

DATE: September 23, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-06266

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Administrative Judge Elizabeth M. Matchinski issued a decision, dated April 15, 2002, in which she 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 some of the Administrative Judge factual findings were erroneous; and (2) whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. For the reasons that follow, the Board affirms the Administrative Judge's decision.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated November 5, 2001. The SOR was based on Guideline B (Foreign Influence) and Guideline L (Outside Activities). A hearing was held on March 12, 2002. The Administrative Judge issued a decision, dated April 15, 2002, in which she 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, 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 Issues

The Administrative Judge concluded that the facts and circumstances of Applicant's business contacts with Mr. X, a foreign businessman, raised security concerns under Guideline B (Foreign Influence). The Judge also concluded that the facts and circumstances of Applicant's acting as a consultant with a foreign company based overseas in Mr. X's home country raised security concerns under Guideline L (Outside Activities). The Judge entered formal findings against Applicant with respect to SOR paragraph 1.a (Guideline B) and SOR paragraph 2.a (Guideline L), but formal findings for Applicant with respect to SOR paragraphs 2.b and 2.c (Guideline L). The Judge's formal findings with respect to SOR paragraphs 2.b and 2.c are not at issue on appeal.

1. Whether some of the Administrative Judge factual findings were erroneous. Applicant contends the Administrative Judge misunderstood the record evidence and made various erroneous findings of fact. In support of this contention, Applicant's appeal brief contains many statements that go beyond the record evidence. Those statements constitute new evidence, which the Board cannot consider. *See* Directive, Additional Procedural Guidance, Item E3.1.29. The Board will not consider or address appeal arguments made by Applicant that rely on new evidence.

Applicant does make some arguments that do not rely on new evidence. Those arguments are the following: (a) the Administrative Judge failed to consider the record evidence that shows Applicant discussed with Mr. X, a foreign businessman, unclassified technology relating to law enforcement and anti-terrorism efforts, not military or defense-related technology; (b) the Judge erred by finding that Applicant discussed "missile technology" with Mr. X; and (c) the Judge erred by finding that Applicant is on a retainer with a specific U.S. company doing business with Mr. X.

(a) The Board does not find persuasive Applicant's argument that the Administrative Judge failed to consider record evidence that shows Applicant's discussions with Mr. X involved unclassified technology relating to law enforcement and anti-terrorism efforts, not military or defense-related technology. There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. Apart from this rebuttable presumption, the Board's reading of the Judge's decision persuades it that the Judge's findings of fact reflect a reasonable interpretation of the record evidence concerning the nature of the technology that Applicant discussed with Mr. X. The Judge did not find that Applicant discussed classified technology with Mr. X; indeed, the Judge specifically found that Applicant discussed technology with Mr. X that was unclassified and in the public domain (Decision at pp. 4 and 9). Furthermore, it was not arbitrary or capricious for the Judge to conclude that "[w]hile these products were apparently intended for law enforcement purposes, such devices could have defense uses" (Decision at p. 9). The Judge's conclusion reflects a reasonable interpretation of the record evidence. In view of the foregoing, the Board concludes Applicant's claim of error lacks merit.

(b) Applicant also argues the Administrative Judge erred by finding he discussed missile technology with Mr. X. The Administrative Judge found Applicant discussed with Mr. X unclassified missile launch detection technology (Decision at pp. 4 and 10). At one point in the decision, the Judge refers to that discussion as one about "missile technology" (Decision at p. 9). Considering the record evidence in this case, the Judge's reference to "missile technology" was erroneous.⁽¹⁾ But that error was harmless in nature because: (i) other portions of the Judge's decision show the Judge understood that Applicant's discussions with Mr. X pertained to missile launch detection technology, not missile technology; and (ii) the Judge's single erroneous reference to missile technology does not appear to have affected her analysis of the case in a manner that was prejudicial to Applicant.

(c) Applicant takes exception to footnote six of the decision below, and asserts that he has never received any funds from Mr. X, citing page 57 of the hearing transcript in support of this argument. A review of the transcript page cited by

Applicant persuades the Board that footnote six of the decision below reflects a reasonable interpretation of the record evidence. Applicant's appeal argument on this point relies on factual assertions that constitute new evidence, which the Board cannot consider on appeal.

2. Whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

Applicant also argues: (a) he has a longer history of holding security clearance without any security violations; (b) no adverse information has been uncovered during any background investigation of him; (c) his business contacts with Mr. X have not involved classified information or technology, and pose no security risks; (d) he has not personally met with Mr. X for several years, and has not traveled to Mr. X's home country since 1993; and (e) he is willing to cease his minimal communications with Mr. X "if it really will serve a purpose." The Board construes these arguments as raising the issue of whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

(a) The absence of security violations by Applicant does not have the significance that he places on it. The federal government is not required to wait until an applicant has mishandled or failed to safeguard classified information before it can deny or revoke the applicant's access to such information. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). Even if an applicant has never engaged in a security violation, the government still can consider whether the facts and circumstances of the applicant's case raises security concerns.

(b) Applicant's argument that no adverse information was uncovered during any background investigation goes beyond the record evidence before the Administrative Judge. No evidence concerning the background investigations of Applicant was presented for the consideration of the Judge during the proceedings below. And, even if the Board were to assume -- solely for purposes of addressing this argument -- that Applicant's assertion is correct, such an assumption would not lead the Board to conclude the Judge erred. Favorable statements about an applicant made by persons during a background investigation are not dispositive of an applicant's security eligibility. The government is not precluded from considering the security significance of other information developed during an applicant's background investigation just because persons interviewed during the background investigation did not make adverse statements about the applicant.

(c) The SOR did not allege that Applicant discussed or otherwise disclosed classified information or technology with Mr. X. Nor did Department Counsel seek to prove that Applicant discussed or otherwise disclosed classified information or technology with Mr. X. And, as discussed earlier in this decision, the absence of security violations does not have the significance Applicant places on it. The Judge's decision is not arbitrary, capricious, or contrary to law because there is no evidence that Applicant's contacts with Mr. X involved the discussion of classified information.

(d) The absence of personal meetings between Applicant and Mr. X in recent years does not detract from the Administrative Judge's findings and conclusions about Applicant's communications with Mr. X. Similarly, the fact that Applicant has not traveled to Mr. X's home country does not detract from the Judge's findings and conclusions about Applicant's communications with Mr. X. The security concerns discussed by the Judge do not turn on whether Applicant has discussions with Mr. X on a face-to-face or a long-distance basis, or on whether Applicant has traveled recently to Mr. X's home country.

(e) Applicant's offer to stop his communications with Mr. X does not demonstrate the Administrative Judge erred. Given the clearly consistent with the national interest standard, a demonstrated track record of reform, rehabilitation, or changed circumstances is needed to extenuate or mitigate security concerns raised by an applicant's conduct or situation. *See Directive, Additional Procedural Guidance, Item E3.1.15.* A promise or offer to take action in the future does not constitute evidence of reform, rehabilitation, or changed circumstances.

Conclusion

The Administrative Judge made findings of fact that, for the most part, are: (i) challenged on appeal based on new evidence, or (ii) not challenged by Applicant on appeal. With one exception that constitutes harmless error, Applicant has failed to demonstrate the Judge's findings of fact are erroneous. The Judge reached conclusions under Guideline B and Guideline L that reflect a reasonable interpretation of the record evidence, and Applicant has failed to demonstrate the Judge's conclusions are arbitrary, capricious, or contrary to law. The Judge's conclusions under Guideline B and

Guideline L support her expressed doubts about Applicant's security eligibility, and the Judge properly resolved those doubts in favor of the national security. Accordingly, 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

1. Missile launch detection technology is no more "missile technology" than radar (a form of aircraft detection technology) is "aircraft technology."