

DATE: December 8, 1997

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 96-0457

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Matthew E. Malone, Esq., Department Counsel

FOR APPLICANT

Bill C. Giallourakis, Esq.

Administrative Judge Elizabeth M. Matchinski issued a decision, dated April 11, 1997, in which she 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 meaningful opportunity to be represented by counsel during the proceeding below; and (2) whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) dated October 18, 1996 to Applicant. The SOR was based on Criterion K (Security Violations).

A hearing was held on February 13, 1997. The Administrative Judge subsequently issued a decision 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 that adverse decision.

Appeal Issues

1. Whether Applicant was denied a meaningful opportunity to be represented by counsel during the proceeding below. On appeal, Applicant argues: (a) prior to the hearing, a Department of Defense (DoD) employee misinformed him about the nature of the hearing's formality and implied that Applicant did not need to retain counsel; (b) at the hearing, the Administrative Judge made a statement that implied indifference to Applicant's right to retain counsel; (c) the Administrative Judge should have postponed the hearing to allow Applicant more time to prepare and to consider retaining counsel; (d) the Administrative Judge failed to make a finding on the record that Applicant was competent to proceed without an attorney; and (e) although the Directive and two other documents Applicant received prior to the

hearing placed him on notice of his right to retain counsel, those documents were insufficient to cure the procedural errors at the hearing. For the reasons that follow, the Board finds Applicant's contention unpersuasive.

Although there is no constitutional right to counsel in DOHA proceedings, an applicant's right to retain counsel is an important right recognized by Executive Order 10865 and the Directive. *See, e.g.*, ISCR Case No. 95-0300 (February 1, 1996) at p. 4 n.3. Furthermore, "[n]o federal official or employee should discourage, directly or indirectly, an applicant from retaining counsel. Federal officials and employees need to be sensitive to the possibility that *pro se* applicants may not understand or appreciate the nuances of statements made to them." *Id.* at p. 4. Even accepting, for purposes of deciding this appeal, Applicant's characterization of his understanding of what he was told by a DoD employee before the hearing, the Board concludes the totality of the record demonstrates he was not denied a meaningful opportunity to retain counsel for the proceeding below.

Applicant was informed, in writing, of his right to retain counsel by three separate documents: the Directive; a January 8, 1997 letter from DOHA; and the prehearing guidance. Applicant's receipt of those documents undercuts his appeal contention. Moreover, a review of hearing transcript shows Applicant indicated he knew he had the right to retain counsel, that he understood that he was responsible for presenting his case, and he was ready to proceed with the hearing. *See* Transcript at pp. 6-8. Moreover, Applicant did not request a continuance in order to seek assistance of counsel.

Under the particular facts of this case, the absence of a formal finding by the Administrative Judge that Applicant was competent to proceed without an attorney is not disturbing. Nothing in the record indicates that Applicant (a 40-year old man holding a technical position with a defense contractor) was unable to understand the proceedings or was incompetent to represent himself during the hearing. Moreover, the Board rejects Applicant's claim that the Administrative Judge made a statement which implied indifference to Applicant's right to retain counsel. Applicant's claim is based on taking the Judge's statement out of context. The Judge's remarks, viewed in their entirety, do not demonstrate any improper indifference to Applicant's rights. At most, those remarks indicate the Judge was trying to make Applicant understand the nature of the proceeding and his responsibilities during the hearing, while trying to maintain her position as an impartial presiding official.

The Administrative Judge was presented with a problem at the hearing. The Department Counsel had provided Applicant with less than a third of a 235-page documentary exhibit in a timely fashion. Three days prior to the hearing the Department Counsel provided the remaining 170 pages to Applicant. At the hearing, the Judge offered the Applicant several accommodations (including the possibility of reconvening the hearing at a later date), each of which was declined. The problem was not the Administrative Judge's handling of the issue at the hearing but the Department Counsel's handling of the document before the hearing.

2. Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. Applicant challenges the Administrative Judge's decision on several grounds: (a) various factual findings by the Judge are in error or misleading; (b) the Judge failed to apply the Adjudicative Guidelines properly; (c) the Judge erred by concluding Applicant failed to appreciate the degree to which he failed in his duties as a facility security officer (FSO) and failed to demonstrate reform and rehabilitation; and (d) the Judge erred by evaluating Applicant's current security eligibility against his past failings as an FSO because his current position does not require him to perform FSO duties. For the reasons that follow, the Board concludes Applicant has failed to demonstrate harmful error.

(a) **Factual findings.** As the trier of fact, the Judge is responsible for weighing the evidence and making factual findings. The Judge is entitled to assess the credibility of witnesses (including the Applicant) when weighing the evidence, and such credibility determinations are entitled to deference on appeal. *See* Directive, Additional Procedural Guidance, Item 32.a. The Board has considered Applicant's claims of factual error in light of the record as a whole and concludes that they fail to demonstrate error. The ability of Applicant to argue for an alternate interpretation of the evidence does not demonstrate the Judge erred. *Cf. American Textile Mfrs Institute v. Donovan*, 452 U.S. 490, 523 (1981) (possibility of drawing two inconsistent conclusions from evidence does not mean agency's findings and conclusions are not supported by substantial evidence).

(b) **Adjudicative Guidelines.** Applicant contends the Administrative Judge erred by not applying the following Security

Violations Mitigating Guidelines: (1) "[Applicant's actions] were due to improper or inadequate training;" and (2) "[Applicant's actions] demonstrate a positive attitude towards the discharge of security responsibilities." This contention is not persuasive.

It is untenable for Applicant to contend the Administrative Judge acted in a perfunctory manner by concluding that none of the Security Violations Mitigating Guidelines was applicable. A reading of the decision shows the Judge gave reasons why she did not find those Mitigating Guidelines applicable to Applicant's situation. The reasons given by the Judge reflect a plausible and reasonable interpretation of the record evidence, and they are not arbitrary, capricious, or contrary to law.

(c) Appreciation of mistakes. There is conflicting record evidence on the issue of whether Applicant really appreciated the degree to which he failed in his duties as an FSO. The mere presence of conflicting record evidence does not diminish the Judge's responsibility for making factual findings. Considering the record as a whole, it was not arbitrary, capricious, or contrary to law for the Judge to conclude that Applicant had failed to truly appreciate the degree to which he failed in his FSO duties. The Judge relied, in part, on her assessment of Applicant's credibility and demeanor in reaching that conclusion. As noted above, such a credibility determination is entitled to deference on appeal. Applicant's appeal brief fails to meet its heavy burden of persuading the Board to overturn the Judge's credibility assessment of Applicant. It was within the scope of the Judge's discretion to conclude that Applicant's expressions of regret, remorse, and appreciation of his security failings as an FSO were less than persuasive in light of the overall record evidence.

(d) Standard used. Applicant contends the Administrative Judge erred by evaluating his current security eligibility as a computer systems security specialist against the standard of an FSO. Applicant argues that his situation has changed, he no longer is an FSO, and it is not reasonable for the Judge to assess his current security eligibility based on his past failures as an FSO. This contention fails to demonstrate error.

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, 528-29 (1988). Evidence that, in the past, an applicant has failed to properly carry out his or her security responsibilities is highly relevant to making an assessment of that applicant's current security eligibility. Here, Applicant's past failures as an FSO were serious and, in light of the record as a whole, provided a rational basis for the Administrative Judge to have doubts about Applicant's current security eligibility. The Judge properly resolved those doubts in favor of the national security. *Egan, supra*, 484 U.S. at 531.

CONCLUSION

Applicant has failed to meet his burden on appeal of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's April 11, 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