

DATE: February 14, 2001

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 00-0233

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Peregrine D. Russell-Hunter, Chief Department Counsel

**FOR APPLICANT**

Barry R. Koch, Esq.

Administrative Judge Jerome H. Silber issued a decision dated September 14, 2000, in which he concluded that it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant has appealed. The Board affirms the Administrative Judge's decision for the reasons explained below.

The Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6, dated January 2, 1992 as amended.

Applicant's appeal presents the following issues: (1) whether the Administrative Judge erred by finding that Applicant intentionally falsified a personnel security questionnaire regarding his use of marijuana and by finding that his falsification was not mitigated; and (2) whether the Administrative Judge erred by concluding that Applicant's falsification of a personnel security questionnaire constituted criminal activity that disqualified Applicant for a security clearance.

**Procedural History**

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated May 30, 2000 to Applicant. The SOR was based on Guideline E (Personal Conduct) and Guideline J (Criminal Conduct).

A hearing was held on August 23, 2000. The Administrative Judge issued a written decision dated September 14, 2000 in which he concluded that 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 Judge's adverse decision.

**Appeal Issues**

1. Whether the Administrative Judge erred by finding that Applicant intentionally falsified

a personnel security questionnaire regarding his use of marijuana and by finding that his falsification was not mitigated.

The Administrative Judge found that in May 1999 Applicant filled out a personnel security questionnaire (hereinafter PSQ) on the premises of his future employer as part of a security clearance application process. Applicant felt rushed during the process of filling the form out and was disturbed enough by the procedure to mention his feelings to his

supervisor. However, at no time did he raise a specific question about the scope or meaning of the questions nor did he offer any corrections or additional information prior to the start of his employment. Applicant answered in the negative a question on the PSQ that asked whether he had used marijuana in the last seven years.

In December 1999 Applicant was interviewed by a Defense Security Service (DSS) agent. The DSS agent had received an FBI report concerning a DUI arrest of Applicant in 1995 that also involved the police finding marijuana in Applicant's vehicle. In a signed sworn statement, Applicant stated that it was possible that he smoked marijuana two or three times in the early 1990's but he stated categorically that he had not been involved with marijuana since 1995.

At the hearing Applicant first testified that he assumed he may have used marijuana at the time of his 1995 DUI arrest. Later on in his testimony he admitted that he smoked marijuana in a park with some friends the day he was arrested for DUI but some time before the actual arrest.

In his decision the Administrative Judge found that Applicant had deliberately concealed his marijuana use when he filled out the PSQ in May 1999. The Judge also found that Applicant conceded his marijuana use "in a fashion" upon confrontation by the DSS agent and acknowledged it "ultimately" at the hearing. The Judge also concluded that the case was not mitigated since Applicant did not make a prompt, good-faith effort to correct the falsification before being confronted with the facts. <sup>(1)</sup>

On appeal, Applicant argues that he did not intentionally falsify the PSQ with regard to marijuana use, and that he made a prompt, good-faith effort to correct any omissions before being confronted with the facts. He reasserts on appeal a theory advanced at the hearing, namely that he had forgotten about the 1995 marijuana use at the time he completed the PSQ but had his memory refreshed at the time of the meeting with the DSS agent. He states that once he was shown the arrest records at the interview, he did not equivocate and he gave accurate answers. Although he does not specifically assign error to the Administrative Judge, he is, in essence, arguing that there was insufficient evidence to support the Judge's conclusions that Applicant falsified his PSQ and that his falsification was not mitigated.

On appeal, the Board must determine whether "[t]he Administrative Judge's findings of fact 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 E3.1.32.1. The presence of conflicting record evidence does not diminish a Judge's fact-finding responsibility. When the record contains conflicting evidence, the Judge must carefully weigh the evidence in a reasonable, common sense manner and make findings that reflect a reasonable interpretation of the evidence that takes into account all the record evidence. *See, e.g.*, ISCR Case No. 99-0435 (September 22, 2000) at p. 3. *See also* ISCR Case No. 97-0727 (August 3, 1998) at p. 3 ("The Board must consider not only whether there is evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings.").

Applicant has failed to demonstrate that the Administrative Judge erred. His appeal brief advances his interpretation of the record evidence. That interpretation is neither conclusive nor is it binding on the Administrative Judge. Absent a showing that the Judge acted in a manner that was arbitrary, capricious or contrary to law, his findings and conclusions will not be disturbed on appeal. A review of the whole record lends support for the Judge's observation that Applicant divulged the extent of his involvement with marijuana in 1995 in a piecemeal, incremental fashion which extended from his DSS interview to the hearing. Applicant omitted the 1995 marijuana involvement from his PSQ. At his DSS interview he stated initially that he had not used or been involved with marijuana or illegal drugs in any way during the past seven years. Later in the interview he told the DSS agent that he had not used marijuana since sometime in 1995 but that he was not using nor was he in the possession of marijuana at the time of his 1995 arrest. Not until the hearing did Applicant give full and accurate details about the marijuana involvement. Applicant's actions in this regard provided a rational basis for the Judge to conclude that the omission of the 1995 marijuana involvement on the PSQ was the product of deliberate concealment rather than faulty memory. Applicant has also failed to demonstrate that the Judge erred in his application of Personal Conduct Mitigating Condition 3. Nothing in the record evidence indicates that the Judge was arbitrary, capricious or acting contrary to law when he concluded that the Applicant's qualified admission of marijuana use during a DSS interview six months after the execution of the PSQ was not sufficient to mitigate Applicant's conduct.

2. Whether the Administrative Judge erred by concluding that Applicant's falsification of a personnel security questionnaire constituted criminal activity that disqualified Applicant for a security clearance. The SOR contained an allegation that Applicant's falsification constituted criminal conduct under Guideline J, namely a violation of 18 U.S.C. Section 1001. On appeal Applicant argues that the only conduct that would serve as an appropriate basis for denial of a clearance must be criminal conduct unrelated to the execution of the PSQ. He maintains that the Administrative Judge is not in a position to determine whether or not the Applicant's actions constitute criminal conduct as the evidentiary hearing did not afford the Judge proof beyond a reasonable doubt that Applicant engaged in criminal conduct. Applicant states that the reasonable doubt standard could only be satisfied if Applicant admitted to a knowing and willful violation of the law.

Applicant's arguments regarding Guideline J lack merit. Any falsification of a form or questionnaire of a government agency engaged in an official investigation or inquiry is criminal conduct under the plain meaning of 18 U.S.C. Section 1001 and can be alleged under Guideline J without regard to the nature of the underlying conduct that is the subject of the falsification. Contrary to the assertions of Applicant, the act of falsification itself can constitute criminal conduct wholly independent of the criminality of the conduct being concealed.

Regarding the burden of proof required to determine criminal conduct, DOHA security clearance adjudications are civil, administrative proceedings. The rules of evidence and burdens of proof associated with criminal proceedings are not applicable in these proceedings. *See Chesna v. U.S. Department of Defense*, 850 F. Supp. 110, 119 (D. Conn. 1994) (DoD need not use safeguards afforded criminal defendants in making a security clearance decision "merely because it is based on a determination that [the applicant] engaged in conduct which would have constituted a felony"). *See also* DISCR Case No. 93-0386 (April 21, 1994) at p. 4 (burden of proof in industrial security cases "is lower than that of criminal cases."). The beyond a reasonable doubt standard is not applicable in these proceedings. *See, e.g.*, ISCR Case No. 98-0761 (December 27, 1999) at p. 2.

A review of the record leads the Board to reject Applicant's contention that there is insufficient evidence for the Administrative Judge to find that Applicant's falsification was a violation of federal criminal law. An admission by Applicant that he engaged in willful falsification is not required before the Administrative Judge could find Applicant violated 18 U.S.C. Section 1001 provided there is other sufficient evidence that establishes Applicant had the requisite state of mind to establish the criminal act. *See, e.g.*, ISCR Case No. 99-0194 (February 29, 2000) at p. 3 ("An intent to falsify can be shown by circumstantial evidence even in the face of denials of any intent to falsify."). The Administrative Judge had sufficient evidence before him to reasonably conclude that Applicant acted willfully when he failed to mention his 1995 marijuana involvement on his PSQ.

### Conclusion

Applicant has failed to meet his burden of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's September 14, 2000 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. Personal Conduct Mitigating Condition 3.