

DATE: August 8, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 00-0433

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Kathryn A. Trowbridge, Esq., Department Counsel

FOR APPLICANT

Jay L. Cohen, Esq.

Administrative Judge Kathryn Moen Braeman issued a remand decision, dated November 16, 2001, 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 remand 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 by excluding proposed Government Exhibit 4; (2) whether the Administrative Judge erred by finding that Applicant did not falsify a security questionnaire in May 2000; and (3) whether the Administrative Judge's remand decision is arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated October 25, 2000. The SOR was based on Guideline E (Personal Conduct) and Guideline J (Criminal Conduct).

A hearing was held on February 21, 2001. The Administrative Judge issued a written decision, dated April 18, 2001 ("Initial Decision"), in which she concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Department Counsel appealed the Administrative Judge's favorable decision. On September 6, 2001, the Board issued a Decision and Remand Order ("Remand Order"). In that Remand Order, the Board concluded: (1) the Judge erred by excluding certain evidence proffered by Department Counsel; and (2) the Judge acted in an arbitrary and capricious manner by drawing conclusions favorable to Applicant based on Department Counsel's failure to present certain evidence, when the absence of such evidence was due to the Judge's rulings against Department Counsel. The Board remanded the case to the Judge with instructions to reopen the record to allow Department Counsel a reasonable opportunity to present and develop the rebuttal evidence it was precluded from presenting at the February 21, 2001

hearing, subject to Applicant's right to raise reasonable objections and to cross-examine the witness that Department Counsel would present at the remand hearing.

The Administrative Judge held another hearing on October 1, 2001. The Judge then issued a Remand Decision, dated November 16, 2001, in which the Judge again 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 Remand Decision.

Scope of Review

On appeal, the Board does not review a case *de novo*. Rather, the Board addresses the material issues raised by the parties to determine whether there is factual or legal error. There is no presumption of error below, and the appealing party must raise claims of error with specificity and identify how the Administrative Judge committed factual or legal error. *See* Directive, Additional Procedural Guidance, Item E3.1.32. *See, e.g.*, ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (discussing reasons why party must raise claims of error with specificity).

When an Administrative Judge's factual findings are challenged, 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 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 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.

When a challenge to an Administrative Judge's rulings or conclusions raises a question of law, the Board's scope of review is plenary. *See* DISCR Case No. 87-2107 (September 29, 1992) at pp. 4-5 (citing federal cases).

When the Board remands a case, an Administrative Judge must correct any errors identified by the Board and issue a new decision. Directive, Additional Procedural Guidance, Item E3.1.35. Accordingly, if an Administrative Judge's remand decision is appealed, the Board will consider any claims made that the Judge failed to comply with the Board's rulings or instructions.

Appeal Issues

The Administrative Judge entered formal findings in favor of Applicant with respect to SOR paragraphs 2.a through 2.e. Those formal findings are not at issue on appeal.

1. Whether the Administrative Judge erred by excluding proposed Government Exhibit 4. On the first appeal, the Board concluded the Administrative Judge erred by excluding proposed Government Exhibit 4 on grounds that were arbitrary, capricious, and contrary to law. On remand, Department Counsel again proffered Government Exhibit 4. Applicant's counsel objected to the admissibility of proposed Government Exhibit 4 and the Judge ruled in Applicant's favor, concluding: (1) proposed Government Exhibit 4 was largely illegible; (2) Department Counsel failed to establish that proposed Government Exhibit 4 was a form (completed by Applicant) that was identical to Government Exhibit 7 (a blank copy of a Personal Qualifications Statement); and (3) there was insufficient basis to rely on Government Exhibit 7 to interpret the illegible portions of proposed Government Exhibit 4.

On appeal, Department Counsel contends the Administrative Judge erred by excluding proposed Government Exhibit 4 because it was inconsistent for the Judge to admit Government Exhibit 7, but then exclude Government Exhibit 4. Department Counsel's arguments in support of this contention are not persuasive.

Because proposed Government Exhibit 4 was largely illegible, Department Counsel had the burden of establishing its contents by indirect or circumstantial means. On remand, Department Counsel argued that proposed Government Exhibit 4 should be admitted into evidence because it was the same form as Government Exhibit 7 and a comparison of the two documents would permit the Administrative Judge to understand how Applicant answered certain questions on proposed Government Exhibit 4. In principle, Department Counsel's argument below was a reasonable one. However,

Applicant's counsel objected on the grounds that a comparison of numbered page 4 of proposed Government Exhibit 4 and numbered page 4 of proposed Government Exhibit 7 raised a question as to whether they actually were identical. The Judge had the responsibility to compare those two pages and make a finding as to whether they were identical or not. *See Directive, Additional Procedural Guidance, Item E3.1.10.* Given the poor quality of proposed Government Exhibit 4, the Judge was faced with a difficult task in comparing those two pages. Given the poor quality of proposed Government Exhibit 4, the Board cannot conclude, as a matter of law, that the Judge was compelled to find the numbered page 4 of proposed Government Exhibit 4 was identical to the numbered page 4 of Government Exhibit 7. Consequently, the Judge did not commit error when she excluded proposed Government Exhibit 4.

2. Whether the Administrative Judge erred by finding that Applicant did not falsify a security questionnaire in May 2000. Department Counsel contends the Administrative Judge erred by finding that Applicant did not falsify a security questionnaire in May 2000. In support of that contention, Department Counsel argues: (a) the Judge improperly attempted to insulate her findings of fact from review by labeling them credibility determinations; (b) the Judge erred by finding Applicant to be a credible witness; (c) the Judge erred by failing to give due weight to Applicant's inconsistent explanations for not listing his past arrests on the security questionnaire in May 2000; and (d) the Judge ignored evidence of Applicant's attitude toward the law and authority in general that undercuts his credibility and raises doubts about his honesty. For the reasons that follow, the Board concludes Department Counsel has failed to demonstrate the Judge erred.

Although credibility determinations are not immune from review, the Board must give them deference on appeal. *See Directive, Additional Procedural Guidance, Item E3.1.32.1.* This is because an Administrative Judge has the opportunity to personally observe the demeanor of witnesses while they testify at the hearing, and a witness's demeanor can convey important visual cues to the trier of fact that are not obvious or apparent from the bare text of a hearing transcript. Therefore, a party seeking to overturn an Administrative Judge's credibility determination has a heavy burden on appeal. In general, an appealing party's strong disagreement with the Judge's credibility determinations is not sufficient to overcome the deference owed to such determinations on appeal. Rather, the appealing party must demonstrate some factual, logical, or legal reason why the Judge's credibility determinations are flawed and should not be sustained.

Department Counsel argues that a careful comparison of the Initial Decision and the Remand Decision shows that the Administrative Judge "attempted to insulate her findings of fact from review by labeling them credibility determinations." After reviewing the passages from the Judge's Initial Decision and the Judge's Remand Decision referred to by Department Counsel, the Board concludes Department Counsel's textual comparisons do not demonstrate the Judge was seeking to insulate her findings of fact from review.

Department Counsel argues the Administrative Judge relied on an erroneous finding that Applicant cooperated with a DSS agent to conclude Applicant was credible. Department Counsel's argument is somewhat strained because the DSS agent testified that Applicant was cooperative (TR II at 34, 39-40). Unless the DSS agent qualified or withdrew his opinion that Applicant was cooperative at the interview, it was legally permissible for the Judge to consider the agent's opinion in weighing the record evidence. Although a DSS agent's opinion about whether an applicant was cooperative during an interview is not binding on a Judge and is not dispositive on the issue of an applicant's credibility, a Judge may consider such an opinion when weighing the record evidence and assessing credibility. Considering the record as a whole, it was not arbitrary, capricious, or contrary to law for the Judge to consider the DSS agent's opinion that Applicant was cooperative during his interview when making her credibility determination.

Department Counsel also argues that Applicant gave inconsistent explanations for not listing his past arrests on the security questionnaire in May 2000, that those explanations are mutually exclusive, and that Applicant's reliance on those explanations underscores his lack of credibility. Department Counsel's argument fails to demonstrate the Administrative Judge erred. If a person gives more than one reason or explanation for his or her conduct, it does not follow automatically that the person is being inconsistent, or that the different reasons or explanations the person gives are mutually exclusive.⁽¹⁾ Reasons or explanations can be different without being mutually exclusive. Considering the record as a whole, the Administrative Judge was not compelled, as a matter of logic or law, to conclude the different reasons given by Applicant were mutually exclusive and, therefore, not credible.

Department Counsel also cites to three instances of Applicant's answers to questions at the February 21, 2001 hearing

and argues they show Applicant has an attitude toward law and authority in general that undercuts his credibility. Whether viewed individually or collectively, Applicant's answers that are cited by Department Counsel do not persuade the Board that the Administrative Judge was compelled, as a matter of law, to conclude Applicant was not a credible witness.

The Board need not agree with the Administrative Judge's credibility determination to conclude that Department Counsel's arguments, viewed individually or collectively, fail to demonstrate the Judge's credibility determination should be overturned.

3. Whether the Administrative Judge's remand decision is arbitrary, capricious, or contrary to law. Department Counsel also argues: (a) the Administrative Judge violated the Board's Remand Order by only giving lip service to a Board ruling; and (b) the Judge failed to apply Personal Conduct Mitigating Condition 4 properly. These arguments raise the issue of whether the Judge's remand decision is arbitrary, capricious, or contrary to law.

(a) On remand, the Administrative Judge complied with the Board's Remand Order by reopening the record so Department Counsel could offer Government Exhibit 4 as evidence. As discussed earlier in this decision, Department Counsel has failed to demonstrate the Judge's ruling on remand concerning the admissibility of Government Exhibit 4 was erroneous. Department Counsel correctly notes a sentence in the Judge's Remand Decision that indicates the Judge indulged in arbitrary and capricious reasoning concerning Government Exhibit 4 (her reasoning is inconsistent with a ruling in the Board's Remand Order). However, because the Judge had a legally permissible reason for excluding Government Exhibit 4, the sentence in the Remand Decision identified by Department Counsel is a gratuitous dictum. In this case, that single sentence of dictum, even though it is arbitrary and capricious, is insufficient grounds for remand or reversal.

(b) Department Counsel contends the Administrative Judge failed to apply Personal Conduct Mitigating Condition 4 ⁽²⁾ properly. In support of this contention, Department Counsel argues: (i) the Judge erred by finding Department Counsel failed to prove Applicant engaged in falsification, and then applying Personal Conduct Mitigating Condition 4; (ii) the Judge erred by concluding Personal Conduct Mitigating Condition 4 was applicable in part; (iii) the record evidence does not support the Judge's finding that Applicant was told by security officials that he only had to report matters that occurred within the past 10 years; and (iv) the record evidence does not support the Administrative Judge's finding that Applicant made a prompt and full disclosure to the DSS agent.

(b)(i) Department Counsel correctly notes the Board has ruled that if an Administrative Judge finds an applicant has not engaged in alleged misconduct, then there is no basis for the Judge to conclude an applicant has demonstrated mitigation. However, that general rule does not apply to this case because of the particular wording of Personal Conduct Mitigating Condition 4. ⁽³⁾ If there is evidence that an applicant omitted material facts because of improper or inadequate advice of authorized personnel, then it is not arbitrary or capricious for a Judge to consider whether to apply Personal Conduct Mitigating Condition 4.

(b)(ii) Department Counsel is correct in pointing out an apparent inconsistency between portions of the Judge's decision where she appears to apply both clauses of Personal Conduct Mitigating Condition 4 and a statement where she indicates that Applicant "met" the mitigating condition "in part." Here, Department Counsel offers no argument concerning how the inconsistency constitutes outcome-determinative error.

(b)(iii) Department Counsel also argues the record evidence does not support the Administrative Judge's finding that Applicant was told by security officials that he only had to report matters that occurred within the past 10 years. Applicant testified that he was told that he only had to report matters that occurred within the past 10 years. Considering the record as a whole, Department Counsel's appeal argument on this point fails to persuade the Board that the Judge should have rejected Applicant's testimony or that the Judge's challenged finding is not sustainable. Department Counsel's appeal argument goes to the weight of Applicant's testimony, but does not persuade the Board that the Judge could not find that testimony persuasive.

(b)(iv) Department Counsel's arguments on this point are not persuasive. Department Counsel's arguments present an alternate interpretation of the record evidence. The Board need not agree with the Administrative Judge's findings to

conclude the Judge's interpretation of the record evidence is sustainable.

Conclusion

The Board does not measure an Administrative Judge's decision against a standard of perfection. Furthermore, the Board does not review a Judge's decision to determine whether it agrees with the decision below. The Board need not agree with a Judge's decision to conclude that the appealing party has failed to demonstrate error below, or failed to demonstrate error that warrants remand or reversal. Department Counsel has failed to demonstrate harmful error below. Accordingly, the Board affirms the 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. In some situations, different reasons or explanations may be inherently inconsistent and mutually exclusive. For example, a person cannot reasonably say that he omitted a criminal incident because he forgot about it, and then say he omitted the criminal incident because it occurred more than 10 years ago and he was told by security personnel that he only needed to disclose matter that occurred within the last 10 years. If the person really forgot the incident, then the person could not have had to consider whether to omit it because it was more than 10 years old. Conversely, if the person decided to omit the incident because it was more than 10 years old, the person did not forget the incident.

2. "Omission of material facts were caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was properly and fully provided."

3. While general rules can be helpful in analyzing and deciding cases, general rules cannot be relied on without considering whether specific language in pertinent provisions of the Directive is applicable to the particular facts and circumstances of a case.