

DATE: June 8, 2001

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 00-0423

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Administrative Judge Kathryn Moen Braeman issued a decision, dated February 26, 2001, 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 erred by finding Applicant willfully falsified a security questionnaire in June 1999 by not disclosing a 1994 drug-related incident.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated August 21, 2000 to Applicant. The SOR was based on Guideline E (Personal Conduct).

Applicant submitted an answer to the SOR, in which he stated he wanted a decision made in his case without a hearing. A File of Relevant Material (FORM) was prepared, and Applicant was given a copy of the FORM. Applicant did not submit a response to the FORM.

The case was then assigned to the Administrative Judge for disposition. The Judge issued a written decision, dated February 26, 2001, 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 Judge's unfavorable decision.

Appeal Issue

The Administrative Judge found that Applicant did not falsify a security questionnaire in June 1999 by denying any illegal drug use in the previous seven years. Accordingly, the Judge entered a formal finding in favor of Applicant with respect to SOR paragraph 1.b. The Judge's favorable finding and conclusion about this aspect of the case are not at issue on appeal.

The Administrative Judge found that Applicant falsified a security questionnaire in June 1999 by not disclosing a 1994 drug-related incident. Based on that finding, the Judge entered a formal finding against Applicant with respect to SOR paragraph 1.a., and concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. On appeal, Applicant challenges the Judge's finding that he falsified the security questionnaire.

After submitting a notice of appeal, Applicant forwarded to the Board a copy of a letter to his Congressman, a copy of a letter from his father, and a copy of a document from a state court. Attached to Applicant's appeal brief is a copy of a petition in which Applicant asks a state court to expunge the criminal record arising from his 1994 drug-related incident. Those four documents are new evidence, which the Board cannot consider. Directive, Additional Procedural Guidance, Item E3.1.29. Apart from the prohibition against submission of new evidence on appeal, the Board notes that Applicant received a copy of the FORM and had an opportunity to submit documents and other information for the consideration of the Administrative Judge in his case. Applicant did not submit any documents or information in response to the FORM. By failing to take advantage of that opportunity, Applicant waived his right to have such documents and other information considered in his case. *See, e.g.*, ISCR Case No. 00-0250 (February 13, 2001) at p. 3.

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. Accordingly, the Board must consider not only whether there is record evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings. *See, e.g.*, ISCR Case No. 99-0205 (October 19, 2000) at p. 2.

The issue before the Administrative Judge in this case was determining Applicant's intent or state of mind when he did not disclose the 1994 drug-related incident in response to questions on the security form he completed in June 1999. In the proceedings below, Applicant provided several explanations for why he did not disclose the 1994 drug-related incident when he completed the security questionnaire. Applicant's explanations are clearly relevant and material information about his intent and state of mind when he completed the security form. However, Applicant's explanations were not binding on the Administrative Judge. Rather, the Judge had the obligation to consider Applicant's explanations in light of the record as a whole. *See, e.g.*, ISCR Case No. 00-0044 (December 22, 2000) at p. 3; ISCR Case No. 99-0194 (February 29, 2000) at p. 3. The Judge found Applicant's explanations to be unpersuasive and concluded that Applicant deliberately failed to disclose the 1994 drug-related incident in an effort to mislead the government. Applicant's appeal arguments do not demonstrate the Judge's finding is arbitrary, capricious, or contrary to law. Considering the record evidence in this case, the Judge's finding of falsification is sustainable.

Applicant's reliance on state law is misplaced for two reasons. First, Applicant has not had his criminal record expunged. Second, even if Applicant had obtained an expungement of his criminal record, such an expungement would not have relieved him of the obligation to disclose his criminal record in response to specific questions on the security form he completed in June 1999. The federal government has a "compelling interest" in protecting classified information. *Department of Navy v. Egan*, 484 U.S. 518, 527 (1988). Consistent with that strong national security interest, the federal government can require persons applying for positions that need possession of a security clearance to disclose information about their criminal record even if it has been expunged. *See American Federation of Government Employees, AFL-CIO v. Department of Housing & Urban Development, et al.*, 118 F.3d 786, 794 (D.C. Cir. 1997). It is well-settled that officers and employees of the federal government are not bound by state law when carrying out their official duties unless there is a specific act of Congress that expressly indicates otherwise. *See, e.g., Hancock v. Train*, 426 U.S. 167, 178-179 (1976); *Environmental Protection Agency*, 426 U.S. 200, 211 (1976). Furthermore, the federal government is not bound by state law concerning the expungement of state criminal charges or convictions. *See Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 114-115 (1983). Accordingly, whatever effect that expungement of an applicant's criminal record might have under state law, such an effect is not binding on the federal government in investigating or adjudicating an applicant's security eligibility. Moreover, the security

questionnaire that Applicant completed specifically noted that criminal charges or convictions had to be listed "regardless of whether the record in your case has been 'sealed' or otherwise stricken from the court record" and that the "single exception to this requirement" was limited to cases where a person obtained an expungement order from a court "under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607." The language of the security questionnaire placed Applicant on reasonable notice that stricken or expunged arrests or convictions should be reported unless they fell within the single exception noted in the security form. Nothing in state law cited by Applicant relieved him from the obligation to report his 1994 drug-related incident when he completed the security questionnaire or precluded the Judge from finding that Applicant falsified the security questionnaire by failing to report that incident.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's February 26, 2001 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