

DATE: June 9, 2003

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 01-25608

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

*Pro Se*

Applicant has appealed the March 7, 2003 decision of Administrative Judge Joseph Testan, 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 issue: whether the Administrative Judge's adverse conclusions are 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 September 23, 2002. The SOR was based on Guideline J (Criminal 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 given to Applicant so that he could have an opportunity to respond to the FORM and submit additional information for consideration in his case. No response to the FORM was received from Applicant. The case was then assigned to the Administrative Judge for determination.

The Administrative Judge issued a written decision, dated March 7, 2003. In the written decision, the Judge made findings and reached conclusions about the matters covered by SOR subparagraphs 1.a and 1.b. The Judge did not address SOR subparagraph 1.c. 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 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 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 Issue**

Much of Applicant's appeal brief consists of proffers of new evidence. The Board cannot consider new evidence on appeal. Directive, Additional Procedural Guidance, Item E3.1.29. Apart from the prohibition of Item E3.1.29, the Board notes that Applicant had the opportunity to respond to the FORM and submit additional information for consideration in his case. By failing to respond to the FORM, Applicant waived his right to submit additional information for the Judge to consider in his case. Applicant cannot fairly claim the Judge erred based on his submission on appeal of information that he did not make available for the Judge to consider during the proceedings below.

The Board construes the remainder of Applicant's brief as raising the issue of whether the Administrative Judge's adverse conclusions are arbitrary, capricious, or contrary to law. <sup>(1)</sup> Considering the record evidence in this case, the Judge's adverse conclusions about SOR subparagraphs 1.a and 1.b are not arbitrary, capricious, or contrary to law. Applicant's ability to argue for an alternate interpretation of the record evidence is not sufficient to demonstrate the Judge erred.

### **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: 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 Board is constrained from addressing issues not raised by the parties on appeal. Directive, Additional Procedural Guidance, Item E3.1.32. Even making allowances for Applicant's *pro se* status, the Board construes Applicant's brief as challenging only the adverse conclusions reached by the Administrative Judge concerning SOR subparagraphs 1.a and 1.b.