

DATE: May 28, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-01494

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

*Pro Se*

Applicant has appealed the February 28, 2003 decision of Administrative Judge Elizabeth M. Matchinski, 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 about Applicant's security eligibility 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 9, 2002. The SOR was based on Guideline J (Criminal Conduct). A hearing was held on December 16, 2002. At the hearing, Department Counsel moved to amend the SOR to include an allegation under Guideline E (Personal Conduct) that incorporated by reference conduct alleged under Guideline J. The motion to amend was granted by the Administrative Judge without objection from Applicant.

The Administrative Judge issued a written decision, dated February 28, 2003, 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 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

The Administrative Judge found that: (a) in 2001 Applicant was convicted of theft for using false SKU numbers he obtained over the Internet in an effort to obtain merchandise for significantly less than its retail cost; and (b) in a written statement Applicant gave to a Defense Security Service investigator in December 2001, Applicant falsified material facts by denying any wrongdoing in connection with the earlier theft incident and suggesting the incident was the result of conduct by two children who had been with him in the store. On appeal, Applicant does not challenge those findings. Rather, Applicant argues: (1) he has properly handled classified information entrusted to him; (2) his misconduct took place almost two years ago; (3) the Judge failed to take into account the evidence that Applicant has "been correcting myself and can be trusted"; (4) he has not engaged in any criminal conduct since the theft; and (5) he wants to use his expertise "to help with important projects and to help the country." The Board construes Applicant's arguments as raising the issue of whether the Administrative Judge's adverse conclusions about Applicant's security eligibility are arbitrary, capricious, or contrary to law. *See* Directive, Additional Procedural Guidance, Item E3.1.32.3 (whether the Administrative Judge's rulings or conclusions are arbitrary, capricious, or contrary to law).

The absence of any evidence that Applicant has mishandled classified information did not preclude the Administrative Judge from making an adverse security clearance decision. The federal government need not wait until an applicant mishandles or fails to properly safeguard classified information 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). The federal government can deny or revoke access to classified information based on facts and circumstances showing that an applicant lacks the high degree of judgment, reliability, and trustworthiness required of persons granted access to such information.

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. Apart from that presumption, a review of the decision below persuades the Board that the Judge considered the passage of time since Applicant's misconduct and the evidence Applicant presented on his behalf. The fact that the Judge did not give as much weight to Applicant's evidence as Applicant might have preferred does not demonstrate the Judge simply ignored that evidence. *See, e.g.*, ISCR Case No. 00-0489 (January 10, 2002) at p. 10. Applicant's assertion that the Judge did not take into account the evidence he presented is not persuasive.

As the trier of fact, the Administrative Judge must consider the record evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. The Board will not disturb a Judge's weighing of the record evidence unless the appealing party demonstrates the Judge acted in a manner that is arbitrary, capricious, or contrary to law. Considering the record as a whole, it was not arbitrary, capricious, or contrary to law for the Judge to conclude that Applicant had not mitigated his misconduct sufficiently to warrant a favorable security clearance decision.

The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). *See also Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960)(security requirements include consideration of a person's judgment and honesty), *aff'd*, 367 U.S. 886 (1961). Applicant's assertion that he can be entrusted with classified information is not dispositive. The Administrative Judge's findings about Applicant's theft and falsification provide a

rational basis for the Judge's adverse conclusions about Applicant's judgment, reliability, and trustworthiness, her adverse conclusions under Guideline E and Guideline J, and her adverse security clearance decision.

### **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: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board