

DATE: May 20, 1999

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 98-0685

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

William S. Fields, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge John R. Erck issued a decision, dated January 29, 1999, 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 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 October 16, 1998 to Applicant. The SOR was based on Criterion J (Criminal Conduct). Applicant submitted an answer to the SOR, in which he indicated he would not request a hearing. A File of Relevant Material (FORM) was prepared. A copy of the FORM was provided to Applicant, who submitted a response to the FORM. The case was then assigned to the Administrative Judge for determination.

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 Board on Applicant's appeal from that unfavorable decision.

Appeal Issue⁽¹⁾

On appeal, Applicant does not challenge the Administrative Judge's factual findings concerning his conduct in August 1997 (when he threatened a cab driver with a shotgun in a dispute over cab fare) or his subsequent prosecution and sentencing for that conduct. However, Applicant asks the Board to reverse the Administrative Judge's adverse security clearance decision. In support of that request, Applicant makes several arguments: (1) the Administrative Judge should have contacted Applicant and asked him for additional information to address those aspects of the case for which the

Judge felt there was an absence of evidence; (2) Applicant was candid with the government about his criminal conduct; (3) Applicant's criminal conduct was isolated in nature and did not result in actual harm to the victim; (4) Applicant regrets his criminal conduct and has learned a hard lesson from it; (5) Applicant's criminal conduct was unrelated to Applicant's job or his job performance; (6) the Administrative Judge did not give sufficient weight to the mitigating evidence that he acknowledged was present in Applicant's case, including the evidence of Applicant's rehabilitation; and (7) the Administrative Judge did not give sufficient weight to Applicant's years of military service and his work for a defense contractor. The Board construes these arguments as raising the issue of whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law.

The Administrative Judge acted properly by not contacting Applicant and asking him for additional information. Given the information in the FORM about Applicant's criminal conduct, the burden shifted to Applicant to present evidence to "rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel" Directive, Additional Procedural Guidance, Item 15. Applicant had the opportunity to respond to the SOR and the FORM. He used those opportunities to respond to the SOR and present information for consideration by the Judge in his case. The Judge must act in a fair and impartial manner (Directive, Sections D.1.; Additional Procedural Guidance, Item 10). In presenting evidence for consideration by the Judge, each party bears the responsibility for presenting evidence that it wants the Judge to consider. If a party fails to present sufficient or convincing evidence, that party cannot expect the Judge to act as a surrogate advocate and help that party develop or bolster its case. *See, e.g.*, DISCR Case No. 90-1931 (January 17, 1992) at p. 6 (Administrative Judge not required to call witnesses for either side; Judge's impartiality could be questioned if Judge called witnesses without being asked to do so by either side); DISCR Case No. 90-0473 (August 14, 1991) at p. 2 (even *pro se* applicant is obligated to take reasonable steps to protect his own interests). It is not reasonable for Applicant to contend the Judge should have helped him satisfy his burden of proof under Item 15 of the Additional Procedural Guidance.

Applicant's candor about his criminal conduct did not preclude an adverse decision in his case. An applicant's candor and honesty about his or her conduct does not immunize that conduct from consideration for its security significance. *See, e.g.*, ISCR Case No. 98-0370 (January 28, 1999) at p. 3. Nor does an applicant's candor change the intrinsic nature of the admitted misconduct. Accordingly, Applicant's candor did not require the Judge to rule in Applicant's favor.

The Administrative Judge has the primary responsibility for weighing the record evidence and making findings of fact. In doing that, the Judge must weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. *See, e.g.*, ISCR Case No. 98-0370 (January 28, 1999) at p. 3. Absent a showing that the Judge acted in a manner that is arbitrary, capricious, or contrary to law, the Board will not disturb the Judge's weighing of the evidence. *See, e.g.*, ISCR Case No. 98-0188 (April 29, 1999) at p. 3. In this case, the Judge's findings about Applicant's criminal conduct reflect a reasonable, plausible interpretation of the record evidence. Therefore, Applicant's ability to argue for an alternate interpretation of the record evidence is not sufficient to demonstrate the Judge erred. *See, e.g.*, ISCR Case No. 98-0445 (April 2, 1999) at p. 2. Furthermore, nothing in Applicant's appeal or the record below persuades the Board that the Judge weighed the record evidence in an arbitrary or capricious manner.

An applicant's security eligibility is not limited to consideration of the applicant's job performance or conduct during duty hours. Any off-duty conduct that has security implications can be considered in deciding an applicant's security suitability. *See, e.g.*, ISCR Case No. 97-0440 (November 23, 1998) at p. 5. Accordingly, neither Applicant's past military service nor his job performance with a defense contractor preclude an adverse decision based on his criminal conduct in August 1997 that has negative security implications.

The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snepp v. United States*, 444 U.S. 508, 511 n.6 (1980). Security requirements include consideration of a person's judgment, reliability, and trustworthiness. *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961). The government need not wait until an applicant fails to properly handle or safeguard classified information before it can deny or revoke that applicant's access to such information. *Adams v. Laird*, 420 F.2d 230, 238-39 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). All that is necessary is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons given access to classified information. *See, e.g.*, ISCR Case No. 98-0445 (April 2, 1999) at p. 3.

The Administrative Judge concluded that Applicant's use of a shotgun to threaten a cab driver over a fare dispute was isolated, but serious, misconduct that raised doubts about his judgment, reliability and trustworthiness. The Judge also concluded that Applicant's criminal conduct was not sufficiently mitigated by the evidence of Applicant's acceptance of responsibility for his criminal misconduct, his remorse, and his desire to distance himself from the August 1997 incident. Considering the record as a whole, the Judge's conclusions are not arbitrary, capricious, or contrary to law.

Conclusion

Applicant has failed to meet his burden of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's January 29, 1999 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. In addition to an appeal brief, Applicant submitted a letter from his wife. Making allowances for Applicant's *pro se* status, the Board will construe the letter from Applicant's wife as part of Applicant's appeal brief. Applicant's brief and his wife's letter contain some factual assertions that go beyond the record evidence. Because the Board cannot consider new evidence on appeal (Directive, Additional Procedural Guidance, Item 29), the Board will not consider those portions of the appeal submissions.