

DATE: July 26, 2002

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-21528

## **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 April 29, 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. 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 certain factual findings by the Administrative Judge are erroneous; and (2) 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 December 18, 2001. The SOR was based on Guideline G (Alcohol Consumption). Applicant submitted an answer to the SOR in which he stated "I desire to have a decision without a hearing." A File of Relevant arial (FORM) was prepared. A copy of the FORM was provided to Applicant, and he was given an opportunity to respond to the FORM and submit additional information for consideration in his case. No response was received from Applicant. The case was then assigned to an Administrative Judge for determination.

The Administrative Judge issued a written decision, dated April 29, 2002, 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

Applicant's appeal brief suggests the Board can contact him if it has any questions or concerns about his case. The Board cannot engage in discussions about a case by calling either the appealing party or the nonappealing party to discuss the merits of a case, or ask them questions about the merits of a case. The Directive specifically limits the parties to making their arguments through appeal briefs, limits the Board to consideration of the record evidence, and precludes the Board from receiving or developing new evidence on appeal. *See* Directive, Additional Procedural Guidance, Items E3.1.29-E3.1.32. Accordingly, the Board declines to avail itself of Applicant's offer to contact him to discuss the case.

1. Whether certain factual findings by the Administrative Judge are erroneous. The Administrative Judge made findings of fact about Applicant's history of alcohol abuse. On appeal, Applicant contends the Judge erred: (a) by referring to Government Exhibit 3 when making findings about the frequency of his alcohol consumption; and (b) by finding that Applicant received a Captain's Mast on August 31, 1998.

(a) Applicant correctly notes that the Administrative Judge's finding about the frequency of his alcohol consumption cannot be based on Government Exhibit 3 of the FORM, which is Applicant's answer to the SOR. Applicant also correctly notes that the Judge's finding about the frequency of his alcohol consumption could only be based on his written statement to an investigator, which is Government Exhibit 5 of the FORM. However, Applicant has failed to show any error by the Judge because the Judge cited Government Exhibit 3 only with respect to Applicant's admission to SOR paragraph 1.a.

(b) Applicant's second claim of error is not well-founded. The Board reaches this conclusion for three, related reasons. First, Applicant's claim of error is based on factual assertions that go beyond the record below and, therefore, constitute new evidence. As noted earlier in this decision, the Board cannot consider new evidence on appeal. Furthermore, an appealing party cannot fairly cite new evidence to support a claim that an Administrative Judge made an erroneous factual finding. Applicant had an opportunity to respond to the FORM and to submit additional information for consideration in his case, but he did not avail himself of that opportunity. Having failed to present additional information for consideration by the Judge, Applicant cannot fairly claim the Judge's findings about the Captain's Mast are erroneous. Second, when answering the SOR, Applicant specifically admitted the SOR allegation concerning the Captain's Mast "as detailed in the aforementioned Statement of Reasons." Having clearly admitted the SOR allegation concerning the Captain's Mast, Applicant cannot fairly claim now that the Judge erred by finding he received a Captain's Mast in 1998. Third, the Judge's findings about the Captain's Mast are supported by the record evidence, specifically Government Exhibit 5 of the FORM.

2. Whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. On appeal, Applicant states that he has not had an alcohol problem since 1999, and that he was granted continued access to classified information in 1999. The Board construes this statement as raising the issue of whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

There is no record evidence on whether Applicant was granted continued access to classified information in 1999. Even if the Board were to assume, solely for purposes of deciding this appeal, that Applicant was granted continued access to classified information in 1999, such a fact would not preclude the Administrative Judge's adverse security clearance

decision. A decision to grant an applicant access to classified information does not give an applicant a vested right or interest in retaining a security clearance. *See, e.g.*, ISCR Case No. 99-0511 (December 19, 2000) at p. 8. Accordingly, any grant or renewal of a security clearance for Applicant in 1999 would not require the Judge to make a favorable security clearance decision in this case.

Given the record evidence in this case, Applicant had the burden of presenting evidence below to extenuate or mitigate his history of alcohol abuse, or demonstrate that he has reformed or rehabilitated himself. *See* Directive, Additional Procedural Guidance, Item E3.1.15 ("The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."). Applicant did not respond to the FORM or present additional information for consideration in his case. Accordingly, it was not arbitrary or capricious for the Judge to conclude Applicant had failed to present evidence that mitigated the record evidence of Applicant's history of alcohol abuse.

The Administrative Judge's findings and conclusions about Applicant's history of alcohol abuse are sustainable on the record evidence in this case, and they provide a rational basis for the Judge's adverse conclusions about Applicant's security eligibility. Therefore, the Judge's adverse decision is not arbitrary, capricious, or contrary to law.

### **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