

DATE: June 30, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-26333

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

*Pro Se*

Applicant has appealed the March 31, 2003 decision of Administrative Judge Darlene Lokey Anderson, 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 issues: (1) whether the Board can permit Applicant to present new evidence on appeal; and (2) whether the Administrative Judge's adverse decision is 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 November 7, 2002. The SOR was based on Guideline B (Foreign Influence).

Applicant submitted an answer to the SOR in which he stated "I wish to have a decision without a hearing." A File of Relevant Material (FORM) was prepared. A copy of the FORM was given to Applicant. In response to the FORM, Applicant submitted a letter in which he stated "I will not be filing any objections to the File of Relevant Material and I do not have any more information to be considered."

The case was assigned to the Administrative Judge for determination. The Judge issued a written decision, dated March 31, 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 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 Board can permit Applicant to present new evidence on appeal. On appeal, Applicant submits new evidence for consideration in his case. For the reasons that follow, the Board cannot consider Applicant's new evidence.

Applicant cites paragraph 13 of the "Information About Appeals under DoD Directive 5220.6" ("Appeal Instructions") [\(1\)](#) to support his request that the Board consider the new evidence he is submitting. That paragraph reads as follows:

"The Chairman, Appeal Board may, in his sole discretion, vary the provisions of these instructions: (a) upon a showing of good cause, or (b) whenever he deems it necessary to provide for the fair and efficient handling of appeals under the Directive. The Chairman, Appeal Board does *not* have the authority to vary the provisions of the Directive." (Emphasis in original)

Paragraph 5 of the Appeal Instructions states "*No new evidence can be considered by the Appeal Board on appeal.*" (Emphasis in original) Although Applicant does not specifically refer to paragraph 5, the Board construes his brief as asking that paragraph 5 be varied to allow him to submit new evidence on appeal.

Paragraph 5 is not based on any authority of the Chairman, but rather is based on Directive, Additional Procedural Guidance, Item E3.1.29. Since the prohibition against new evidence on appeal is based on the Directive, it cannot be waived by the Chairman pursuant to paragraph 13 of the Appeal Instructions. Similarly, the Board as a whole does not have the authority to waive that prohibition. In view of the foregoing, the Board cannot consider the new evidence submitted by Applicant on appeal.

Applicant had an opportunity to respond to the FORM and to submit additional information for consideration in his case. When responding to the FORM, Applicant explicitly indicated that he had no additional information to submit on his behalf. Under the circumstances, Applicant waived the right to submit information for consideration in his case.

2. Whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. The Administrative Judge made findings of fact about Applicant's spouse (a citizen of Japan) and his wife's immediate family members (who are Japanese citizens living in Japan), including Applicant's father-in-law (a retired senior officer who had served in the Japanese Navy). The Judge concluded that Department Counsel had met its burden of presenting sufficient evidence under Guideline B (Foreign Influence) to shift the burden of persuasion to Applicant to present evidence to rebut, extenuate, or mitigate the security concerns raised under Guideline B. The Judge concluded that Applicant had not met his burden of persuasion and rendered an adverse security clearance decision.

Applicant does not raise any specific claim of factual or legal error by the Administrative Judge. Rather, Applicant merely offers new evidence on appeal and asks the Board to consider that new evidence and reverse the Judge's security clearance decision.

As noted earlier in this decision, there is no presumption of error below and the appealing party must demonstrate factual or legal error by the Judge. Because Applicant has not made any specific claim of error below, there is no basis for the Board to conclude the Judge's decision is arbitrary, capricious, or contrary to law.

### **Conclusion**

The Board affirms the Administrative Judge's decision because Applicant has not demonstrated error below.

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: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. When a party appeals an Administrative Judge's decision, the notice of appeal is acknowledged in writing. A copy of the appeal instructions is sent to each party with the written acknowledgment of the notice of appeal.