

DATE: May 1, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-03705

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Administrative Judge Wilford H. Ross issued a decision, dated January 2, 2002, 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 issue of whether the Administrative Judge's findings and conclusions are arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated June 26, 2001. The SOR was based on Guideline D (Sexual Behavior) and Guideline J (Criminal Conduct).

Applicant submitted an answer to the SOR, in which he indicated he wanted a decision made in his case without a hearing. A File of Relevant Material (FORM) was prepared. A copy of the FORM was sent to Applicant, and he was given the opportunity to respond to the FORM and submit additional information for consideration in his case. No response to the FORM was received from Applicant.

The Administrative Judge issued a written decision, dated January 2, 2002, 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 security clearance decision.

Scope of Review

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 (discussing reasons why party must raise claims of error with specificity).

When an Administrative Judge's factual findings are challenged, the Board must determine whether "[t]he Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge." Directive, Additional Procedural Guidance, Item E3.1.32.1. The Board must consider not only whether there is record evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings. *See, e.g.*, ISCR Case No. 99-0205 (October 19, 2000) at p. 2.

When a challenge to an Administrative Judge's rulings or conclusions raises a question of law, the Board's scope of review is plenary. *See* DISCR Case No. 87-2107 (September 29, 1992) at pp. 4-5 (citing federal cases).

Appeal Issue

Applicant's appeal brief contains many factual assertions that constitute new evidence. The Board cannot consider new evidence on appeal. Directive, Additional Procedural Guidance, Item E3.1.29. Furthermore, Applicant cannot fairly challenge the Judge's findings based on information that was not presented for the Judge's consideration. Applicant had the opportunity to present such information in response to the FORM, but he did not do so. By failing to present such information at that time, Applicant waived the right to have it considered in his case. What remains of Applicant's appeal brief are statements that can be construed as challenging the Judge's findings and conclusions.

The Administrative Judge made findings of fact concerning Applicant's involvement in two incidents in which he was arrested and charged with soliciting prostitution, and two other incidents in which Applicant solicited prostitutes but was not arrested or charged. The Judge specifically considered Applicant's explanations about those incidents and gave reasons why he did not find those explanations to be credible. Furthermore, the Judge gave reasons why he concluded that Applicant had failed to demonstrate that he had been successfully rehabilitated. Considering the record as a whole, the Judge's findings reflect a reasonable interpretation of the record evidence. Furthermore, the Judge's conclusions follow rationally from his findings of fact and do not reflect any arbitrary or capricious reasoning. Applicant's appeal arguments do not demonstrate the Judge's findings are erroneous or that the Judge's conclusions are arbitrary or capricious.

Conclusion

Applicant has failed to demonstrate the Administrative Judge committed factual or legal error. Therefore, the Board affirms the 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