

DATE: December 9, 1997

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 96-0897

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Michael H. Leonard, Esq., Department Counsel

FOR APPLICANT

Michael P. Heiskell, Esq.

Administrative Judge Paul J. Mason issued a decision, dated July 8, 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 the Administrative Judge demonstrated bias in favor of the Government; and (2) whether Applicant was denied due process because there is no applicable burden of proof that Department Counsel shouldered in presenting its evidence against Applicant.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated January 30, 1997 to Applicant. The SOR was based on Criteria H (Drug Involvement), E (Personal Conduct), and J (Criminal Conduct).

A hearing was held on May 7, 1997. The Administrative Judge subsequently issued a written 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 Appeal Board on Applicant's appeal from that unfavorable decision.

Appeal Issues

1. Whether the Administrative Judge demonstrated bias in favor of the Government. Applicant contends the Administrative Judge was biased in favor of the Government, thereby depriving him of a fair and impartial hearing and denying him due process. In support of this contention, Applicant points to a statement the Judge made at the hearing and contends the statement demonstrates the Judge prejudged the evidence to Applicant's detriment. For the reasons that follow, the Board concludes Applicant's contention lacks merit.

There is a rebuttable presumption that quasi-judicial officials are impartial and unbiased, and the appealing party has a heavy burden when seeking to overcome that presumption. *See* ISCR Case No. 94-1055 (May 8, 1996) at p. 2 (citing

federal cases). In assessing a claim of bias, the Board will not limit itself to individual statements in isolation, but rather will review the record in its entirety. *See, e.g.*, DISCR Case No. 90-0279 (September 22, 1993) at p. 4 (citing federal case). The Board does not have to agree with the Administrative Judge's remarks to Applicant to conclude that those remarks, viewed in light of the entire record below and the Judge's written decision, do not rebut the presumption of impartiality. While the Judge's particular choice of words could be viewed as less than optimal it does not translate into a showing of bias.

2. Whether Applicant was denied due process because there is no applicable burden of proof that Department Counsel shouldered in presenting its evidence against Applicant. Applicant contends he was denied due process because: (a) the Directive does not detail any burden of proof that Department Counsel must meet to establish controverted facts; (b) the preponderance of the evidence standard should be applied in these proceedings; and (c) Department Counsel failed to establish controverted facts by a preponderance of the evidence. We find these arguments unpersuasive.

Item 14 of the Additional Procedural Guidance requires Department Counsel to prove controverted facts, but it does not specifically state what burden of proof Department Counsel must meet in carrying out that responsibility. However, the Directive does provide indirect guidance on the issue: the Board must review an Administrative Judge's factual findings to determine whether they "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. The Item 32.a. language reflects one version used by federal courts to describe the substantial evidence test, which is less than the preponderance of the evidence. *See also Department of Navy v. Egan*, 484 U.S. 518, 531 (1988)(security clearance decisions not based on preponderance of the evidence standard); DISCR Case No. 90-1054 (July 20, 1992) at p. 4 (standard of proof in industrial security clearance cases is less than the preponderance of the evidence). Viewed in its entirety, the Directive places all applicants on reasonable notice of

the quantum of proof that Department Counsel must satisfy to meet its burden on proving controverted facts.

Considering the record as a whole, there is substantial record evidence (including admissions against interest by Applicant) to support the Administrative Judge's findings that Applicant engaged in drug abuse and falsifications. The Judge was responsible for assessing Applicant's demeanor and credibility (as well as the demeanor and credibility of the Government's witnesses) and deciding whether to accept Applicant's recantation of his earlier written admissions of drug abuse. Nothing in the record evidence or Applicant's appeal brief persuades the Board to disturb the Judge's findings concerning Applicant's earlier written admissions and his subsequent recantation of them. Moreover, given the Judge's sustainable findings about Applicant's written admissions of drug abuse, the Judge had a rational basis in the record to find Applicant engaged in falsifications as alleged in the SOR.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's July 8, 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