

DATE: July 29, 1997

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 96-0127

APPEAL BOARD DECISION

Appearances

FOR GOVERNMENT

Matthew E. Malone, Esq.

Department Counsel

FOR APPLICANT

Pro se

Administrative Judge Paul J. Mason issued a decision, dated March 14, 1997, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed. For the reasons set forth below, the Board affirms the Administrative Judge's decision.

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 Applicant was denied a fair hearing because of ineffective assistance of counsel; and (2) whether the Administrative Judge erred by finding Applicant engaged in knowing falsifications concerning his drug abuse history.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated April 8, 1996 to Applicant. The SOR was based on Criterion H (Drug Involvement), Criterion E (Personal Conduct), and Criterion J (Criminal Conduct).

A hearing was held on June 24, 1996. Because of medical incapacity, the Administrative Judge who held the first hearing was unable to complete the case. The case was assigned to another Judge, who held another hearing on February 19, 1997. After the second hearing, the Judge issued a decision in which he 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 that adverse decision.

Appeal Issues

1. Whether Applicant was denied a fair hearing because of ineffective assistance of counsel. On appeal, Applicant

contends the attorney representing him during the proceedings below did not adequately represent him and failed to present certain evidence that Applicant believes would have helped his case.

Applicant's brief contains assertions about matters that go outside the record evidence, including assertions about disagreements between him and his attorney about how to proceed with his case, what evidence to present, and what defenses to raise before the Administrative Judge. The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item 29. Accordingly, the majority of Applicant's appeal assertions go beyond what the Board legitimately can consider.

Even if the Board were willing to construe Item 29 of the Additional Procedural Guidance as not precluding consideration of the kinds of assertions Applicant makes about his disagreements with his attorney, Applicant's brief does not demonstrate remand or reversal is warranted. The ineffective assistance of counsel doctrine does not apply to civil proceedings. *See, e.g., Friedman v. State of Arizona*, 912 F.2d 328, 333 (9th Cir. 1990), *cert. denied*, 498 U.S. 1100 (1991); *Hutcherson v. Smith*, 908 F.2d 243, 245 (7th Cir. 1990); *MacCuish v. United States*, 844 F.2d 733, 735 (10th Cir. 1988); *Sanchez v. U.S. Postal Service*, 785 F.2d 1236, 1237 (5th Cir. 1986); *Mekdeci v. Merrill National Laboratories*, 711 F.2d 1510, 1522-23 (11th Cir. 1983). Because DOHA proceedings are civil, not criminal, in nature, the ineffective assistance of counsel doctrine does not apply to them. *Accord* DISCR Case No. 89-2086 (June 13, 1991) at pp. 3-4. Even if the Board were to assume, solely for the sake of discussion, that Applicant's appeal assertions are correct, Applicant is not seeking relief in the appropriate forum.

Regardless of any disagreements that Applicant may have had with his attorney, the record shows Applicant received his full measure of due process under Executive Order 10865 and the Directive. He received a Statement of Reasons (SOR) and was given the opportunity to respond to it. He appeared at two separate hearings, represented by an attorney of his own choice. And, Applicant had the opportunity to present evidence on his behalf and respond to the evidence presented by Department Counsel in support of the SOR allegations.

Applicant asks the Board to remand the case for another hearing so that he can present new evidence. This request is based on Applicant's contention that his attorney failed to adequately represent him and did not present certain evidence that Applicant now asserts would have helped his case. As discussed above, Applicant's arguments concerning his attorney's representation fail to demonstrate he is entitled to relief in this forum. Absent a showing of prejudicial error that is legally recognized in these proceedings, an applicant is not entitled to a new hearing solely to give him another chance to present evidence to make his case. *See, e.g., ISCR Case No. 96-0544* (May 12, 1997) at p. 2; *ISCR Case No. 96-0681* (April 14, 1997) at p. 3. Therefore, Applicant is not entitled to the relief he seeks.

2. Whether the Administrative Judge erred by finding Applicant engaged in knowing falsifications concerning his drug abuse history. Applicant makes various arguments in support of his contention that he did not engage in knowing falsifications concerning his drug abuse history. The Board construes Applicant's arguments as raising the issue of whether the Administrative Judge erred by finding Applicant engaged in knowing falsifications as alleged in the SOR.

Applicant's appeal arguments concerning the falsification issue include assertions about some matters that go outside the record evidence (*e.g.*, his assertion that he passed a polygraph examination in 1989, and his assertion that he received instructions indicating he only need go back five years when filling out the January 1995 Personnel Security Questionnaire). As discussed above, the Board cannot consider new evidence on appeal. Accordingly, the Board cannot consider those arguments made by Applicant that go beyond the record evidence.

As the trier of fact, the Administrative Judge is responsible for weighing the record evidence, assessing the credibility of each witness's testimony (including Applicant's), and making factual findings. On appeal, the Board reviews the decision to determine whether the 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 32.a.

Applicant's ability to argue for an alternative interpretation of the record evidence is not sufficient to demonstrate the Judge's findings on falsification are in error. Considering the record evidence as a whole, the Administrative Judge had ample documentary and testimonial evidence (including admissions by Applicant) to support his findings that Applicant

engaged in knowing falsifications about his drug abuse history. Applicant's appeal arguments fail to demonstrate the Judge's findings about falsification are in error.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's March 14, 1997 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