

DATE: October 19, 2001

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 00-0620

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Matthew E. Malone, Esq., Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Claude R. Heiny issued a decision, dated May 24, 2001, in which he 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 reverses 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 by accepting Applicant's loss of memory defense to find Applicant did not engage in falsification of a security questionnaire; and (2) whether the Administrative Judge erred by applying Criminal Conduct Mitigating Condition 1.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated December 29, 2000. The SOR was based on Guideline J (Criminal Conduct), Guideline G (Alcohol Consumption), and Guideline E (Personal Conduct). A hearing was held on March 26, 2001.

The Administrative Judge issued a written decision, dated May 24, 2001, in which he 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.

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).

Appeal Issues

The Administrative Judge entered formal findings in favor of Applicant with respect to the SOR allegations under Guideline G. Those favorable formal findings are not at issue on appeal. Accordingly, the Board need not discuss or address the Judge's findings and conclusions about Applicant's history of alcohol abuse unless those findings and conclusions are relevant to the issues specifically raised on appeal.

1. Whether the Administrative Judge erred by accepting Applicant's loss of memory defense to find Applicant did not engage in falsification of a security questionnaire. There is no dispute about the following facts: (a) Applicant has a history of several arrests and convictions that spans the period 1984-1995; (b) Applicant completed a Standard Form 86 ("Security Clearance Application") in August 1999; (c) in the Standard Form 86, Applicant disclosed only one of his five alcohol-related arrests and convictions in response to question 24 (which asked about alcohol or drug-related offenses); and (d) in the Standard Form 86, Applicant answered "no" to question 26 (which asked about other arrests, criminal charges or convictions within the last 7 years) despite the fact that he had been arrested in August 1993 and charged with third degree assault. The Judge found Applicant's omissions were not knowing and deliberate falsifications because Applicant had suffered memory loss due to head injuries he received in a motorcycle accident in 1981.

Department Counsel challenges the Administrative Judge's finding that Applicant lacked any intent to falsify the Standard Form 86 when he failed to disclose all of his criminal record. Department Counsel makes several arguments to support its contention that Applicant's memory loss defense is not supported by the record evidence as a whole.

The Administrative Judge's finding that Applicant did not falsify the Standard Form 86 rests on his acceptance of Applicant's memory loss claim. The Judge's acceptance of Applicant's memory loss claim had to have been based on a favorable assessment of Applicant's credibility because Applicant offered no evidence to corroborate his memory loss claim. Although the Judge's credibility determination is entitled to deference on appeal (Directive, Additional Procedural Guidance, Item E3.1.32.1), it is not immune from review on appeal. However, an appealing party has a heavy burden of demonstrating a Judge's credibility determination is unsustainable. *See, e.g.*, ISCR Case No. 00-0417 (May 1, 2001) at p. 3. In this case, Department Counsel has satisfied that heavy burden.

An Administrative Judge is not required to accept testimony merely because it is un rebutted. *See, e.g.*, ISCR Case No. 99-0005 (April 19, 2000) at p. 3. Indeed, it would be arbitrary and capricious for a Judge to uncritically accept a witness's testimony without considering whether it is plausible and consistent with other record evidence. As the Supreme Court noted in *Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985):

"[T]he trial judge may [not] insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable fact-finder would not credit it. Where such factors are present, the court of appeals may well find clear error even on a finding purportedly based on a credibility determination."

Accordingly, whether to accept an applicant's explanation about a matter cannot simply turn on a Judge's assessment of the applicant's demeanor when the applicant testifies. Furthermore, a Judge's acceptance of an applicant's explanation for his or her conduct must be based on a reasonable interpretation of the record evidence as a whole. *See, e.g.*, ISCR Case No. 99-0710 (March 19, 2001) at p. 4; ISCR Case No. 99-0194 (February 29, 2000) at p. 3. In determining whether there is sufficient record evidence to support a Judge's findings, the Board will consider not just whether there

is record evidence supporting the Judge's findings. Instead, the Board must also consider whether there is record evidence that detracts from the Judge's findings. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1. *See, e.g.*, ISCR Case No. 99-0205 (October 19, 2000) at p. 2.

The Administrative Judge accepted Applicant's claim of memory loss without any discussion or explanation of his finding despite the fact that Applicant presented no evidence of any kind to corroborate his claim of memory loss. In making findings of fact, a Judge must make a reasonable, common sense evaluation about the significance of the presence or absence of corroborating evidence. *See, e.g.*, ISCR Case No. 99-0012 (December 1, 1999) at p. 3; ISCR Case No. 98-0592 (May 4, 1999) at p. 5. In this case, the absence of any evidence corroborating Applicant's memory loss claim is significant for several reasons.

First, if Applicant had suffered a long-term or permanent injury to his ability to remember events as a result of a motorcycle accident in 1981, then it is reasonable to expect that there would be some kind of objective evidence that showed Applicant has been suffering from memory loss during the years since the motorcycle accident, not merely in connection with his completion of the Standard Form 86.

Second, Applicant's claim is somewhat implausible because of its selective nature. If Applicant had suffered a long-term or permanent injury to his ability to remember events as a result of the motorcycle accident in 1981, then it does not seem plausible for Applicant to claim "I have not let my accident in 1981 affect my work performance. I have however blocked out bad person[al] times in my life." *See* Applicant Exhibit A; *see also* Hearing Transcript at pp. 57-59. Absent corroborating evidence, it strains credulity for Applicant to claim as he did in the above-quoted statement that he can limit or control the manner in which his memory is affected by the injuries he received in the 1981 motorcycle accident, or that his memory has been impaired concerning bad events in his life but not impaired for events that are good or neutral for him.

Third, the timing of when Applicant raised his memory loss claim is somewhat suspicious. In Applicant's April 2000 written statement (Government Exhibit 5), he gave details about a November 1994 alcohol-related incident, acknowledged the possibility of another alcohol-related incident in the 1970s, denied any other arrest, and stated "[t]his is to the best of my recollection, but there could have been something 30-35 years ago that I do not remember." Applicant did not raise his memory loss claim until the Special Agent reinterviewed him in June 2000 and specifically asked him about various criminal charges that he had not disclosed earlier. *See, e.g.*, Hearing Transcript at pp. 54-55. Standing alone, the timing of when Applicant raised his memory loss claim is not fatal to his memory loss defense. However, it provides another reason why the absence of corroborating evidence is significant.

Fourth, Applicant's claim of memory loss is inconsistent with his testimony that when he was filling out the Standard Form 86, he thought he thought he had to list only matters that occurred within the previous 7 years (Hearing Transcript at pp. 79, 80). If Applicant did not recall his past arrests and criminal charges, then why would he even be considering whether they had occurred within the previous 7 years? The presence of such an inconsistent explanation by Applicant provides another reason why the absence of corroborating evidence is significant.

Given the totality of the record evidence in this case, it was arbitrary and capricious for the Administrative Judge to accept Applicant's memory loss claim in the absence of corroborating evidence. The Judge's error on this aspect of this case left him without a rational basis for concluding Applicant did not commit a knowing and willful falsification.

2. Whether the Administrative Judge erred by applying Criminal Conduct Mitigating Condition 1. Department Counsel contends the Administrative Judge erred by applying Criminal Conduct Mitigating Condition 1 ⁽¹⁾ because: (a) the Judge erred by finding Applicant did not intentionally falsify the Standard Form 86; (b) the Judge erroneously assumed "that the Applicant had to have been arrested for there to have been some security significance attached to the conduct"; and (c) Applicant's falsification of the Standard Form 86 constitutes a violation of 18 U.S.C. § 1001, and as such is recent criminal conduct that the Judge should have taken into consideration when weighing Applicant's criminal record under Guideline J. Department Counsel's arguments have mixed merit.

The Board rejects Department Counsel's argument that the Administrative Judge erroneously assumed that Applicant had to have been arrested for his conduct to have security significance under Guideline J. As discussed earlier in this

decision, the Judge erred by accepting Applicant's memory loss claim. Absent acceptance of that claim, the Judge did not have a rational basis to find Applicant did not falsify the Standard Form 86 by failing to list all of his criminal record. Although the Judge erred by finding Applicant did not falsify the Standard Form 86, nothing in the Judge's decision indicates or suggests he made the particular assumption Department Counsel contends the Judge made. An erroneous finding by the Judge that no falsification occurred does not translate into an erroneous assumption by the Judge that Applicant had to be arrested or formally charged before a falsification constitutes a violation of 18 U.S.C. §1001, which falls under Guideline J.

A finding of falsification of a Standard Form 86 leads, logically, to a conclusion that the falsification is a violation of 18 U.S.C. §1001, which is a criminal offense. The Judge's error concerning Applicant's falsification of the Standard Form 86 fatally undercuts his rationale for applying Criminal Conduct Mitigating Condition 1. Furthermore, that error undercut the Judge's rationale for considering Applicant prior criminal conduct as dated and having no current security significance under Guideline J.

Department Counsel argues that the Administrative Judge's errors warrant reversal. That argument is persuasive. Falsification of a security clearance application raises serious questions about an applicant's security eligibility. Once Department Counsel demonstrates that an applicant has engaged in falsification, the burden shifts to the applicant to demonstrate extenuation, mitigation or changed circumstances sufficient to warrant a favorable security clearance decision. *See* Directive, Additional Procedural Guidance, Item E3.1.15. Applicant offered no such evidence in this case concerning his falsification of the Standard Form 86. Rather, Applicant's defense rested solely on his claim that he did not falsify the Standard Form 86. The Judge's errors provide the basis for his favorable security clearance decision. Elimination of those errors leaves no rational basis for the Judge's favorable security clearance decision. Accordingly, correction of the Judge's errors mandates reversal of his favorable decision.

Conclusion

Department Counsel has demonstrated error that warrants reversal. Pursuant to Item E3.1.33.3 of the Directive's Additional Procedural Guidance, the Board reverses 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 criminal behavior was not recent."