

DATE: January 22, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-14701

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

*Pro Se*

Administrative Judge Darlene Lokey Anderson issued a decision dated August 30, 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.

The Board has jurisdiction under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant's appeal presents the issues of: (1) Whether the Administrative Judge's decision was arbitrary, capricious and contrary to law, and (2) Whether Applicant was denied an opportunity to have legal representation and a fair hearing. For the reasons that follow, the Board affirms the Judge's decision.

### **Procedural History**

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) to Applicant dated February 12, 2002. The SOR was based on Guideline F (Financial Considerations) and Guideline E (Personal Conduct). Applicant requested a hearing which was held on August 2, 2002. Subsequently, the Administrative Judge issued an unfavorable decision. The case is before the Board on Applicant's appeal from that 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 Issue<sup>(1)</sup>

1. Whether the Administrative Judge's decision was arbitrary, capricious and contrary to law. Applicant offers a variety of arguments in his appeal of the Administrative Judge's adverse decision. Taken together those arguments present the issue of whether the Judge's decision is arbitrary, capricious and contrary to law. Applicant argues (i) He never deliberately withheld information from security clearance questionnaires; (ii) He followed the Defense Security Service (DSS) Agent's instructions concerning how to answer questions after receiving the SOR; (iii) The Judge and the government acknowledged his cooperation; (iv) There are discrepancies in his arrest record; and (v) If the government is permitted to correct errors in the SOR after it was issued, Applicant questions why his errors in his security clearance documents are deemed deliberate falsifications.

Applicant argues he never deliberately withheld information from the government and he gave reasons why he failed to list certain arrests and drug involvements on his security clearance questionnaires. The Administrative Judge found that Applicant deliberately provided false or incomplete answers in 1995 and in 1999 to questions about his history of arrests and drug involvement on two security clearance questionnaires. A review of the record evidence demonstrates that the Judge's findings are sustainable. Faced with a conflict in the evidence between obvious omissions in the questionnaires and Applicant's denials that he falsified answers, the Administrative Judge was charged with the task of ascertaining Applicant's state of mind at the time he completed the questionnaires. Her findings regarding Applicant's state of mind are sustainable. The ability of Applicant to offer explanations that constitute an alternative interpretation of the record evidence is insufficient to establish error on the part of the Administrative Judge.

Applicant argues on appeal that after he received the SOR, he followed the instructions of a DSS Agent concerning how to respond to it. Applicant's argument does not demonstrate error by the Administrative Judge. The Judge found against Applicant with regard to his falsification in 1995 and 1999. Even if Applicant followed every instruction since the SOR was issued, that would fail to demonstrate that the Judge's findings about falsification were in error.

Applicant's third argument has limited merit. Department Counsel acknowledged (and the Judge noted the acknowledgment) that Applicant voluntarily provided all the information concerning his arrests in detail to the government in an interview with a DSS agent subsequent to Applicant's filling out of the security clearance questionnaires. Applicant's argument raises the question of whether he was denied the benefit of application of a mitigating condition (specifically, item E2.A5.1.3.3. under Guideline E of the Directive).<sup>(2)</sup> The Board notes that the record evidence does not provide a basis for application of the mitigating condition as Applicant has not demonstrated that his voluntary cooperation was prompt or was made prior to being confronted with the facts. To the extent that Applicant's disclosures at the time of the DSS interview and his subsequent cooperation were mitigating in a general sense, such mitigation was not dispositive of the case, and the Judge was not required to conclude that such mitigation overcame the government's falsification case.

Applicant maintains there are discrepancies in his arrest record. This argument fails to demonstrate error by the Administrative Judge. The alleged discrepancies in Applicant's arrest record have no bearing on Applicant's failure to be forthcoming about his drug involvement and arrests during his preparation of security clearance questionnaires in 1995 and 1999.

Applicant notes that his SOR contained errors (regarding form names and the date of one arrest) and that the government was permitted to correct the errors at the hearing. Applicant asks on appeal why his errors in his security clearance questionnaires are not subject to correction but deemed deliberate falsification. The Board concludes that the two situations are easily distinguishable. The government's corrections (amendments) involve changes to the titles of documents and the date on which one arrest occurred. There was no mistake on the government's part as to whether or

not the events actually happened. Applicant's falsifications on the security clearance questionnaire constitute his denial that certain events ever happened. The Administrative Judge noted that Applicant "knew that he had been arrested and that he had used speed and he should have revealed those matters." The Judge also stated that "With the particular evidence I have been provided, I do not find his excuses credible or believable. I have been provided no reasonable excuse for the Applicant to have failed to reveal his arrest history and illegal drug involvement." A review of the record evidence leads the Board to conclude that the Judge's findings, conclusions and credibility determination on this issue are sustainable. Applicant's argument does not demonstrate error.

2. Whether Applicant was denied an opportunity to have legal representation and a fair hearing. Applicant argues that he was hurt at the hearing because he became confused and overwhelmed by the proceeding and was unprepared for the caliber of the hearing based on conversations with a DSS Agent and Department Counsel. He further states that he became upset and flustered on realizing that representation could have helped him. The Board construes his argument as raising the issue of whether he was denied an opportunity to have legal representation and was denied a fair hearing. At the beginning of the hearing the Administrative Judge asked Applicant if he was aware of his right to bring an attorney. He said he was. The Judge engaged him in a brief dialogue before concluding that Applicant could represent himself. At no time did Applicant raise the issue of needing an attorney, nor did he request a postponement or continuance to afford him the opportunity to obtain counsel. Concerning the fairness of the proceedings, there is evidence in the transcript of confusion. There is also evidence in the transcript that the Department Counsel tried to assist Applicant and the Judge in clarifying matters subject to confusion by saying, "Your Honor let me clear this up because I promised Applicant I would."(TR. p. 41). A review of the record indicates that Applicant was not generally confused at the hearing and there is no evidence to suggest that Department Counsel led (or misled) Applicant regarding any procedural matters or any other aspect of the hearing. Applicant has failed to demonstrate error below.

### **Conclusion**

Applicant has failed to meet his burden on appeal of demonstrating error below. The decision below is affirmed.

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

### **Separate opinion of Chairman Emilio Jaksetic, concurring**

On appeal, Applicant claims he acted in reliance on conversations he had with a Defense Security Service agent. There is no record evidence which supports that claim. Applicant's claim is based on assertions that constitute new evidence, which the Board cannot consider on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29.

Applicant's claim of confusion has mixed merit. A review of the hearing transcript persuades me there were a few occasions during the hearing when there was some confusion. However, even making allowances for Applicant's *pro se* status, he had the obligation to take reasonable steps to protect his rights during the proceedings below. If Applicant was confused or uncertain about what was happening at the hearing, he had the obligation to speak up and let the Judge know that he was confused or uncertain. If Applicant had any concerns about what was happening at the hearing, he had the responsibility to speak up and inform the Judge of his concerns. If Applicant felt that he was not being allowed a fair

opportunity to present his case, he should have told the Judge he believed he was not being given a fair opportunity to present his case. Applicant did not do any of these things. It is too late for Applicant to raise such concerns for the first time on appeal.

I am troubled by cryptic references in the transcript about Department Counsel making a promise or commitment to Applicant before the hearing, and Department Counsel expressing concern that Applicant might think Department Counsel had tricked him. My concern does not stem from any assumption that Department Counsel acted improperly or in bad faith. Rather, my concern is based on the failure of either party to explain the matter on the record in a coherent manner (either on their own initiative or at the request of the Administrative Judge). Such an explanation would have permitted the Judge to understand what had transpired between Applicant and Department Counsel before the hearing so that she could consider whether it had any bearing on the procedural posture of the case. However, despite the concerns I have about this matter, I conclude that Applicant waived any claim of error. If Applicant felt that he had not prepared enough for the hearing because of his reliance on statements made to him by DoD personnel, he should have told the Judge why he believed he was not prepared to proceed with the hearing. If Applicant thought that Department Counsel had not adequately informed the Judge about the matter or matters that he and Department Counsel had discussed before the hearing, Applicant should have raised the matter at the hearing so the Judge could hear from Applicant and Department Counsel about it. Applicant did none of these things.

Applicant's claim about the lack of legal representation fails to demonstrate the Administrative Judge erred. A review of the record below shows that Applicant was advised of his right to retain a lawyer to represent him, and that he decided to appear at the hearing without a lawyer. If Applicant believed that he was unable to proceed with the hearing without a lawyer, he had the obligation to raise the matter with the Judge at the hearing. Having decided to proceed without a lawyer, and having not informed the Judge of any concern about proceeding without a lawyer, Applicant cannot fairly complain now that he should have had a lawyer represent him at the hearing. Applicant's post-hearing regrets about proceeding without a lawyer do not demonstrate that he was denied the right to have a lawyer represent him.

I concur with the majority's conclusions that: (1) the Administrative Judge did not err by allowing Department Counsel to amend the SOR at the hearing; (2) Personal Conduct Mitigating Condition 3 is not applicable to the facts of this case; (3) the Judge's findings of falsification are sustainable; and (4) any alleged discrepancies in Applicant's arrest record have no bearing on his failure to disclose various matters in response to questions on the security clearance questionnaires. Accordingly, I concur with the majority's determination to affirm the Judge's adverse security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

1. The Administrative Judge found for Applicant under SOR paragraph 1 (Guideline F). Those favorable findings are not at issue on appeal.
2. "The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts."