

DATE: April 9, 2003

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 01-18445

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

*Pro Se*

Applicant has appealed the December 6, 2002 decision of Administrative Judge John G. Metz, Jr., in which the Judge concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

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 the Administrative Judge's findings of fact are erroneous; and (2) Whether the Administrative Judge's adverse 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 July 10, 2002. The SOR was based on Guideline K (Security Violations), Guideline M (Misuse of Information Technology Systems), and Guideline E (Personal Conduct).

Applicant submitted an answer to the SOR in which he indicated he wanted a decision made in his case without a hearing. A File of Relevant Material (FORM) was prepared. A copy of the FORM was given to Applicant, who submitted a response to the FORM. The case was then assigned to an Administrative Judge for disposition.

The Administrative Judge issued a written decision dated December 6, 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 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 Issues**

Applicant's appeal brief contains several factual assertions that go beyond the record evidence that was before the Administrative Judge. Such assertions constitute new evidence, which the Board cannot consider. Directive, Additional Procedural Guidance, Item E3.1.29. Applicant had the opportunity to present evidence for consideration by the Judge during the proceedings below. Applicant cannot fairly challenge the Judge's decision based on new evidence. The Board will limit its consideration to those appeal arguments made by Applicant that do not rely on new evidence.

1. Whether the Administrative Judge's findings of fact are erroneous. The Administrative Judge found that: (a) Applicant connected a personal external drive to a federal government computer, and used the personal external drive to download classified files, government-licensed software programs, and company proprietary information; (b) Applicant's conduct was unauthorized and in violation of company policy and basic security precautions; (c) Applicant sought to remove evidence of his actions from his unclassified computer; and (d) Applicant's conduct was not caused by inadequate or improper training. On appeal, Applicant challenges the Judge's findings of fact.

Apart from relying on factual assertions that constitute new evidence, Applicant argues for an alternate interpretation of the record evidence. The ability of Applicant to argue for a different interpretation of the record evidence in this case does not demonstrate the Administrative Judge's findings are erroneous. *See, e.g.*, ISCR Case No. 98-0620 (June 22, 1999) at p. 3 (citing federal cases). Applicant's explanation of the relevant events and his conduct was part of the record evidence available to the Judge. As the trier of fact, the Judge was not bound, as a matter of law, to accept Applicant's explanation. Rather, the Judge was obligated to consider Applicant's explanation in light of the record evidence as a whole and decide what weight to give to his explanation. *See, e.g.*, ISCR Case No. 00-0683 (September 17, 2001) at p. 4. Considering the record evidence as a whole, Applicant has failed to demonstrate the Judge's findings of fact are erroneous. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1 (the Board shall 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").

2. Whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. Applicant refers to the character letters submitted on his behalf, asserts he is trustworthy and honest, and states that he has demonstrated a positive attitude toward security. The Board construes Applicant's statements as raising the issue of whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law.

The character letters submitted on behalf of Applicant were part of the record evidence that the Administrative Judge had to consider. However, the Judge was not compelled to give great or decisive weight to those character letters. The Judge had to consider and weigh those character letters in light of the record evidence as a whole. A review of the decision below shows the Judge specifically referred to the character letters submitted by Applicant and explained how he weighed them as evidence in this case. The Judge's consideration of the character letters was within the bounds of his discretion and did not reflect action that was arbitrary, capricious, or contrary to law.

Applicant's statements about his trustworthiness, honesty, and attitude toward security fail to demonstrate the Administrative Judge's decision is arbitrary, capricious, or contrary to law. Applicant's opinion about his trustworthiness, honesty and attitude toward security is not binding on the Judge. *See, e.g.*, ISCR Case No. 99-0519

(February 23, 2001) at p. 12 ("Moreover, an applicant's opinion as to the security significance of the applicant's conduct or circumstances is not dispositive and does not relieve a Judge of his or her responsibility to evaluate the applicant's security eligibility."). The Judge properly considered the record evidence in this case, made findings of fact concerning Applicant's conduct and reached his own conclusions about the nature of Applicant's conduct and Applicant's judgment, reliability, and trustworthiness. Applicant's personal disagreement with the Judge's adverse conclusions is not sufficient to demonstrate the Judge's conclusions are arbitrary, capricious, or contrary to law. Considering the record evidence as a whole, the Judge's adverse conclusions about Applicant follow rationally from the Judge's findings of fact and do not reflect arbitrary or capricious reasoning.

The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. The Administrative Judge articulated a rational basis for why he had unresolved doubts about Applicant's security eligibility. Given those unresolved doubts, the Judge properly resolved them in favor of the national security. *See* Directive, Enclosure 2, Item E2.2.2 ("Any doubt as to whether access to classified information is clearly consistent with the national security will be resolved in favor of the national security.").

### **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: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board