

DATE: January 28, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-19447

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

*Pro Se*

Administrative Judge Joseph Testan issued a decision, dated October 17, 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 an opportunity to present documentary evidence on his behalf; (2) whether the Administrative Judge erred by finding Applicant falsified a security clearance application; and (3) whether the Administrative Judge should have concluded Applicant's January 1998 domestic incident was mitigated. For the reasons that follow, the Board affirms the Administrative Judge's adverse decision.

### **Procedural History**

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated February 11, 2002. The SOR was based on Guideline E (Personal Conduct). Applicant submitted an answer to the SOR, in which he indicated he wanted a decision made without a hearing.

A File of Relevant Material (FORM) was prepared. A copy of the FORM was sent to Applicant, and he was given an opportunity to respond to the FORM. No response to the FORM was received from Applicant.

The case was assigned to the Administrative Judge for determination. The Judge issued a written decision, dated October 17, 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 that adverse decision. Department Counsel did not file a reply brief.

### **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 an opportunity to present documentary evidence on his behalf. Attached to Applicant's appeal brief are four documents. One of the documents is a copy of Applicant's October 2001 written statement. The three other documents are: a certificate of commendation (dated September 25, 2002); a letter of appreciation (dated September 25, 2002); and a character letter (dated June 28, 2002). Applicant's appeal brief asks the Board to consider those documents in his case.

Applicant's October 2001 written statement (FORM, Item 5) is part of the record evidence in this case. The three other documents submitted with Applicant's appeal brief are not part of the record evidence. The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Moreover, Applicant had the opportunity to respond to the FORM and provide additional information for the Administrative Judge to consider in his case. By failing to respond to the FORM, Applicant waived his opportunity to represent additional information for the Judge to consider. Having failed to use that opportunity, Applicant cannot now fairly challenge the decision below based on information Applicant did not submit for the Judge's consideration.

2. Whether the Administrative Judge erred by finding Applicant falsified a security clearance application. The Administrative Judge found that Applicant falsified a security clearance application in February 2001 by failing to disclose he had been arrested in connection with a January 1998 domestic incident, and failing to disclose that he attended an alcohol education course as a result of that incident. On appeal, Applicant asserts: (a) he did not falsify the security clearance application; (b) his failure to disclose the arrest and the alcohol education course was "a simple oversight on my behalf"; and (c) he disclosed the arrest and the alcohol education course when he was interviewed. The Board construes Applicant's statements as raising the issue of whether the Judge erred by finding he falsified the security clearance application.

The Administrative Judge had to consider the record evidence of Applicant's denial of any intent to falsify the security clearance application, but that evidence was not binding on the Judge. Rather, the Judge had to consider Applicant's denial of any intent to falsify in light of the record evidence as a whole and make a finding as to Applicant's intent or state of mind when he completed the security clearance application. Considering the record evidence as a whole, the Judge's finding that Applicant falsified the security clearance application reflects a reasonable interpretation of the record evidence and is sustainable.

3. Whether the Administrative Judge should have concluded Applicant's January 1998 domestic incident was mitigated. Applicant does not challenge the Administrative Judge's findings of fact concerning the January 1998 domestic incident. However, Applicant asserts that his family situation has improved since the January 1998 domestic incident and that such an incident will never happen again. The Board construes Applicant's assertions as raising the issue of whether the Judge should have concluded Applicant's conduct during the January 1998 domestic incident was mitigated.

Although the Administrative Judge made findings of fact about the January 1998 domestic incident (Decision at p. 2), the Judge did not discuss or analyze that incident under the Personal Conduct Adjudicative Guidelines or under other

pertinent provisions of the Directive, such as Section 6.3 or Enclosure 2, Item E2.2.1. The Judge's failure to do so was arbitrary, capricious, and contrary to his obligation to issue a written decision "setting forth pertinent findings of fact, policies, and conclusions as to the allegations in the SOR." Directive, Additional Procedural Guidance, Item E.3.1.25. The Judge's failure to discuss or analyze the January 1998 domestic incident left Applicant, Department Counsel, and the Board unable to discern what the Judge concluded about that incident and how he weighed that incident in reaching his decision as to Applicant's security eligibility.

Since the Administrative Judge did not discuss or analyze the January 1998 domestic incident in his decision, the Board cannot determine how the Judge weighed and evaluated the record evidence concerning that incident under Guideline E. Solely for purposes of deciding this appeal, the Board will construe the Judge's failure to discuss or analyze the January 1998 domestic incident as constituting an adverse formal finding with respect to SOR paragraph 1.a. Even if the Board were to assume, solely for purposes of deciding this appeal, that the Judge erred by failing to conclude the January 1998 domestic incident was mitigated, such an error would be harmless. The Judge's findings and conclusions about Applicant's falsification of the security clearance application are sufficient to support his adverse security clearance decision under Guideline E.

### **Conclusion**

Applicant has failed to demonstrate error below that warrants remand or reversal. 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