

DATE: February 15, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 00-0713

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Kathryn A. Trowbridge, Esq., Department Counsel

FOR APPLICANT

Patrick H. Stiehm, Esq.

Administrative Judge Kathryn M. Braeman issued a decision, dated June 28, 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 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 issue of whether the Administrative Judge's favorable security clearance 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 December 8, 2000. The SOR was based on Guideline F (Financial Considerations), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct). A hearing was held on April 12, 2001. The Administrative Judge issued a written decision, dated June 28, 2001, in which she 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 Issue

Department Counsel contends the Administrative Judge's favorable security clearance decision is arbitrary, capricious, and contrary to law because: (a) various findings of fact by the Judge are not supported by substantial record evidence; (b) the Judge misapplied various provisions of the Adjudicative Guidelines; and (c) the Judge's errors preclude affirmance of her favorable security clearance decision. Applicant challenges Department Counsel's various arguments and contends the Judge's security clearance decision should be sustained. Discussion of the appeal issues will be facilitated by reviewing them in terms of the different guidelines alleged in the SOR.

Administrative Judge's findings about falsification allegation. The SOR alleged Applicant falsified a security questionnaire in April 1999 by failing to disclose she had been terminated from her job as a bank teller in late 1995 because her teller drawer was short approximately \$1,000 due to teller error. The Administrative Judge found Applicant did not falsify the security questionnaire.

Department Counsel challenges the Administrative Judge's finding that Applicant did not falsify the security questionnaire. Specifically, Department Counsel argues: (a) the record evidence does not support Applicant's explanation why she did not list her 1995 termination on the security questionnaire; and (b) the Judge failed to take into account Applicant's conflicting statements about why the information about her 1995 termination was not listed on the security questionnaire. For the reasons that follow, the Board concludes Department Counsel's arguments are persuasive.

There is no dispute that Applicant's 1995 termination is not listed on the security questionnaire she signed on April 9, 1999. Contrary to Applicant's appeal argument (Reply Brief at pp. 3-5), a reasonable person⁽¹⁾ would know or should know that Applicant's 1995 termination was required to be listed in response to question 20 on the security questionnaire. The plain language of question 20 simply does not support Applicant's appeal argument. However narrowly Applicant seeks to characterize or label the facts and circumstances of her 1995 termination, a reasonable person would know or should know that her 1995 termination fell under one or more of the five categories listed in question 20 of the security questionnaire. Since Applicant's 1995 termination should have been listed on the questionnaire but was not, the issue before the Administrative Judge was whether Applicant falsified the security questionnaire. A review of the decision below shows the Judge's findings on this issue turn on her conclusion that Applicant's explanation is credible.

Although the Board must give deference to the credibility determinations made by an Administrative Judge (Directive, Additional Procedural Guidance, Item E3.1.32.1), that deference does not immunize credibility determinations from review. *See, e.g.*, ISCR Case No. 99-0710 (March 19, 2001) at p. 4. 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. Thus, the Board must consider whether a Judge's acceptance of an applicant's explanation for his or her conduct is consistent with a reasonable interpretation of the record evidence as a

whole. *See, e.g.*, ISCR Case No. 00-0620 (October 19, 2001) at p. 3.

Department Counsel correctly notes that Applicant provided contradictory explanations for why her 1995 termination was not listed on the security questionnaire she signed in April 1999. Applicant claimed (1) she disclosed her 1995 termination when she completed the earlier electronic version of the security questionnaire but it was somehow not listed in the printed out version she signed in April 1999, *and* (2) she did not disclose her termination on the security questionnaire because she did not believe it was covered by question 20 on the form. A review of the decision below supports Department Counsel's claim that the Judge accepted *both* of Applicant's explanations. No deference is owed to a favorable credibility determination that results in acceptance of an applicant's explanations that are patently inconsistent and incompatible. The Judge's finding that Applicant did not falsify the security questionnaire is unsustainable because it does not reflect a reasonable interpretation of the record evidence as a whole, including the evidence that runs contrary to the Judge's finding. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1.

Administrative Judge's application of Personal Conduct Mitigating Conditions. The Administrative Judge listed Personal Conduct Mitigating Conditions 2⁽²⁾ and 4⁽³⁾ as being applicable to Applicant's case (Decision at p. 6). The Judge then explained why she concluded Personal Conduct Mitigating Conditions 3⁽⁴⁾ and 4 were applicable (Decision at p. 8). Department Counsel argues: (a) it was arbitrary and capricious for the Judge to list Personal Conduct Mitigating Conditions 2 and 4 as being applicable, and then to fail to discuss Personal Conduct Mitigating Condition 2 at all and rely on Personal Conduct Mitigating Condition 3; and (b) the record evidence does not support the Judge's application of Personal Conduct Mitigating Conditions 3 and 4.

(a) It was arbitrary and capricious for the Administrative Judge to list Personal Conduct Mitigating Conditions 2 and 4 as being applicable (Decision at p. 6), fail to discuss Personal Conduct Mitigating Condition 2 at all,⁽⁵⁾ and then proceed to rely on Personal Conduct Mitigating Condition 3 in addition to Personal Conduct Mitigating Condition 4 (Decision at p. 8). However, the Judge's failure to list Personal Conduct Mitigating Condition 3 on page 6 of the decision is harmless error in light of the fact the Judge gave an explanation (on page 8 of the decision) why she concluded that Mitigating Condition was applicable.

(b) Applicant falsified the security questionnaire in April 1999 and made no effort to correct her falsification until a Special Agent of the Defense Security Service interviewed her in September 1999 and raised the matter of her 1995 termination. Considering the record evidence as a whole, it was arbitrary and capricious for the Administrative Judge to apply Personal Conduct Mitigating Condition 3. *See, e.g.*, ISCR Case No. 99-0201 (October 12, 1999) at pp. 3-4 (discussing what constitutes prompt, good-faith correction of falsification).

As discussed earlier in this decision, Appellant gave inconsistent and incompatible explanations for why her 1995 termination was not listed on the security questionnaire she signed in April 1999. Furthermore, Applicant's statements that her supervisor might have removed information from her security questionnaire are pure speculation and lack probative value. Considering the record as a whole, there is insufficient credible evidence to support the Administrative Judge's application of Personal Conduct Mitigating Condition 4.

Administrative Judge's application of Criminal Conduct Mitigating Condition 6. The Administrative Judge concluded that Criminal Conduct Mitigating Condition 6⁽⁶⁾ was applicable because she found Applicant had not engaged in criminal conduct since her 1994 shoplifting incident. Department Counsel argues that it was arbitrary and capricious for the Judge to apply Criminal Conduct Mitigating Condition 6 because: (a) Applicant stole money from a bank in 1995; and (b) Applicant's falsification of the security questionnaire constituted a violation of 18 U.S.C. §1001. Department Counsel's argument is partially persuasive.

The record evidence in this case did not compel the Judge to find that Applicant stole money in 1995 when she was working as a bank teller. Given the record evidence in this case, the fact that Applicant was responsible for the money as a bank teller does not mean the only possible explanation for the 1995 incident was that she stole the money. Accordingly, to the extent Department Counsel argues that the 1995 incident precludes application of Criminal Conduct Mitigating Condition 6, Department Counsel has failed to demonstrate the Judge erred.

However, the rest of Department Counsel's argument has merit. Falsification of a security questionnaire is a violation of

18 U.S.C. §1001, a federal felony. *See, e.g., United States v. Yermian*, 468 U.S. 63 (1984)(case involving prosecution under 18 U.S.C. §1001 for falsification of a security questionnaire). The government can allege and prove that an applicant has engaged in criminal conduct even if the applicant has not been formally charged with a criminal offense by the relevant criminal justice authorities. *See, e.g., ISCR Case No. 99-0382* (May 3, 2000) at p. 4; *ISCR Case No. 95-0818* (January 31, 1997) at p. 4. Proof that an applicant has engaged in felonious conduct militates against a finding that "[t]here is clear evidence of successful rehabilitation." Given the record evidence that Applicant falsified her security questionnaire, the Judge erred by applying Criminal Conduct Mitigating Condition 6.

Administrative Judge's findings and conclusions about Applicant's financial situation. Department Counsel contends the record evidence does not support the Administrative Judge's findings that (a) Applicant has made arrangements with individual creditors to resolve debts which are worth less than \$10,000; (b) Applicant is now able to be financially responsible. Department Counsel also contends the record evidence does not warrant the Judge's application of Financial Considerations Mitigating Condition 6. [\(7\)](#)

Department Counsel persuasively argues the record evidence does not support the Administrative Judge's finding that Applicant has made arrangements with the creditor to resolve her debts. The record evidence shows that Applicant: (i) has not addressed her outstanding debts in a timely manner for the past few years; (ii) has failed to follow through with past promises to deal with her creditors; (iii) failed to complete a debt management program in 1999; and (iv) has failed, as of the hearing date, to make significant progress on dealing with her overdue debts. Given the evidence of Applicant's overall poor record of dealing with her financial obligations, it was arbitrary and capricious for the Judge to accept Applicant's uncorroborated claims that she has made arrangements with her creditors to resolve her outstanding debts. *See, e.g., ISCR Case No. 00-0620* (October 19, 2001) at p. 4 ("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."); *ISCR Case No. 99-0012* (December 1, 1999) at p. 3 ("Failure to present documentation in support of an applicant's claims about financial matters is a factor to be considered by a Judge in evaluating such claims."). Furthermore, the Judge's finding that Applicant is now able to be financially responsible does not reflect a reasonable interpretation of the record evidence as a whole. Because it was arbitrary and capricious for the Judge to accept Applicant's uncorroborated claims that she has made arrangements with her creditors, there was not a rational basis for the Judge to apply Financial Considerations Mitigating Condition 6.

Administrative Judge's mitigation analysis. Department Counsel contends "[t]he Administrative Judge's whole-sale mitigation without mention of specific mitigating factors is problematic."

Department Counsel notes the Administrative Judge referred to Appendix I in her decision, and then suggests the Judge may have been erroneously referring to Appendix I of Department of Defense Regulation 5200.2-R. Even if the Judge were erroneously referring to Department of Defense Regulation 5200.2-R, the Board notes the language of the Adjudicative Guidelines which appear in that regulation is identical to the language of the Adjudicative Guidelines that appears in the Directive. Accordingly, the Judge's reference to Appendix I was harmless error.

Department Counsel also argues the Administrative Judge should have found Applicant stole the money that was missing from her teller drawer in 1995. As discussed earlier in this decision, the record evidence as a whole did not compel the Judge to find Applicant stole that money.

Finally, Department Counsel argues the Administrative Judge failed to provide a satisfactory explanation or analysis for her conclusion that Applicant's conduct had been mitigated. Department Counsel's argument adds little to its other appeal arguments. Because the Board has addressed Department Counsel's specific challenges to the Judge's application of various provisions of the Adjudicative Guidelines, no useful purpose would be served by addressing this argument.

Conclusion

Department Counsel has met its burden of demonstrating error that warrants reversal. Accordingly, 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 conduct of applicants must be evaluated in light of the reasonable person standard. *See, e.g.*, ISCR Case No. 99-0462 (May 25, 2000) at p. 4; ISCR Case No. 98-0355 (March 12, 1999) at p. 4.
2. "The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily."
3. "Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided."
4. "The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts."
5. Personal Conduct Mitigating Condition 2 is not applicable to the facts and circumstances of Applicant's case. *See, e.g.*, ISCR Case No. 99-0557 (July 10, 2000) at p. 4 (explaining difference between Personal Conduct Mitigating Condition 2 and Personal Conduct Mitigating Condition 3).
6. "There is clear evidence of successful rehabilitation."
7. "The individual initiated a good-faith effort to repay overdue debts or otherwise resolve debts."