neither the Administrative Judge nor the Board has jurisdiction over the matter of reinstatement of a security clearance. Reapplications are fall under the jurisdiction of the Director, DOHA. Directive, Additional Procedural Guidance, Items 37-41. Since Applicant's eligibility for reapplication is outside our jurisdiction, the Board lacks authority to address Applicant's argument about reinstatement.

3. Whether the Administrative Judge erred by failing to consider information submitted by Applicant. On appeal, Applicant resubmitted information that he originally sent to DOHA in February 1999 and states "[n]o one read this material when it was originally submitted. Perhaps someone will read it now." The Board construes this contention as raising the issue of whether the Administrative Judge failed to consider information submitted by Applicant.

The information resubmitted with Applicant's appeal brief duplicates his February 24, 1999 answer to the SOR. A copy of Applicant's answer to the SOR is in the case file. There is a rebuttable presumption that an Administrative Judge considers all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 98-0617 (July 14, 1999) at p. 3. Apart from that rebuttable presumption, the record shows the following: at the hearing, the Judge referred to Applicant's answer to the SOR and explained its role in the proceedings; the Judge's decision refers to Applicant's answer to the SOR; and the Judge's findings include references to some matters noted in Applicant's answer to the SOR.

The fact that the Administrative Judge did not find the favorable evidence submitted by Applicant sufficient to overcome the evidence presented against him does not demonstrate the Judge failed to consider that evidence. A Judge must consider all the available information, both favorable and unfavorable (Directive, Section F.3.), and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. An appealing party's disagreement with a Judge's weighing of the record evidence is not sufficient to demonstrate the Judge erred. *See, e.g.*, ISCR Case No. 98-0247 (January 20, 1999) at p. 3 ("The fact that the Judge weighed the record evidence differently than Department Counsel wanted does not demonstrate that the Judge ignored that evidence or that he weighed the conflicting evidence erroneously."). Nothing in Applicant's brief persuades the Board that the Judge weighed the record evidence in a manner that is arbitrary, capricious, or contrary to law.

Considering the record as a whole, the Board concludes Applicant has failed to rebut the presumption that the Administrative Judge considered Applicant's answer to the SOR.

4. Whether the Administrative Judge erred by finding Applicant had engaged in a felony. The Administrative Judge found: (a) in November 1996 Applicant made by telephone a false report of a bomb in a police station; (b) Applicant had been drinking before making the phone call; (c) a year and a half later, Applicant (who had moved from the state) was told there was an arrest warrant pending on him; (d) Applicant returned to the state and was arrested on a felony charge in connection with the November 1996 incident; and (e) Applicant pleaded no contest and was placed on two years probation in December 1998, and was required to pay the costs of the investigation, perform 200 hours of community service, write a letter of apology to the recipient of his phone call, attend an anger management course, and continue with alcohol counseling. Later in the decision, the Judge referred to the November 1996 incident as "felonious." Applicant contends the Judge erred by characterizing the November 1996 incident as "felonious" because he was not convicted of a felony. For the reasons that follow, Applicant's contention lacks merit.

The record evidence supports the Administrative Judge's findings about Applicant making a false report of a bomb in a police station. Furthermore, Exhibit 5 shows the following: Applicant was charged with false report of a deadly explosive, with a maximum sentence of 15 years imprisonment; Applicant appeared in court with counsel and pleaded no contest to the charge; adjudication of guilt was withheld; Applicant was sentenced to two years probation, with various condition; and Applicant was placed on notice that any violation of probation could result in Applicant being adjudicated guilty of the offense to which he pleaded no contest. Even though a state court has withheld adjudication of guilt (pending Applicant's successful completion of probation by December 2000), the Judge had a rational and legally permissible basis for characterizing the November 1996 incident as "felonious" in nature. *See, e.g.*, ISCR Case No. 99-0119 (September 13, 1999) at p. 2 ("However, the absence of a conviction does not preclude the government from proving an applicant engaged in criminal conduct. Furthermore, the fact that criminal charges were dropped, dismissed, or resulted in an acquittal does not preclude an Administrative Judge from finding an applicant engaged in the conduct underlying those criminal charges")(citing earlier Board decisions).

5. Whether the Administrative Judge erred by finding Applicant used alcohol to excess for 20 years. Applicant contends "[t]he government claims 20 years of drinking to excess in their decision" and there is no evidence to support that claim. For the reasons that follow, the Board concludes Applicant has failed to demonstrate error by the Administrative Judge.

The Administrative Judge did not find that Applicant drank to excess for 20 years. Rather, the Judge found the following: "Applicant has had a lengthy history of alcohol consumption to excess, including four alcohol-related incidents"; Applicant drank to intoxication on a number of occasions; Applicant was involved in alcohol-related driving incidents in 1984, 1987, and May 1996; Applicant had been drinking before the November 1996 false bomb report incident; Applicant has sought help from Alcoholics Anonymous and his employee assistance program because he thought he might have an alcohol problem; and Applicant has refrained from drinking alcohol since August 1998. Although the Judge's findings are not a model of clarity in some respects, they reflect a reasonable interpretation of the record evidence concerning Applicant's history of episodic alcohol abuse. Applicant's claim of error on this point does not demonstrate the Judge erred.

6. Whether the Administrative Judge's adverse decision is arbitrary and capricious because there was no showing that Applicant is a security risk. Applicant argues: (a) Department Counsel did not prove that he is a security risk; (b) the fact that Applicant suffers from the disease of alcoholism[(3)] does not demonstrate he is a security risk; (c) he has held a security clearance for 17 years without indication that he is a security risk; and (d) there is no proof that alcoholism constitutes a security risk. The Board construes these arguments as raising the issue of whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. For the reasons that follow, the Board concludes Applicant's arguments fail to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law.

The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). Security clearance decisions are not an exact science, but rather are predictive judgments about a person's security suitability in light of that person's past conduct and present circumstances. *Department of Navy v. Egan*, 484 U.S. 518, 528-29 (1988). The government does not have to show that an applicant presents a "clear and present danger" to security before it can deny or revoke access to classified information. *Smith v. Schlesinger*, 513 F.2d 462, 476 n.48 (D.C. Cir. 1975). Indeed, the federal government need not wait until an applicant actually mishandles or fails to properly handle or safeguard classified information before it can deny or revoke access to such information. *Adams v. Laird*, 420 F.2d 230, 238-39 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). Direct or objective evidence of nexus is not required before the government can deny or revoke access to classified information. *Gayer v. Schlesinger*, 490 F.2d 740, 750 (D.C. Cir. 1973). All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. *See, e.g.*, ISCR Case No. 98-0188 (April 29, 1999) at p. 4. Finally, security clearance decisions are not limited to consideration of an applicant's conduct during duty hours; off-duty conduct can be considered in evaluating an applicant's security eligibility. *See, e.g.*, ISCR Case No. 98-0620 (June 22, 1999) at p. 3.

Alcohol abuse, even if limited to off-duty hours, provides a rational basis for the government to question an applicant's security eligibility. *See, e.g., Cole v. Young*, 351 U.S. 536, 550 n.13 (1956); *Croft v. Department of Air Force*, 40 M.S.P.R. 320, 321 n.1 (1989). The Administrative Judge was not precluded from concluding that Applicant's history of episodic alcohol abuse warranted an adverse security clearance decision merely because Applicant held a security clearance for many years without a security violation, or because Applicant's alcohol abuse did not affect his job performance. Applicant's overall history of episodic alcohol abuse, which resulted in several alcohol-related incidents (including Applicant's November 1996 false bomb report incident), provides a rational basis for the Judge's doubts about Applicant's security eligibility.

There is no merit to Applicant's assertion that he is being punished based on his status as an alcoholic. Department Counsel presented a case against Applicant based on his abuse of alcohol, including his involvement in several alcohol-related incidents. The Judge's decision is not based on Applicant's status as an alcoholic, but rather Applicant's overall history of alcohol abuse (including his alcohol-related incidents).

7. Whether the Administrative Judge's adverse decision is in violation of the Americans with Disabilities Act. Applicant

contends the Administrative Judge's adverse decision is in violation of the Americans with Disabilities Act because it discriminates against him solely because he is afflicted with the disease of alcoholism "without having any concrete indication whatsoever that [Applicant is] a security risk."

Applicant's contention lacks merit. First, the Americans with Disabilities Act (ADA) does not apply to these proceedings. The federal government is specifically excluded from the coverage of the ADA by 42 U.S.C. Section 12111(5)(B). Accordingly, a person cannot challenge an action by a federal agency under the ADA. *Kemer v. Johnson*, 900 F.Supp. 677, 681 (S.D.N.Y. 1995), *aff'd mem*., 101 F.3d 683 (2d Cir. 1996), *cert. denied*, 117 S.Ct. 441 (1996). Second, as discussed earlier in this decision, the Administrative Judge did not base his decision on any finding that Applicant is an alcoholic. Rather, the Judge based his decision on Applicant's overall history of alcohol abuse, including Applicant's involvement in several alcohol-related incidents (one of which was Applicant's bomb threat in November 1996). And, as discussed earlier in this decision, Applicant's history of alcohol abuse provides a rational basis for the Judge's adverse security clearance decision.

Conclusion

Applicant has failed to meet his burden of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's July 16, 1999 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. *See, e.g.*, ISCR Case No. 99-0032 (November 10, 1999); ISCR Case No. 99-0040 (October 1, 1999); ISCR Case No. 97-0356 (April 21, 1998).

2. *See, e.g.*, ISCR Case No. 98-0611 (November 1, 1999); ISCR Case No. 98-0395 (June 24, 1999); ISCR Case No. 98-0592 (May 4, 1999).

3. Department Counsel did not present evidence to show Applicant had been diagnosed as an alcoholic or alcohol dependent person. The Administrative Judge did not find Applicant was an alcoholic or alcohol dependent person. The only references in the record to Applicant's status as an alcoholic or alcohol dependent person come from Applicant himself and one of his character letters.