

DATE: September 11, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-11489

## APPEAL BOARD DECISION

### APPEARANCES

#### FOR GOVERNMENT

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

#### FOR APPLICANT

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated January 15, 2003 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline J (Criminal Conduct). Administrative Judge Robert Robinson Gales issued an unfavorable security clearance decision dated June 19, 2003.

Applicant appealed the Administrative Judge's unfavorable decision. The Board has jurisdiction 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 findings of fact by the Administrative Judge are erroneous, and (2) 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 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. 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 the rulings or conclusions of an Administrative Judge are challenged, the Board must consider whether they: (1) are arbitrary or capricious; or (2) contrary to law. Directive, Additional Procedural Guidance, Item E3.1.32.3. In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See, e.g.*, ISCR Case No. 97-0435 (July 14, 1998) at p. 3 (citing Supreme Court decision). In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are

contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. Compliance with state or local law is not required because security clearance adjudications are conducted by the Department of Defense pursuant to federal law. *See* U.S. Constitution, Article VI, clause 2 (Supremacy Clause). *See, e.g.*, ISCR Case No. 00-0423 (June 8, 2001) at p. 3 (citing Supreme Court decisions).

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, and whether the Judge's findings reflect a reasonable interpretation of the record evidence as a whole. Although a Judge's credibility determination is not immune from review, the party challenging a Judge's credibility determination has a heavy burden on appeal.

When an appeal issue 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).

If an appealing party demonstrates factual or legal error, then the Board must consider the following questions:

Is the error harmful or harmless? *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine);

Has the nonappealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds? *See, e.g.*, ISCR Case No. 99-0454 (October 17, 2000) at p. 6 (citing federal cases); and

If the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded? (Directive, Additional Procedural Guidance, Items E3.1.33.2 and E3.1.33.3)

### **Appeal Issues** [\(1\)](#)

1. Whether certain findings of fact by the Administrative Judge are erroneous. The Administrative Judge made various findings of fact about Applicant's case. Applicant does not challenge most of those findings. However, Applicant makes the following representations concerning several of them: (a) Applicant not only participated in counseling from 1987 to 1994, he completed counseling in 1994; (b) Applicant served in the regular Air Force from 1964 to 1972, rather than the Air Force Reserve; and (c) Applicant has not only served in the same job since 1996, he served in a similar job from 1992 to 1996.

The Board has reviewed the record and concludes that the Administrative Judge's challenged findings reflect a reasonable interpretation of the record evidence, and are sustainable. Applicant's characterizations of the record evidence are based upon assertions that amount to new evidence, which may not be considered. *See* Item 29 of the Directive, Additional Procedural Guidance ("... No new evidence shall be received or considered by the Appeal Board."). On appeal, an Administrative Judge's findings must be reviewed based on the record evidence before him and not matters outside the record. Applicant had the opportunity to respond to the File of Relevant Material and submit information for the Judge to consider in his case. Having failed to take advantage of that opportunity, Applicant cannot fairly complain about the Judge's reliance on the record evidence that was available to him.

2. Whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. Appellant also argues that the Administrative Judge did not give sufficient weight to his evidence of rehabilitation. That argument is without merit.

In deciding a case, an Administrative Judge must weigh the record evidence. Absent a showing that the Administrative Judge acted in a manner that is arbitrary, capricious, or contrary to law, the Board will not disturb his weighing of the record evidence. *See, e.g.*, ISCR Case No. 00-0030 (September 20, 2001) at p. 9. Applicant's ability to argue for a more favorable interpretation of the record evidence is not sufficient to demonstrate the Judge weighed the evidence

improperly. *See, e.g.*, ISCR Case No. 00-0525 (November 15, 2001) at p. 3.

Furthermore, when weighing the record evidence, the Administrative Judge must consider the evidence as a whole and not view it in an isolated or piecemeal fashion. *See* Directive, Section 6.3 ("Each clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information . . ."); Directive, Enclosure 2, Item E2.2.1 ("The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination."). Applicant's arguments fail to demonstrate the Administrative Judge erred because they urge consideration of various portions of the evidence in a piecemeal fashion. The Judge was not required to consider the significance of each matter cited by Applicant in isolation from the overall record evidence in this case.

Security clearance decisions are not an exact science, but rather are predictive judgments about a person's security suitability in light of that person's past conduct and present circumstances. *Department of Navy v. Egan*, 484 U.S. 518, 528-529 (1988). Accordingly, it was not arbitrary or capricious for the Administrative Judge to consider Applicant's overall history of conduct and current circumstances and evaluate whether Applicant was at risk of repeating his past misconduct. Furthermore, there is no presumption in favor of granting a security clearance and Applicant bears the ultimate burden of persuasion to show it is clearly consistent with the national interest to grant or continue a security clearance for him. *See* Directive, Enclosure 2, Items E2.2.1, E2.2.2 and E2.2.3, and Additional Procedural Guidance, Item E3.1.15. Therefore, the Judge was not required to resolve any uncertainties or doubts in favor of Applicant.

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). Security requirements include consideration of a person's judgment, reliability, and trustworthiness. *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961). The Administrative Judge's findings of fact provide a rational basis for his overall adverse conclusions about Applicant's security eligibility and his doubts about whether Applicant had demonstrated a sufficient track record of rehabilitation to warrant a conclusion that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

### **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: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. Even making allowances for Applicant's *pro se* status, the Board concludes Applicant's appeal brief raises no issue with respect to the Administrative Judge's findings and conclusions about the applicability of 10 U.S.C. §986 to Applicant's felony conviction. Accordingly, the Board need not address or comment on those findings and conclusions.