

DATE: May 1, 2001

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 00-0417

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Administrative Judge Paul J. Mason issued a decision, dated January 10, 2001, 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 August 25, 2000 to Applicant. The SOR was based on Guideline C (Foreign Preference), Guideline B (Foreign Influence), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct).

A hearing was held on October 26, 2000. The Administrative Judge issued a written decision, dated January 10, 2001, 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 the Judge's adverse decision.

Appeal Issue

The Administrative Judge entered formal findings in favor of Applicant with respect to the SOR paragraphs dealing with Guideline B and Guideline C. Those favorable formal findings are not at issue on appeal.

Applicant challenges the Administrative Judge's adverse findings and conclusions under Guideline E and Guideline J. Specifically, Applicant argues: (1) he understands the government's concern about his failure to correctly answer the question on the security form that dealt with financial interests in foreign countries; (2) his answer was based on a mistake in understanding the wording of the question on the security form; (3) the Judge did not give sufficient weight to the evidence of Applicant's personal character and record of integrity, and his contributions on behalf of the national

defense of the United States; and (4) the Judge's adverse decision is too harsh because it disregarded all the mitigating circumstances of Applicant's personal conduct. The Board construes Applicant's arguments as raising the issue of whether the Judge's decision is arbitrary, capricious, or contrary to law.

The following facts are not in dispute: Applicant executed a security form in August 1999. Applicant answered "NO" to question 12 of the security form, which reads "**Your Foreign Activities - Property** Do you have any foreign property, business connections, or financial interests?" Applicant has a bank account worth approximately \$7000 in a foreign country, which came from an inheritance from his aunt on his mother's side. What is in dispute is the reason for Applicant's "NO" answer to question 12 of the security form.

Applicant provided an explanation for his "NO" answer to question 12 and why he did not think his foreign bank account was covered by question 12. Applicant's statements are clearly relevant and material information about his intent and state of mind when he completed the security form. However, Applicant's statements are not binding on the Administrative Judge. Rather, the Judge had the obligation to consider Applicant's statements 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. Applicant's statements, if believed by the Administrative Judge, would support a finding that Applicant did not list a foreign bank account on the security form he executed in August 1999 because he misunderstood the wording of question 12. Pivotal to the Judge's decision on this point was his assessment of Applicant's credibility. The Judge had the opportunity to personally observe Applicant's demeanor when he testified and concluded that Applicant's explanation about his understanding of question 12 was not credible.

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."). A Judge's credibility determinations are not immune 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 a Judge's credibility determination is unsustainable.

Applicant's appeal arguments fail to persuade the Board that the Judge's adverse credibility determination is arbitrary, capricious, or otherwise unsustainable. Given the Judge's conclusion that Applicant's explanation (about his failure to list a foreign bank account on the security form) was not credible, it was not arbitrary or capricious for the Judge to find that Applicant's omission of that information was intentional and constituted a falsification within the meaning of Guideline E.

The favorable evidence cited by Applicant did not compel the Administrative Judge, as a matter of law, to make a favorable security clearance decision. A Judge must consider all the record evidence, both favorable and unfavorable, and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. *See, e.g.*, ISCR Case No. 00-0311 (March 8, 2001) at p. 2. Absent a showing that the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law, the Board will not disturb the Judge's findings. *See, e.g.*, ISCR Case No. 00-0016 (October 23, 2000) at p. 3. Although Applicant sets forth a plausible argument for an alternate way of weighing the record evidence, his argument does not demonstrate the Judge weighed the evidence in a way that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 99-0435 (September 22, 2000) at p. 4 ("Department Counsel's appeal arguments set forth a possible interpretation of the record evidence that runs contrary to the Administrative Judge's findings. However, the ability of an appealing party to make such arguments is not sufficient to demonstrate the Judge's findings are erroneous.").

The federal government need not wait until an applicant mishandles or fails to properly handle or safeguard classified information before it can deny or revoke access to such information. *Adams v. Laird*, 420 F.2d 230, 238-39 (D.C. Cir.

1969), *cert. denied*, 397 U.S. 1039 (1970). Direct or objective evidence of nexus is not required before the government can deny or revoke access to classified information. *Gayer v. Schlesinger*, 490 F.2d 740, 750 (D.C. Cir. 1973). All that is required 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 handling classified information. *See, e.g.*, ISCR Case No. 99-0296 (April 18, 2000) at p. 5. Falsification of a security form provides a rational basis for an adverse security clearance decision. *See, e.g.*, ISCR Case No. 00-0245 (February 16, 2001) at p. 2; ISCR Case No. 99-0260 (April 12, 2000) at p. 3. Given the Administrative Judge's finding that Applicant falsified his security form in August 1999, the Judge's adverse security clearance decision is not 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 January 10, 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