

DATE: September 21, 2001

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 00-0601

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

*Pro Se*

Administrative Judge Joseph Testan issued a decision, dated June 15, 2001, 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 the Administrative Judge erred by finding that Applicant falsified material facts; and (2) whether the Administrative Judge had a rational basis for his unfavorable security clearance decision.

### **Procedural History**

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated October 20, 2000 to Applicant. The SOR was based on Guideline E (Personal Conduct) and Guideline J (Criminal Conduct). A hearing was held on March 1, 2001. The Administrative Judge issued a written decision, dated June 15, 2001, 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 Judge's adverse decision.

### **Appeal Issues**

On appeal, the Board does not review a case *de novo*. Rather, the Board addresses the material issues raised by the parties to determine whether there is factual or legal error. There is no presumption of error below, and the appealing party must raise claims of error with specificity and identify how the Administrative Judge committed factual or legal error. *See* Directive, Additional Procedural Guidance, Item E3.1.32. *See, e.g.*, ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3.

In this case, Applicant makes arguments that the Board construes as raising two issues on appeal: (1) whether the Administrative Judge erred by finding that Applicant falsified material facts; and (2) whether the Administrative Judge had a rational basis for his unfavorable security clearance decision. For the reasons that follow, the Board concludes

Applicant has failed to demonstrate the Judge erred.

(1) During the proceedings below, Applicant denied that he falsified a security clearance application in April 1999 or his March 23, 2000 written statement. The Administrative Judge found Applicant's denials to be not credible, and concluded: (a) Applicant falsified a security clearance application in April 1999 by failing to disclose a 1982 criminal offense, and (b) in the March 23, 2000 written statement, Applicant falsified material facts about his conduct that resulted in his 1982 arrest and conviction.

Applicant's appeal brief contains factual assertions about the circumstances surrounding his completion of a security clearance application in April 1999, and the preparation of his March 23, 2000 written statement. Some of Applicant's assertions go beyond the record evidence. Those assertions constitute new evidence, which the Board cannot consider. Directive, Additional Procedural Guidance, Item E3.1.29. The Board will limit its consideration of Applicant's arguments to those that are based on record evidence. Those arguments fail to demonstrate the Judge erred.

Applicant's denials of any intent to falsify the security clearance application in April 1999 or his written statement in March 2000 are relevant evidence. However, an applicant's statements about his or her intent or state of mind are not binding or conclusive on an Administrative Judge. Rather, a Judge must consider an applicant's statements in light of the record evidence as a whole, including the Judge's assessment of the applicant's credibility. <sup>(1)</sup> An applicant's intent or state of mind can be shown through indirect or circumstantial evidence, and a Judge may make findings about an applicant's intent or state of mind that run contrary to the applicant's statements and testimony when such findings have a rational basis in the record evidence. <sup>(2)</sup> Accordingly, the Judge was not bound by Applicant's denials of any intent to falsify. Rather, the Judge had the responsibility to consider the record evidence as a whole when making findings of fact about Applicant's intent or state of mind when he completed the security clearance application in April 1999 and gave the investigator a written statement in March 2000. Considering the record evidence as a whole, the Judge's findings of falsification are supported by substantial record evidence. Applicant's arguments to the contrary are not persuasive.

(2) Applicant also argues: (a) he is an honest and trustworthy person; (b) he has not been in legal trouble since 1982; (c) he has had no involvement with alcohol or drugs for almost 20 years; and (d) he is an upstanding citizen who has raised two daughters. The Board construes these arguments as raising the issue of whether the Administrative Judge had a rational basis for his unfavorable security clearance decision.

The SOR issued to Applicant was based on his falsification of a security clearance application he completed in April 1999 and a written statement he gave to an investigator in March 2000, not the matters that he sought to conceal from the government. Furthermore, the Administrative Judge did not base his adverse security clearance decision on Applicant's past criminal conduct, or Applicant's past involvement with alcohol or drugs. Since Applicant's conduct other than the falsifications in April 1999 and March 2000 was not alleged in the SOR and did not form the basis of the Judge's decision, Applicant's arguments about his past conduct (other than falsification) fail to demonstrate any error by the Judge. Furthermore, Applicant's remaining arguments do not demonstrate the Judge erred.

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 federal government need not wait until an applicant 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.

The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snapp v. United States*, 444 U.S. 507, 511 n.6 (1980). Security requirements include consideration of a person's judgment, reliability, and trustworthiness. *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961). Falsification of a security questionnaire or a written statement given to a government investigator provides a rational basis for an adverse security clearance decision.

*See Harrison v. McNamara*, 228 F.Supp. 406, 408 (D. Conn. 1964)(lying on application for government position requiring a security clearance raises questions as to person's reliability and justifies dismissal), *aff'd per curiam*, 380 U.S. 261 (1965). Accordingly, the Administrative Judge's findings and conclusions about Applicant's falsifications in April 1999 and March 2000 provide a rational basis for the Judge's adverse security clearance decision.

### **Conclusion**

Applicant has failed to demonstrate error below. Accordingly, the Board affirms the Administrative Judge's adverse security clearance 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. 00-0423 (June 8, 2001) at p. 3; ISCR Case No. 00-0302 (April 23, 2001) at p. 3.

2. *See, e.g.*, ISCR Case No. 00-0233 (February 14, 2001) at p. 4 (intent to falsify can be shown by circumstantial evidence despite applicant's denial of intent to falsify); ISCR Case No. 99-0424 (February 8, 2001) at p. 13 (applicant's denial of a preference for a foreign country is not dispositive and must be considered in light of facts and circumstances of an applicant's conduct and circumstances); ISCR Case No. 99-0597 (December 13, 2000) at p. 9 (applicant's statements about his reasons for getting a foreign passport do not preclude consideration of the natural, foreseeable consequences of applicant's use of such a foreign passport).