

DATE: February 12, 2002

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-08390

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

William S. Fields, Esq., Department Counsel

#### **FOR APPLICANT**

#### ***Pro Se***

Administrative Judge Kathryn M. Braeman issued a decision, dated August 14, 2001, in which she 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 a fair hearing; (2) whether certain findings of fact by the Administrative Judge are erroneous; and (3) whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

### **Procedural History**

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated April 18, 2001. The SOR was based on Guideline E (Personal Conduct) and Guideline J (Criminal Conduct). A hearing was held on July 10, 2001. The Administrative Judge issued a written decision, dated August 14, 2001, 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**

1. Whether Applicant was denied a fair hearing. Applicant contends he was deprived of the opportunity to properly prepare for the hearing because he was not provided with a copy of his investigative file until after his hearing was held. The Board construes Applicant's contention as raising the issue of whether he was denied a fair hearing.

In support of this claim, Applicant attached to his appeal brief copies of correspondence pertaining to the processing of his request for his investigative file. The Board notes that it cannot consider new evidence on appeal. Directive, Additional Procedural Guidance, Item E3.1.29. However, that prohibition does not preclude the Board from considering Applicant's procedural claim in this case. In the interests of judicial economy, the Board has addressed procedural claims by assuming solely for the purposes of deciding specific cases that the appealing party's claims about matters outside the record were true. *See, e.g.,* ISCR Case No. 96-0457 (December 8, 1997) at p. 2 (solely for purposes of deciding claim that applicant was denied meaningful opportunity to be represented by counsel during proceedings below, Board accepted the applicant's characterizations of a conversation he had with a DoD employee that was not in record evidence). The interests of judicial economy would be served by accepting as true (solely for purposes of deciding this appeal) Applicant's statements about his request for a copy of his investigative file.

Applicant was represented by a lawyer during the proceedings below. As of the hearing date (July 10, 2001), Applicant knew: (a) he had made a request for a copy of the investigative file in his case; (b) he had received an acknowledgment of his request from the Defense Security Service, Privacy Act Branch; and (c) he had not yet received any documents from the Defense Security Service. At the hearing, neither Applicant's lawyer nor Applicant told the Administrative Judge that there was an outstanding request for a copy of Applicant's investigative file. Applicant's lawyer was twice asked if he had any procedural issues to address and on both occasions said no (Hearing Transcript at pp. 7 and 8). Furthermore, neither Applicant's lawyer nor Applicant stated or indicated that they were not ready to proceed with the hearing, or that they wanted additional time to receive a copy of the investigative file in Applicant's case. Furthermore, Applicant received a partial release from the Defense Security Service, Privacy Act Branch, dated July 25, 2001. Yet, there is no indication that Applicant's lawyer or Applicant contacted the Administrative Judge (who did not issue her decision until August 14, 2001) to request that the record be reopened in light of additional information Applicant had received from the Defense Security Service.

An applicant has the right to have a reasonable opportunity to prepare for his or her hearing. Directive, Additional Procedural Guidance, Item E3.1.8. However, an applicant also has the obligation to take prompt, reasonable steps to protect his or her rights in these proceedings. If an applicant believes that he or she has not been provided with sufficient time to prepare for the hearing, then the applicant has the affirmative obligation to raise his or her concern with the Administrative Judge as soon as practical. If Applicant felt that he was not ready to proceed with the hearing because he had not yet received a copy of the investigative file in his case, then Applicant had the obligation to raise that concern with the Judge as soon as practical. By appearing at the hearing and not raising the matter of the investigative file, Applicant waived any claim that he needed a copy of the investigative file to proceed with the hearing. Accordingly, Applicant waived any claim that he was denied a fair hearing based on his not getting the investigative file before the hearing.

2. Whether certain findings of fact by the Administrative Judge are erroneous. The Administrative Judge made various findings of fact about Applicant's case. Applicant does not challenge most of the Judge's findings of fact. However, Applicant does challenge the following findings by the Judge: (a) Applicant served a day in jail in connection with an August 1993 incident for which he was arrested and charged with burglary and the charge was later nolle prossed; (b) Applicant's defense contractor reported that he was on work release and had appealed his conviction for an April 1998

driving under the influence incident; and (c) Applicant was able to continue his work through a work release program.

The Board has reviewed the record and concludes that the Administrative Judge's challenged findings reflect a reasonable interpretation of the record evidence and are sustainable. Furthermore, even if the Board were to accept Applicant's arguments about the Judge's challenged findings, his arguments do not demonstrate anything other than minor, harmless errors that do not warrant remand or reversal. The Board need not address the Judge's remaining findings of fact because they have not been challenged on appeal.

3. Whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. Appellant also argues: (a) the Administrative Judge gave undue weight to the evidence that a court issued a protective order against Applicant in 1999; (b) the Judge gave undue significance to the testimony by Applicant's expert that the expert could not predict with certainty what Applicant's future conduct might be if he were to become disappointed again in a romantic relationship; and (c) the Judge gave undue weight to the evidence that Applicant was orally reprimanded in June 2001. <sup>(1)</sup> Applicant's arguments fail to demonstrate the Judge erred.

In deciding a case, an Administrative Judge must weigh the record evidence. Absent a showing that the Judge acted in a manner that is arbitrary, capricious, or contrary to law, the Board will not disturb the Judge's weighing of the record evidence. *See, e.g.*, ISCR Case No. 00-0030 (September 20, 2001) at p. 9. Applicant's ability to argue for a more favorable interpretation of the record evidence is not sufficient to demonstrate the Judge weighed the evidence improperly. *See, e.g.*, ISCR Case No. 00-0525 (November 15, 2001) at p. 3.

Furthermore, when weighing the record evidence, the Administrative Judge must consider the evidence as a whole and not view it in an isolated or piecemeal fashion. *See* Directive, Section 6.3. ("Each clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information . . ."); Directive, Enclosure 2, Item E2.2.1 ("The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination."). *See also United States v. Carson*, 702 F.2d 351, 362 (2d Cir. 1983)(even though defendant urges an exculpatory explanation for each strand of evidence, the court must view the evidence as a whole and not in isolated parts; each incident may gain significance from the others), *cert. denied*, 462 U.S. 1108 (1983); *United States v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966)("The trier of fact is entitled, in fact bound, to consider the evidence as a whole; and, in law as in life, the effect of this generally is greater than the sum of the parts."), *cert. denied*, 385 U.S. 974 (1966). Applicant's arguments fail to demonstrate the Judge erred because they urge consideration of various portions of the evidence in a piecemeal fashion. The Judge was not required to consider the significance of each matter cited by Applicant in isolation from the overall record evidence in this case.

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, 528-529 (1988). Accordingly, it was not arbitrary or capricious for the Administrative Judge to consider Applicant's overall history of conduct and current circumstances and evaluate whether Applicant was at risk of repeating his past misconduct. Furthermore, there is no presumption in favor of granting a security clearance and Applicant bears the ultimate burden of persuasion to show it is clearly consistent with the national interest to grant or continue a security clearance for him. *See* Directive, Enclosure 2, Items E2.2.1, E2.2.2 and E2.2.3, and Additional Procedural Guidance, Item E3.1.15. Therefore, the Judge was not required to resolve any uncertainties or doubts in favor of Applicant.

The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snepp 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). The Administrative Judge made findings of fact about Applicant's long history of inappropriate behavior, which resulted in criminal charges and disciplinary action against him for rule violations. The Judge's findings of fact provide a rational basis for her overall adverse conclusions about Applicant's judgment and reliability and her doubts about whether Applicant had demonstrated a sufficient track record of rehabilitation to warrant a conclusion that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

## Conclusion

Applicant has failed to meet his burden of demonstrating 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 makes additional arguments about the Administrative Judge's conclusions that are based on factual assertions which go beyond the record evidence. The Board cannot consider new evidence on appeal. Directive, Additional Procedural Guidance, Item E3.1.29. Furthermore, an appealing party cannot fairly challenge a Judge's conclusions based on evidence that was not presented to the Judge.