

DATE: March 27, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-04713

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

*Pro Se*

Administrative Judge John R. Erck issued a decision, dated November 22, 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.

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 adverse decision of the Administrative Judge under the Foreign Influence Guideline (Guideline B) was the product of racial discrimination or was otherwise unjustified; (2) whether findings of fact made by the Administrative Judge concerning Applicant's financial delinquencies are supported by the record; and (3) whether the government's amendment of a falsification allegation in the Statement of Reasons (SOR) unfairly prejudiced the Applicant. For the reasons that follow, the Board affirms the Administrative Judge's decision.

### **Procedural History**

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) to Applicant dated November 29, 2001. The SOR was based on Guideline F (Financial Considerations), Guideline E (Personal Conduct), Guideline B (Foreign Influence) and Guideline J (Criminal Conduct). A hearing was held on August 28, 2002. The Judge issued a written decision, dated November 22, 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 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 also* 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 the same record. 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 Issues <sup>(1)</sup>

1. Whether the adverse decision of the Administrative Judge under the Foreign Influence Guideline (Guideline B) was the product of racial discrimination or was otherwise unjustified. In this case the Administrative Judge was required to determine whether Applicant's association and contacts with his wife (who is a Nigerian citizen) and with his parents and siblings (who are citizens of and residing in Nigeria) warranted an adverse security clearance decision. The Judge concluded that Guideline B should be concluded against Applicant because Applicant had not met the burden of proving that he was not at risk of being vulnerable because of his family connections. Applicant states on appeal that he feels racial discrimination played a role in the decision.

There is a rebuttable presumption that federal officials and employees carry out their duties in good faith. *See, e.g.*, ISCR Case No. 00-0030 (September 20, 2001) at p. 5. Furthermore, there is a rebuttable presumption that an Administrative Judge is impartial and unbiased. *See, e.g.*, ISCR Case No. 99-0710 (March 19, 2001) at p. 5. A party seeking to rebut either of those presumptions has a heavy burden of persuasion on appeal. The issue is not whether Applicant personally believes that he has been discriminated against. Rather, the issue is whether the record of the proceedings below contains any indication that the Judge acted in a manner that would lead a reasonable person to question the fairness and impartiality of the Judge. *See, e.g.*, ISCR Case No. 00-0248 (March 21, 2001) at p. 5. Applicant fails to identify anything in the record below that indicates or suggests a basis for a reasonable person to question the fairness or impartiality of the Judge in this case. Applicant's bare assertion that the Judge's decision was racially motivated is wholly inadequate to overcome the rebuttable presumptions of good faith, impartiality, and lack of bias. Because Applicant fails to raise a colorable claim of racial discrimination or discrimination based on national origin, there is no need for the Board to decide what legal effect, if any, the International Covenant on Civil and Political Rights (cited by Applicant on appeal) has on security clearance adjudications. Finally, the Board notes that this program has adjudicated foreign influence and foreign preference cases involving applicants associated with or having family ties to a wide variety of countries, including Canada, Egypt, France, Great Britain, Iran, Israel, Italy, and Japan.

Concerning Guideline B, Applicant also makes the statement on appeal, "[i]t is unfortunate that foreign influence had to play a portion to your decision" (sic). Applicant goes on to say that he has lived in the United States for 27 years and personally considers it his home. To the extent these statements assert that there was no basis for the Administrative Judge's adverse decision under Guideline B, the Board disagrees. Foreign contacts such as the ones maintained by Applicant are of legitimate concern to the Department of Defense in assessing risks to the nation's security. In this case, a review of the record evidence supports the Administrative Judge's conclusion that the security concerns raised by Applicant's family ties with family members in Nigeria have not been mitigated.

2. Whether findings of fact made by the Administrative Judge concerning Applicant's financial delinquencies are supported by the record. Concerning the portion of the case brought under the Financial Considerations Guideline (Guideline F), Applicant's brief seeks to introduce new evidence on appeal, which the Board cannot consider (*See* Directive, Additional Procedural Guidance, Item E3.1.29). In his appeal brief, Applicant also states, "[W]hen I reviewed the debts listed, some information has not been successfully updated and shown factual financial amounts." Applicant does not specifically identify those portions of the record he believes are in error, nor does he explain how any failure to update his financial records is the fault of the Administrative Judge. The Judge is bound to consider only those matters properly before him. Applicant was given the opportunity, both at the hearing and afterward (for post-hearing submission of documents) to establish the status of his finances. The Judge's findings and conclusions regarding

Applicant's finances are adequately supported by the record evidence. Applicant has failed to demonstrate error on the part of the Judge.

3. Whether the government's amendment of a falsification allegation in the Statement of Reasons unfairly prejudiced the Applicant. At the hearing, prior to the taking of evidence, Department Counsel sought to amend subparagraph 2.c of the SOR. In the original SOR, Applicant was alleged to have willfully falsified his answer to question 23(a) on a security clearance questionnaire dated September 21, 1998. At the hearing, Department Counsel moved to amend subparagraph 2.c of the SOR to allege that Applicant falsified question 23(f) of the security clearance questionnaire. Applicant did not object to Department Counsel's motion to amend at the hearing.

On appeal, Applicant asserts he was not aware that "question 23f was going to be revised to read differently from question 23a." He further states, "The response to 23f is not a response that I would have given." He characterizes the change as a "mishap" that has cast a doubt and damaged his credibility with the Department of Defense.

Applicant's remarks in his appeal brief can be construed as raising the issue of whether he gave full and knowing consent to Department Counsel's motion to amend SOR subparagraph 2.c at the hearing and whether he fully understood what was going on. The Board need not reach any conclusions as to the legal sufficiency of Applicant's acquiescence to Department Counsel's motion to amend to conclude that Applicant was not prejudiced by it. The Administrative Judge ultimately found in favor of Applicant on the issue of falsification of the security clearance questionnaire as alleged in subparagraph 2.c of the SOR. Applicant has failed to demonstrate error on the part of the Administrative Judge.

### **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. Applicant filed a notice of appeal, dated December 5, 2002. That notice contains a significant narrative dealing with the substantive issues raised on appeal. These assertions are largely repeated in Applicant's appeal brief which was filed on January 5, 2003. However, the submissions are not identical. For purposes of this appeal, the Board will treat both Applicant's December 5, 2002 submission and his January 5, 2003 submission as constituting his appeal brief and will consider them together.

