

DATE: April 4, 2003

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-22311

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

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

**FOR APPLICANT**

*Pro Se*

Applicant has appealed the December 17, 2002 decision of Administrative Judge Barry M. Sax, 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 Applicant was denied a fair adjudication of his case; (2) whether certain factual findings by the Administrative Judge are erroneous; and (3) 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 June 19, 2002. The SOR was based on Guideline F (Financial Considerations) and Guideline E (Personal Conduct).

Applicant submitted an answer to the SOR, in which he stated "I wish to have a decision 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 the Administrative Judge for determination. The Judge issued a written decision, dated December 17, 2002, in which the Judge 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 some factual assertions that go beyond the record evidence below. Such assertions constitute new evidence, which the Board cannot consider. *See* Directive, Additional Procedural Guidance, Item E3.1.29. During the proceedings below, Applicant was provided a reasonable opportunity to present evidence for consideration in his case. Applicant cannot fairly seek to challenge the Administrative Judge's decision based on new evidence. The Board will limit its discussion to those issues raised by Applicant that do not rely on new evidence.

1. Whether Applicant was denied a fair adjudication of his case. On appeal, Applicant states the following: (i) "So as I see it, it wouldn't matter what I said, your decision was already made up. Ever since I retired from the USAF in Dec 97, I have been treated like a parasite that should be exterminated whenever possible"; (ii) "I can see how easy it would be to say that I am just another civilian that can no longer be trusted because he don't care about his debts and tried to get out of them by filing bankruptcy. That would be the easy way out, just stamp my paper and stick it in the file somewhere and another worthless civilian taken care of"; and (iii) "In conclusion we both can say anything we want, apparently [Department Counsel] was given the opportunity to be present with the judge and I wasn't. (Not that it would have mattered)." The Board construes these statements as raising the issue of whether Applicant was denied a fair adjudication because: (a) Applicant has been unfairly targeted in these proceedings; (b) Applicant was denied an opportunity to appear before the Administrative Judge; (c) Department Counsel made an *ex parte* presentation to the Judge about Applicant's case; and (d) the Judge was not inclined to fairly consider evidence submitted by Applicant. For the reasons that follow, the Board concludes Applicant's claims lack merit.

(a) There is a rebuttable presumption that federal officials and employees carry out their duties in good faith, and a person seeking to rebut the presumption has a heavy burden of persuasion. *See, e.g.*, ISCR Case No. 00-0030 (September 20, 2001) at p. 5. There is no record evidence supporting Applicant's claim that he has been mistreated since he retired from the military. Applicant's assertion that he has been mistreated by unspecified persons since his retirement from the military falls far short of raising any colorable claim that rebuts the presumption that his case was handled by DOHA personnel in good faith and with administrative regularity.

(b) It is groundless for Applicant to assert he was not given an opportunity to be present with the Administrative Judge. Applicant was given the opportunity to request a hearing in which he would appear before the Judge. Applicant's answer to the SOR clearly and unequivocally waived a hearing. Having waived a hearing, Applicant cannot fairly claim he was denied an opportunity to appear before the Judge.

(c) There is nothing in the case file that indicates or suggests that Department Counsel made any presentation to the Administrative Judge in person. <sup>(1)</sup> As noted earlier in this decision, there is a rebuttable presumption that federal officials and employees carry out their duties in good faith. Applicant's unadorned speculation is wholly inadequate to raise even a colorable claim of misconduct by Department Counsel.

(d) Applicant's arguments are based, in large part, on the premise that if the Administrative Judge did not accept Applicant's statements and explanations, then the Judge was simply ignoring them. That premise is wrong. A Judge is

not compelled to accept at face value the statements or explanations of an applicant. Rather, as the trier of fact, a Judge must consider the record evidence as a whole and decide what weight, if any, to give to an applicant's statements and explanations. Furthermore, after weighing the record evidence, a Judge may decide to accept some of an applicant's statements and explanations, but not accept others. Absent a showing that the Judge acted in a manner that is arbitrary, capricious, or contrary to law, the Board will not disturb a Judge's weighing of the record evidence. Applicant's dissatisfaction with the Judge's weighing of the record evidence is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law.

There is a rebuttable presumption that an Administrative Judge is impartial and unbiased. *See, e.g.*, ISCR Case No. 99-0710 (March 19, 2001) at p. 5. Furthermore, there is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. Applicant's assertion that it would not have mattered if he had made a presentation to the Judge lacks any support in the record below and is wholly insufficient to raise even a colorable claim that the Judge prejudged the case against Applicant or that the Judge ignored Applicant's statements and submissions.

2. Whether certain factual findings by the Administrative Judge are erroneous. Applicant also argues: (a) the Administrative Judge erred by stating Applicant has been in financial trouble since 1985; (b) the Judge's decision shows the Judge does not know the difference between a Chapter 7 bankruptcy and a Chapter 13 bankruptcy; and (c) the Judge erred by finding that Applicant knowingly falsified material facts on a security clearance application by not disclosing all his delinquent debts.

(a) Applicant's first claim of factual error by the Administrative Judge has some merit. In the synopsis of the decision, the Judge stated Applicant's history of financial problems went back to 1985. Later in the decision, the Judge noted that Applicant's delinquent debts began in 1995. Given the record evidence in this case, the Judge's reference to 1985 is erroneous. However, considering the record as a whole, the Board concludes this factual error by the Judge is harmless because the erroneous reference to 1985 in the synopsis is not crucial or pivotal to the Judge's adverse conclusions under Guideline F, and it is totally irrelevant to the Judge's adverse conclusions under Guideline E and Guideline J. *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine).

(b) Applicant's second claim of factual error by the Administrative Judge is not persuasive. In making this claim of error, Applicant focuses on one sentence in the Judge's decision. When reviewing a Judge's decision, the Board does not review individual sentences in isolation, but rather considers the Judge's decision in its entirety to determine what findings the Judge made and what conclusions the Judge reached. *See, e.g.*, ISCR Case No. 00-0104 (March 21, 2001) at p. 3. Although the sentence referred to by Applicant is not a model of clarity, a review of the Judge's decision in its entirety shows the Judge correctly found Applicant was seeking relief through a Chapter 13 bankruptcy proceeding, not a Chapter 7 bankruptcy proceeding.

(c) Applicant's third claim of factual error fails to demonstrate the Administrative Judge erred. Applicant's statements about his intent and state of mind when he completed the security clearance application are relevant evidence, but they were not binding on the Judge. As the trier of fact, the Judge had to consider Applicant's statements in light of the record evidence as a whole and make findings of fact about the allegation that Applicant had falsified the security clearance application. Applicant's denial of any intent to falsify did not preclude the Judge from weighing the record evidence and making a finding that ran contrary to Applicant's denial. *See, e.g.*, ISCR Case No. 00-0601 (September 21, 2001) at pp. 2-3. The Judge's finding that Applicant falsified the security clearance application reflects a legally permissible interpretation of the record evidence as a whole. *See Directive, Additional Procedural Guidance, Item E3.1.32.1.* Applicant's ability to argue for an alternate interpretation of the record evidence is not sufficient to demonstrate the Judge's finding of falsification is unsustainable.

3. Whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. Applicant also argues: (a) "I have had a security clearance for over 25 years and have done nothing to indicate that I would be a security threat"; (b) the Judge was inconsistent when he stated in one part of his decision that Applicant did nothing to satisfy his debts, and then in another part of the decision stated Applicant incurred some debts to make payments on earlier debts; (c) the Judge did not look at "the whole picture" concerning Applicant's financial difficulties; (d) the Judge failed to take into account the difference between a Chapter 7 bankruptcy and a Chapter 13 bankruptcy; and (e) "I ask to

please give me the benefit of the doubt. Please grant my security clearance back and if you wish, evaluate me again in a year or two to ensure that I'm doing what's required." The Board construes these arguments as raising the issue of whether the Judge's decision is arbitrary, capricious, or contrary to law. For the reasons that follow, the Board concludes Applicant's arguments fail to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law.

(a) The federal government does not have to wait until a person commits a security violation before it can deny or revoke access to classified information. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). Even in the absence of any evidence that an applicant has committed a security violation, the federal government can deny or revoke access to classified information based on an applicant's conduct or circumstances that raise security concerns. Accordingly, the absence of any evidence that Applicant has ever committed a security violation did not make it arbitrary or capricious for the Administrative Judge to make an adverse security clearance decision based on his findings and conclusions about Applicant's history of financial difficulties and Applicant's falsification of a security clearance application.

(b) Applicant's second argument is based on taking a phrase from one sentence in the Administrative Judge's decision and comparing it to another sentence in the decision. There is nothing inherently objectionable about comparing passages from a Judge's decision and basing an argument on the comparison. However, the problem with Applicant's argument is that he is relying on a phrase from one sentence, taken out of context, to base his comparison. As noted earlier in this decision, the Board does not review isolate sentences or phrases from a Judge's decision. Rather, the Board considers a Judge's decision in its entirety to discern what the Judge found and concluded. Read in its entirety, the Judge's decision in this case does not exhibit the inconsistency that Applicant claims it does.

(c) A review of the decision below persuades the Board that the Administrative Judge considered the record evidence as a whole in making findings and reaching conclusions about Applicant's history of financial difficulties. As discussed earlier in this decision, the Judge was not required to accept at face value Applicant's statements and explanations for his financial difficulties. The Judge's analysis of Applicant's history of financial difficulties reflects a reasonable interpretation of the record evidence and does not exhibit any arbitrary or capricious reasoning.

(d) A review of the decision below shows the Administrative Judge understood that Applicant had filed for a Chapter 13 bankruptcy and not a Chapter 7 bankruptcy. Applicant's argument on this point is based on focusing on a single sentence in isolation from other passages in the Judge's decision. As noted earlier in this decision, such an approach is insufficient to demonstrate error.

(e) Applicant's last argument seeks relief that he is not entitled to. Any doubts about an applicant's security eligibility must be resolved in favor of the national security. Directive, Enclosure 2, Item E2.2.2. *See also Department of Navy v. Egan*, 484 U.S. 518, 531 (1988). Furthermore, the Directive does not authorize an Administrative Judge or the Board to grant a conditional or probationary security clearance. *See, e.g.*, ISCR Case No. 99-0109 (March 1, 2000) at p. 3.

### **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: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. A review of the case file shows Department Counsel submitted written arguments as part of the FORM. Applicant received a copy of the FORM and submitted a written response to it.