

DATE: April 5, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-07629

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Rebecca Birmingham, Esq.

Administrative Judge Richard A. Cefola issued a decision, dated November 7, 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 Applicant was denied effective assistance of counsel during the proceedings below; and (2) whether Applicant can be granted a security clearance on a probationary basis with certain conditions.

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 E (Personal Conduct). A hearing was held on October 11, 2001. The Administrative Judge 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 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

1. Whether Applicant was denied effective assistance of counsel during the proceedings below. During the proceedings below, Applicant was represented by a lawyer who is different from the lawyer representing him on appeal. Applicant contends he was denied adequate representation during the proceedings below. In support of this contention, Applicant argues his hearing lawyer failed to address the government's security concerns by focusing on the issue of whether Applicant's conduct was criminal in nature even though the SOR did not allege Applicant's conduct was criminal. Applicant further asks the Board to consider the facts in evidence as outlined in his appeal submission.

As noted in the Scope of Review section of this decision, the Board does not review a case *de novo*. Therefore, the Board will not conduct an independent evaluation of the record evidence to make its own findings about Applicant's case. Because Applicant does not challenge the Administrative Judge's findings of fact, those findings of fact stand for purposes of this appeal.

DOHA proceedings are civil in nature. *See, e.g.*, ISCR Case No. 00-0519 (December 7, 2001) at p. 3; ISCR Case No. 99-0424 (February 8, 2001) at p. 7. Accordingly, technical legal defenses that may be appropriate to raise in a criminal prosecution are out of place in industrial security clearance adjudications. *See, e.g.*, ISCR Case No. 99-0382 (May 3, 2000) at p. 3; ISCR Case No. 98-0529 (June 15, 1999) at p. 2; ISCR Case No. 97-0184 (June 16, 1998) at p. 2. Although a claim of ineffective assistance of counsel may be an appropriate defense in a criminal case, it is not an appropriate defense to raise in these proceedings. *See, e.g.*, ISCR Case No. 98-0515 (March 23, 1999) at p. 3; ISCR Case No. 96-0127 (July 29, 1997) at p. 2. The actions and inactions of Applicant's hearing lawyer during the proceedings below do not provide a basis for the Board to conclude that the Administrative Judge's decision should be reversed or remanded. In short, Applicant's remedy for this claim, if any, would be in another forum.

2. Whether Applicant can be granted a security clearance on a probationary basis with certain conditions. Applicant asks the Board to place him "on a probationary status": (a) pending Applicant's reinstatement with a therapist who does not argue that Appellant's sexual behavior is "okay"; (b) with Applicant showing proof of enrollment in such therapy; and (c) with any problems Applicant has during therapy being reported to the security director of his company. Applicant seeks relief that cannot be granted. *See, e.g.*, ISCR Case No. 99-0109 (March 1, 2000) at pp. 3-4 (citing earlier Board decisions).

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