

DATE: November 17, 1998

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 98-0198

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

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

**FOR APPLICANT**

*Pro Se*

Administrative Judge Elizabeth M. Matchinski issued a decision, dated August 14, 1998, 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 issue of whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

**Procedural History**

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated March 10, 1998 to Applicant. The SOR was based on Criterion H (Drug Involvement).

Applicant submitted an answer to the SOR and requested that his case be decided without a hearing. Department Counsel prepared a File of Relevant Material (FORM), a copy of which was provided to Applicant. After Applicant submitted a response to the FORM, the case was assigned to the Hearing Office for determination. The Administrative Judge subsequently issued a written 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 the Administrative Judge's adverse decision.

**Appeal Issue**

Applicant contends the Administrative Judge should have made a favorable security clearance decision in his case based on application of Drug Involvement Mitigating Guidelines 2, 3, and 4. The Board construes Applicant's arguments as raising the issue of whether the Judge's adverse decision is arbitrary, capricious, or contrary to law.

Applicant's appeal brief contains factual assertions that go beyond the record evidence and seek to present new evidence

for the Board's consideration. Also, Applicant submitted various documents that were not part of the record before the Administrative Judge. The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item 29.<sup>(1)</sup> Furthermore, Applicant had the opportunity to present such documentary evidence for consideration by the Judge when Applicant responded to the FORM. It is too late for Applicant to present such documentary evidence at this time. *See, e.g.*, ISCR Case No. 97-0769 (July 9, 1998) at p. 2 (waiver of opportunity to present evidence in response to FORM); ISCR Case No. 97-0618 (June 11, 1998) at p. 2 n.1 (same). The Board can not consider any arguments made by Applicant that are based on new evidence.

Drug Involvement Mitigating Guideline 2.<sup>(2)</sup> Applicant argues the Administrative Judge should have applied this mitigating guideline because his drug use was isolated or infrequent by the time of his positive drug screen test results in September 1997. This argument fails to demonstrate the Administrative Judge erred.

The Administrative Judge properly considered the overall history of Applicant's drug use, which spanned a period of approximately 17 years. Given the overall frequency of Applicant's drug use over that long period of time, it was entirely reasonable for the Judge to conclude Applicant's drug use was not isolated or infrequent. *See, e.g.*, ISCR Case No. 95-0560 (August 16, 1996) at p. 3 ("whole person" concept requires Administrative Judge to consider an applicant's drug abuse history in its entirety, not just pieces of it in isolation).

Drug Involvement Mitigating Guideline 3.<sup>(3)</sup> Applicant contends the evidence was not "fully weighed" by the Administrative Judge in connection with this mitigating guideline. Applicant argues that the Judge would have had a better understanding of the facts of his case "had the [J]udge requested any recent documentation from [Applicant's] company." Applicant's arguments fail to demonstrate the Judge erred.

There is a rebuttable presumption the Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 97-0783 (August 7, 1998) at p. 4. Apart from that rebuttable presumption, a reading of the Judge's decision persuades the Board that the Judge gave careful consideration to the record evidence. The Judge gave specific reasons for why she concluded Applicant's stated intention to refrain from drug use in the future was not sufficient to warrant giving him the full benefit of Drug Involvement Mitigating Guideline 3 (Decision at pp. 5-6). The Judge's reasons reflect a reasonable interpretation of the record evidence and do not involve any reasoning that is arbitrary, capricious, or contrary to law.

Applicant had the responsibility for presenting evidence for the Administrative Judge's consideration. *See* Directive, Additional Procedural Guidance, Item 7. Furthermore, Applicant had the responsibility "for presenting . . . evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive, Additional Procedural Guidance, Item 15. It is the responsibility of the parties, not the Judge, to present evidence and develop a record for the Judge's consideration. Accordingly, the Judge did not err.

Drug Involvement Mitigating Guideline 4.<sup>(4)</sup> Applicant contends the Administrative Judge should have applied this mitigating guideline in his case. This contention is not well-founded because it is based on factual assertions and documentary evidence that go outside the record below. As discussed earlier, the Board cannot consider new evidence on appeal. Furthermore, Applicant had the opportunity to present such evidence for the Judge's consideration when he responded to the FORM. Having not presented such evidence for the Judge's consideration, Applicant cannot now fairly complain that the Judge erred by not applying this mitigating guideline. Based on the limited nature of the record evidence, the Judge had a rational basis for stating "there is not enough information about the [drug awareness] program itself to conclude that it qualifies as a drug treatment program of the type contemplated within MC 4" (Decision at p. 5).

The United States must be able to repose a high degree of trust and confidence in persons granted access to classified information. A history of drug abuse raises legitimate concerns about a person's suitability for a security clearance. *See, e.g.*, ISCR Case No. 98-0088 (July 20, 1998) at p. 2. The Judge's findings about Applicant's long history of drug abuse are supported by the record evidence and provide a rational basis for her adverse security clearance decision. Nothing in Applicant's appeal brief demonstrates that the Judge's decision is arbitrary, capricious, or contrary to law.

## Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's August 14, 1998 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

1. Applicant states he is "not offering this information as new testimony or evidence, but only to point to facts already in evidence . . . ." For purposes of Additional Procedural Guidance, Item 29, "new evidence" is any evidence presented to the Board that was not presented by a party during the proceedings below, even if the proffered evidence existed before or during those proceedings.

2. "[T]he drug involvement was an isolated or infrequent event."

3. "[A] demonstrated intent not to abuse any drugs in the future."

4. "[S]atisfactory completion of a drug treatment program prescribed by a credentialed medical professional."