

DATE: January 24, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-22917

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Administrative Judge Burt Smith issued a decision, dated September 30, 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 issue: whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. 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 June 6, 2002. The SOR was based on Guideline J (Criminal Conduct).

Applicant submitted an answer to the SOR, in which he stated 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 provided an opportunity to respond to the FORM. Applicant submitted a response to the FORM, dated August 19, 2002.

The Administrative Judge issued a written decision, dated September 30, 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 Administrative Judge's adverse security clearance 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 Issue

On appeal, Applicant: (1) challenges the accuracy of various entries in an FBI document (FORM, Item 7); and (2) questions the relevance of certain entries in the FBI document because they list names for some incidents that differ from his name. The Board construes Applicant's arguments as raising the issue of whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. For the reasons that follow, the Board concludes Applicant has failed to demonstrate error that warrants remand or reversal.

The August 2, 2002 cover letter accompanying the FORM sent to Applicant informed him that he could object to any material in the FORM, and he could submit information for the Administrative Judge to consider in his case. Applicant did submit a brief, one-page response to the FORM. Nothing in Applicant's response to the FORM indicated or suggested that Applicant was objecting to the admissibility of the FBI document or challenging the accuracy of the FBI document. Because Applicant failed to object to the FBI document when he had the chance to do so, Applicant cannot fairly claim now that the Administrative Judge erred by considering that document.

On appeal, Applicant makes a variety of factual assertions about various entries in the FBI document. Those factual assertions are based on factual assertions that go beyond the record evidence. As such, they are based on new evidence, which the Board cannot consider. *See* Directive, Additional Procedural Guidance, Item E3.1.29. After receiving the FORM, Applicant could have presented information for consideration by the Administrative Judge in his case. Applicant's response to the FORM offered no information or explanation about the incidents covered by the SOR, offered no information or explanation that would raise any question about the accuracy of the FBI document, and offered no information or explanation about the incidents covered by the entries in the FBI document. Because Applicant failed to present additional information for the Judge to consider in his case, Applicant cannot fairly challenge the Judge's factual findings based on information that he did not present for the Judge's consideration.

Applicant's challenges to the FBI document do identify one finding of fact by the Administrative Judge that warrants discussion. Specifically, the Judge relied on the FBI document to find that Applicant had been arrested "approximately 15 times" during the period 1965-1971. As Applicant correctly notes on appeal, four entries in the FBI document list names other than his. ⁽¹⁾ By using the phrase "approximately 15 times," the Judge created an ambiguity because it is not clear whether the Judge was relying on the 13 entries with Applicant's name or all 17 entries on the FBI document. However, the FBI document also indicates the entries are based on fingerprint information submitted by various government entities. Considering the record evidence as a whole, the Board concludes it was not arbitrary or capricious for the Judge to rely on the FBI document. Even if the Board were to assume, solely for purposes of deciding this appeal, that the Judge erred by failing to be more specific in making his finding of fact about the number of arrests, such an error would be harmless in light of the Judge's decision as a whole. *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine).

Even making allowances for Applicant's *pro se* status, nothing in his appeal brief raises any issue or challenge to the Judge's analysis or conclusions about this case under 10 U.S.C. §986. Accordingly, the Board will not address the Judge's analysis or conclusions under that statute.

Conclusion

There is no presumption of error below. Applicant has failed to demonstrate the Administrative Judge erred. Accordingly, the Board affirms the 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

1. The FBI document has 17 entries -- 13 with Applicant's name and 4 others with names different from his.