

DATE: April 23, 2001

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 00-0302

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Matthew E. Malone, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

Administrative Judge Kathryn Moen Braeman issued a decision, dated December 15, 2000, in which she concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Department Counsel 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.

Department Counsel's appeal presents the following issues: (1) whether the Administrative Judge erred in her application of pertinent provisions of the Adjudicative Guidelines; and (2) whether the Administrative Judge erred by finding that Department Counsel had not established a *prima facie* case of intentional violation of 18 U.S.C. 1001.

**Procedural History**

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated June 29, 2000 to Applicant. The SOR was based on Guideline G (Alcohol Consumption), Guideline F (Financial Considerations), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct).

A hearing was held on September 29, 2000. The Administrative Judge issued a written decision, dated December 15, 2000, in which she concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Department Counsel's appeal from the Judge's favorable security clearance decision.

**Appeal Issues**

The Administrative Judge entered favorable formal findings with respect to the SOR paragraphs pertaining to Guideline F and Guideline G. Those favorable formal findings have not been challenged by Department Counsel. Accordingly, the Board need not address the Judge's findings and conclusions about the matters alleged under Guideline F and Guideline G. *See* Directive, Additional Procedural Guidance, Item E3.1.32 ("The Appeal Board shall address the material issues *raised by the parties . . .*")(italics added).

The Administrative Judge found that Applicant did not falsify a security questionnaire in March 1998 because: (a) his omission of information about a 1995 alcohol-related offense was not a willful omission made to mislead the government; and (b) his omission of information about certain unsatisfied debts was not willful because he did not know they existed when he completed the security questionnaire. Department Counsel has not challenged the Judge's finding about Applicant's omission of the unsatisfied debts. Accordingly, the Board need not address the Judge's findings and conclusions about that omission. Department Counsel's appeal challenges only the Judge's findings and conclusions about Applicant's omission of information about a 1995 alcohol-related offense.

Department Counsel contends the Administrative Judge erred in applying pertinent provisions of the Adjudicative Guidelines. In support of this contention, Department Counsel argues: (a) the Administrative Judge erred by applying Personal Conduct Mitigating Condition 3; (b) the Administrative Judge improperly imposed a burden of proof on Department Counsel to disprove the applicability of Personal Conduct Mitigating Condition 3; and (c) the Administrative Judge erred by applying Personal Conduct Mitigating Condition 4. Department Counsel also contends the Administrative Judge erred by finding that Department Counsel had not established a *prima facie* case of intentional violation of 18 U.S.C. 1001 under Guideline J because of her erroneous application of Personal Conduct Mitigating Conditions 3 and 4.

This appeal revolves around the Administrative Judge's finding that Applicant did not omit the 1995 alcohol-related arrest and conviction in order to conceal it, but rather he did not include it on the security questionnaire because of a mistaken belief about that matter and confusion about the question being asked.

There is no dispute that Applicant was involved in a 1995 alcohol-related incident, and that the 1995 incident was pertinent to a question in the security questionnaire he completed in March 1998. However, what was in dispute during the proceedings below was Applicant's intent or state of mind when he completed the security questionnaire and did not list the 1995 alcohol-related incident. An omission of relevant information from a security questionnaire is not a falsification under Guideline E unless there is showing that the applicant acted with the intent to mislead or deceive the government by not disclosing the information. An intent to falsify can be proven by direct or circumstantial evidence. An applicant's statements about his or her intent or state of mind are relevant evidence, but they are not binding or conclusive evidence. Rather, an applicant's statements must be considered in light of the applicant's credibility and the record evidence as a whole. *See, e.g.*, ISCR Case No. 00-0233 (February 14, 2001) at p. 4; ISCR Case No. 00-0044 (December 22, 2000) at p. 3.

In this case, the Administrative Judge considered the record evidence and concluded that Applicant's explanation for omitting the 1995 incident when he completed the security questionnaire was credible. The Judge had the opportunity to personally observe Applicant when he testified at the hearing and assess his demeanor when deciding whether his testimony was credible. The Board does not review the record evidence *de novo*, and it must give deference to a Judge's credibility determinations. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1. That deference does not immunize a Judge's credibility determination from review on appeal. *See, e.g.*, ISCR Case No. 99-0435 (September 22, 2000) at p. 3. However, an appealing party has a heavy burden of demonstrating that a Judge's credibility determination is arbitrary, capricious, or otherwise unsustainable. Department Counsel's appeal arguments fail to meet that heavy burden. Given the Judge's favorable credibility determination and the absence of a showing that the Judge's credibility determination is arbitrary, capricious, or otherwise unsustainable, the Board concludes Department Counsel has failed to demonstrate the Judge erred by finding that Applicant did not falsify the security questionnaire he completed in March 1998.

Department Counsel correctly notes that an applicant has the burden of presenting evidence to extenuate or mitigate conduct that is admitted or proven. However, absent a finding that an applicant engaged in misconduct, there is nothing that an applicant needs to extenuate or mitigate. *See* ISCR Case No. 99-0703 (January 26, 2001) at pp. 2-3; DISCR Case No. 97-0184 (June 16, 1998) at p. 5 n.4 (citing earlier Board decisions). Once the Administrative Judge found that Applicant lacked the intent or state of mind required to conclude he falsified the security questionnaire, there was no need for the Judge to consider whether Applicant had demonstrated extenuation or mitigation. Accordingly, the Judge's discussions of Personal Conduct Mitigating Condition 3<sup>(1)</sup> and Personal Conduct Mitigating Condition 4<sup>(2)</sup> were unnecessary in this case. Even if the Board were to conclude that Department Counsel's appeal arguments demonstrate the Judge's discussion and application of Personal Conduct Mitigating Condition 3 and Personal Conduct Mitigating

Condition 4 were erroneous, such errors would be harmless under the particular facts of this case.

Department Counsel's argument concerning 18 U.S.C. 1001 also fails to demonstrate harmful error by the Administrative Judge. Even if the Board were to conclude that the Judge's explanation for concluding Applicant did not violate 18 U.S.C. 1001 was arbitrary, capricious, or contrary to law, reversal or remand would not be warranted under the particular facts of this case. If Applicant lacked the intent or state of mind required to find he falsified the security questionnaire in March 1998, there would be no rational basis for the Judge to find that Applicant violated 18 U.S.C. 1001. Once the Judge found Applicant did not intend to mislead or deceive the government when he completed the security questionnaire in March 1998, the Judge had no rational basis for concluding that Applicant violated 18 U.S.C. 1001. Accordingly, reversal is unwarranted and no useful purpose would be served by remanding the case to the Judge for issuance of a new decision with a different explanation for the same result.

### **Conclusion**

Department Counsel has failed to meet its burden of demonstrating error below that warrants reversal or remand. Accordingly, the Board affirms the Administrative Judge's favorable security clearance 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. "The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts."
2. "Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided."