

DATE: August 29, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-21102

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Applicant has appealed the June 25, 2003 decision of Administrative Judge Burt Smith, in which the Administrative 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: (1) whether the Administrative Judge erred in finding that the Applicant had been provided a copy of the "Money Memorandum" (hereinafter "ASDC3I Memorandum"); ⁽¹⁾ and (2) whether the Administrative Judge erred by not concluding the allegations against the Applicant were mitigated under Guideline C. 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 January 17, 2003. The SOR was based on Guideline C (Foreign Preference).

Applicant submitted an answer to the SOR, in which he admitted to all of the allegations and stated he wanted a decision made without a hearing. A File of Relevant Material (FORM) was prepared and a copy of the FORM was provided to the Applicant. The Applicant did not submit a reply to the FORM and the case was assigned to the Administrative Judge for decision.

On June 16, 2003, the Administrative Judge issued an Order to the parties in the case. That Order requested Department Counsel provide the Administrative Judge with a response showing the Applicant had been furnished a copy of the ASDC3I Memorandum. On that same date, Department Counsel filed a written response to the Administrative Judge's Order. That response included as an attachment the Defense Office of Hearings and Appeals (DOHA) letter previously sent to the Applicant and its enclosed copy of the ASDC3I Memorandum. A copy of Department Counsel's response and its attachments was mailed to the Applicant at the address he had provided to DOHA. The Applicant did not submit a reply to Department Counsel's response.

The Administrative Judge issued a written decision, dated June 25, 2003, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for the Applicant. As part of that decision, the Administrative Judge found that the Applicant had been provided a copy of the ASDC3I Memorandum when he received his SOR, and had, therefore, been given an opportunity to address it in his answer.

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 Issues

1. Whether the Administrative Judge erred in finding that the Applicant had been provided a copy of the ASDC3I Memorandum. The ASDC3I Memorandum was listed as an attachment to the letter that transmitted the SOR (also a listed attachment) to the Applicant. The letter and a copy of the ASDC3I memorandum were made part of the record as attachments to Department Counsel's response to the Administrative Judge's June 16, 2003 Order. In her response, Department Counsel affirmatively asserted that the Applicant had been provided a copy of the ASDC3I Memorandum when he received the SOR. A copy of Department Counsel's response and attachments was mailed to the Applicant at the address he had provided the office. The Applicant filed no reply or objection to Department Counsel's response. In his brief, the Applicant acknowledges receiving the letter and SOR, and the record shows that he filed an answer to the SOR. The Applicant does not affirmatively assert that he did not receive the ASDC3I Memorandum. Rather, he ambiguously states that he does not recall having received it. In light of the foregoing, the Administrative Judge's finding that the Applicant received the ASDC3I Memorandum when he had received the SOR was reasonable and sustainable.

2. Whether the Administrative Judge erred by not concluding the allegations against the Applicant were mitigated under Guideline C. Applicant contends that the Administrative Judge should have concluded the allegations against him were mitigated because his dual citizenship was based upon the birth country of one of his parents and he is willing to surrender his foreign passport. His arguments in this regard are not persuasive. Because the Applicant had not surrendered his foreign passport as required by the ASDC3I Memorandum, the Government's security concerns have not been mitigated. Under such circumstances, the Administrative Judge's adverse decision is not arbitrary, capricious, or contrary to law.

To the extent Applicant offers (in his appeal brief) to comply with the ASDC3I Memorandum, Applicant fails to demonstrate error below. First, Applicant's offer constitutes new evidence, which the Board cannot consider. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Second, offers to take remedial action in the future do not demonstrate factual or legal error by the Administrative Judge.

Conclusion

Applicant has failed to demonstrate harmful 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. *Guidance to DoD Central Adjudication Facilities (CAF) Clarifying the Application of the Foreign Preference Adjudicative Guideline*, dated August 16, 2000, from the Assistant Secretary of Defense, Command, Control, Communications, and Intelligence, Arthur L. Money.