

DATE: January 16, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-14710

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

*Pro Se*

Administrative Judge Barry M. Sax issued a decision, dated August 28, 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 Applicant was denied a hearing; (2) whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law; and (3) whether Applicant can be granted a security clearance conditioned on his submitting to drug testing. 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 March 6, 2002. The SOR was based on Guideline J (Criminal Conduct), and Guideline H (Drug Involvement).

Applicant submitted an answer to the SOR. A File of Relevant Material (FORM) was prepared. Applicant was given a copy of the FORM, and was provided an opportunity to respond to the FORM. No response to the FORM was received from Applicant.

The case was assigned to an Administrative Judge for consideration. The Judge issued a written decision, dated August 28, 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 unfavorable 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

1. Whether Applicant was denied a hearing. On appeal, Applicant states that he had asked for a hearing and asserts that the Administrative Judge may have had difficulty in reaching a decision in his case without the opportunity to get to know Applicant and the facts. The Board construes Applicant's statements as raising the issue of whether he was denied a hearing.

Applicant submitted an answer to the SOR, in which he stated "If you [feel] that you will require a hearing to make me eligible for clearance then please schedule a meeting." By letter dated April 15, 2002, DOHA acknowledged Applicant's answer to the SOR. The April 15, 2002 letter included the following statement: "You requested that a determination be made in your case without a hearing." Along with the April 15, 2002 letter, Applicant was given a copy of the File of Relevant Material (FORM) that had been prepared for his case, and was given an opportunity to respond to the FORM. No response to the FORM was received from Applicant.

In this case, Applicant made a qualified or conditional request for a hearing. Solely for purposes of deciding this appeal, the Board will assume that Applicant's qualified or conditional request was sufficient to place DOHA on notice that he was asking for a hearing, even if that request was ambiguous. However, DOHA personnel interpreted Applicant's request as one waiving a hearing. The April 15, 2002 cover letter placed Applicant on notice that DOHA had interpreted his answer to the SOR as waiving a hearing. Once Applicant knew that DOHA had not interpreted his answer to the SOR as asking for a hearing, he had an obligation to act promptly if he believed DOHA had misunderstood or misinterpreted his answer to the SOR. However, Applicant did not object to that interpretation of his answer to the SOR, did not try to clarify or explain his earlier qualified or conditional request for a hearing, and did not otherwise respond to the FORM. Even a *pro se* applicant must take reasonable steps to protect his or her rights in these proceedings. *See, e.g.*, ISCR Case No. 00-0250 (February 13, 2001) at p. 3. By remaining silent after receiving the April 15, 2002 cover letter, Applicant effectively acquiesced in DOHA's interpretation of his answer to the SOR as not asking for a hearing. Considering all the circumstances, Applicant waived a hearing by failing to place DOHA on clear, unequivocal, and timely notice that he wanted a hearing.

2. Whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. On appeal, Applicant: (a) makes various statements about the facts and circumstances surrounding his drug-related incidents in 1977, 1981, and 1997; (b) states he is aware that he was in the wrong and demonstrated poor judgment in the past, but points to various actions that he claims reflect favorably on him; (c) asserts that he has been "clean for over five years" and is "past any urges of going back to something that has been nothing but trouble for me"; (d) denies that he is a security risk or would do anything to "jeopardize my job, family and national security"; and (e) asks the Board to render a favorable security clearance decision in his case. The Board construes these statements and assertions as raising the issue of whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law.

Applicant's appeal brief contains many factual assertions that go beyond the record evidence below. As such, those assertions constitute new evidence, which the Board cannot consider on appeal. Furthermore, Applicant had an opportunity to respond to the FORM and submit additional information for the Administrative Judge to consider in his case, but he failed to do so. Having failed to present additional information for the Judge to consider, Applicant cannot fairly expect the Board to find the Judge erred based on the proffer of information he did not submit for the Judge's

consideration.

The Administrative Judge explained why he concluded Applicant's overall history of drug-related conduct has negative security implications under Guidelines H and J, and why he concluded Applicant had not demonstrated mitigation of those negative security implications. None of Applicant's appeal arguments demonstrate the Judge's analysis and adverse conclusions are arbitrary, capricious, or contrary to law.

The Administrative Judge also concluded that an adverse security clearance decision was mandated under 10 U.S.C. 986 because Applicant had been convicted in 1981 and sentenced to imprisonment for more than one year. Because the Board is limited to considering the issues raised on appeal (Directive, Additional Procedural Guidance, Item E3.1.32), and nothing in Applicant's appeal brief raises any issue or challenge to the Judge's analysis or conclusions about this case under 10 U.S.C. 986, the Board will not address or discuss the Judge's analysis or conclusions under that statute.

3. Whether Applicant can be granted a security clearance conditioned on his submitting to drug testing. Applicant offers "to pay for my own drug testing to show my sincerity and to prove to you that I am clean and intend to stay that way." Under the Directive, neither the Administrative Judge nor the Board is authorized to grant Applicant a security clearance conditioned on his submitting to drug testing.

### **Conclusion**

Applicant has failed to demonstrate error below. Therefore, 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