

DATE: June 14, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-01642

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Administrative Judge Richard A. Cefola issued a decision, dated December 28, 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 following issues: (1) whether the Administrative Judge erred with respect to his findings and conclusions about Applicant's history of criminal conduct; (2) whether the Administrative Judge erred by finding that Applicant engaged in falsification on two occasions; and (3) 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 to Applicant a Statement of Reasons (SOR) dated August 17, 2001. The SOR was based on Guideline J (Criminal Conduct), Guideline E (Personal Conduct), and Guideline F (Financial Considerations). A hearing was held on December 6, 2001.

The Administrative Judge issued a written decision, dated December 28, 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.

While this appeal was pending, a security manager from Applicant's company submitted a letter to the Board that included information favorable to Applicant. The letter was submitted after Applicant had filed his appeal brief and Department Counsel had indicated no intent to submit a reply brief. There is no indication whether the letter was submitted at Applicant's request. Even if the letter had been submitted at Applicant's request, it was submitted long after the time for filing appeal briefs had passed. Furthermore, the Board cannot consider new evidence on appeal. Directive, Additional Procedural Guidance, Item E3.1.29. Accordingly, the new evidence cited in the security manager's letter could not be considered even if it had been submitted during the briefing process.

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 Guideline F allegations (SOR paragraphs 3.a and 3.b). Those favorable formal findings are not at issue on appeal.

Applicant's appeal brief has three attachments. Two of those attachments are duplicates of exhibits that were submitted to the Administrative Judge during the proceedings below. One of the attachments consists of new evidence. Furthermore, Applicant's appeal brief contains some statements that go beyond the record evidence and, as such, those statements constitute new evidence. As noted earlier in this decision, the Board cannot consider new evidence. Furthermore, Applicant had a full and fair opportunity to submit evidence for consideration by the Judge during the proceedings below. An appealing party cannot fairly seek to challenge a Judge's findings and conclusions based on new evidence that was not submitted for the Judge's consideration. Accordingly, the Board will not consider the new evidence submitted with Applicant's appeal brief.

1. Whether the Administrative Judge erred with respect to his findings and conclusions about Applicant's history of criminal conduct. The Administrative Judge made findings of fact about Applicant's involvement in incidents in June 1993 and April 1999 that resulted in misdemeanor convictions (SOR paragraphs 1.a and 1.b), a March 2000 incident that resulted in two misdemeanor charges being filed against Applicant which were later dropped (SOR paragraph 1.c), and a November 1999 driving under the influence incident (SOR paragraph 1.d). Applicant contends the Judge made various errors in connection with his findings about those incidents. Specifically, Applicant argues: (a) the Judge's findings about the June 1993, April 1999 and March 2000 incidents are "accurate in presenting my legal history," but they fail to discuss or consider the evidence Applicant presented to show he was "the victim of a vengeful individual who has blatantly and knowingly used the legal system in an unlawful manner to assert her aggravations upon me as the result of my refusal to continue my association with her"; (b) the Judge erred by finding Applicant was arrested in June 1993; (c) the Judge ignored the evidence that Applicant was innocent of the charges brought against him in April 1999; (d) the Judge ignored the evidence Applicant presented about the facts and circumstances surrounding the March 2000 incident; (e) the Judge erred by finding that Applicant admitted consuming "quite a bit" of alcohol prior to the November 1999 driving under the influence incident; and (f) the Judge erred by concluding that no Criminal Conduct Mitigating Conditions were applicable.

Applicant's first, third and fourth arguments are not persuasive. There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. The mere fact that an appealing party believes that a Judge should have given more weight to specific evidence cited by the appealing party is not sufficient to overcome or rebut that presumption. The Judge was not required to accept at face value Applicant's explanations concerning the facts and circumstances surrounding the

June 1993, April 1999 and March 2000 incidents. Rather, the Judge was required to assess the credibility of Applicant's testimony at the hearing and consider Applicant's written and testimonial explanations in light of the record evidence as a whole. Applicant's strong disagreement with the Judge's decision not to give more weight to Applicant's explanations about the June 1993, April 1999, and March 2000 incidents is not sufficient to demonstrate factual or legal error by the Judge.

The evidence shows, and the SOR alleged, that Applicant was charged in June 1993. The Administrative Judge erred by finding that Applicant was arrested in June 1993. However, an Administrative Judge's decision is not measured against a standard of perfection and any errors identified on appeal must be considered in the context of the Judge's decision as a whole to determine whether the errors are harmful or harmless. *See, e.g.*, ISCR Case No. 00-0621 (January 30, 2002) at p. 4. The Judge's error about the June 1993 incident is harmless under the particular facts of this case. For purposes of Guideline J (Criminal Conduct), the criminality of Applicant's conduct in connection with the June 1993 incident does not turn on whether he was arrested or merely charged without being arrested. Therefore, the fact that Applicant was charged without being arrested in connection with the June 1993 incident is not material under Guideline J. As will be discussed later in this decision, for purposes of Guideline E (Personal Conduct), it does not matter whether Applicant was arrested in June 1993 or merely charged without being arrested. Accordingly, the Board concludes Applicant's second argument has merit, but that argument only demonstrates harmless error by the Judge which does not warrant remand or reversal. *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine).

Applicant's fifth argument fails to raise any material issue of fact or law. The record evidence shows (and Applicant concedes on appeal) that in connection with the November 1999 driving under the influence incident his blood alcohol level was above the legal limit. Accordingly, Applicant's argument about whether the Administrative Judge erred by stating Applicant admitted drinking "quite a bit of alcohol" before his arrest is essentially irrelevant.

Applicant's sixth argument fails to demonstrate error by the Administrative Judge. Applicant fails to state any persuasive reason for why the Judge should have applied any of the Criminal Conduct Mitigating Conditions to Applicant's history of criminal conduct.

2. Whether the Administrative Judge erred by finding that Applicant engaged in falsification on two occasions. The Administrative Judge found that Applicant: falsified a security questionnaire in December 1998 by failing to disclose the June 1993 incident that resulted in Applicant's conviction for misdemeanor assault; and falsified a written statement he gave to an investigator in February 2000 by denying he had ever been involved in an extramarital affair. Applicant argues the Judge's findings of falsification are erroneous because: (a) the June 1993 incident did not involve alcohol or drugs, so his "NO" answer to question 23.d on the security questionnaire was true and accurate; (b) he was not arrested in connection with the June 1993 incident, he believed that the charge against him and the summons to appear that he received were "consistent in seriousness to a traffic ticket," and therefore his "NO" answer to question 23.f on the security questionnaire was not a knowing and willful failure to disclose the June 1993 incident; (c) the Judge erred by not accepting Applicant's explanation about his "NO" answers to questions 23.d and 23.f on the security questionnaire; and (d) the Judge erred by making an incorrect finding that Applicant is a Facility Security Officer and relying in that incorrect finding to conclude Applicant "clearly should have known what responses were required" to the questions 23.d and 23.f on the security questionnaire; (e) the Judge failed to consider his explanation for why he did not disclose his involvement in extramarital affairs when he gave a written statement to an investigator in February 2000; and (f) his failure to disclose his extramarital affairs to the investigator was not due to "malice of intent, only professional embarrassment."

Applicant's first argument has merit. Applicant persuasively argues that the Administrative Judge erred by finding that Applicant engaged in falsification when he answered "NO" to question 23.d on a security questionnaire he completed in December 1998. There is no record evidence that the June 1993 incident was alcohol-related or drug-related. Therefore, given the wording of question 23.d of the security questionnaire, Applicant's "NO" answer to question 23.d. was not a falsification with respect to the June 1993 incident.

Applicant's second and third arguments lack merit. SOR paragraph 2.a alleged that Applicant engaged in falsification by failing to list the June 1993 incident in response to question 23 of a security questionnaire he signed in December 1998. Given the wording of question 23.f, Applicant was required to disclose the June 1993 incident regardless of whether he

was arrested or merely charged without being arrested. The Board also rejects Applicant's argument that the Administrative Judge erred by finding he falsified a security questionnaire in December 1998 because he was not required to disclose the June 1993 incident since he was issued only a summons "which is consistent in seriousness to a traffic ticket." The June 1993 incident did not involve a traffic ticket, but a domestic violence incident. Although the Judge was required to consider Applicant's explanation about his failure to list the June 1993 incident, the Judge was not bound to accept it at face value. Rather, the Judge had to consider Applicant's explanation in light of his assessment of Applicant's credibility and his evaluation of the record evidence as a whole and decide whether Applicant's explanation is credible and reasonable. *See, e.g.*, ISCR Case No. 00-0620 (October 19, 2001) at pp. 3-4. Considering the record as a whole, the Judge had a rational basis for concluding Applicant engaged in falsification by failing to disclose the June 1993 incident when he completed the security questionnaire in December 1998. Accordingly, Applicant's second and third arguments fail to demonstrate the Judge erred.

Applicant's fourth argument is groundless. The Administrative Judge did not err by finding that Applicant is a Facility Security Officer. Government Exhibit 1 shows that Applicant's job title is "Security Administrator." Furthermore, at the hearing Applicant identified himself as the Facility Security Officer of his company's facility. *See* Hearing Transcript at pp. 6-7.

Applicant's fifth and sixth arguments fail to demonstrate the Administrative Judge committed factual or legal error. As discussed earlier in this decision, the Judge is not bound to accept at face value an applicant's explanations about an alleged falsification. And, in any event, Applicant's personal embarrassment is not a justification or excuse for deliberately lying to an investigator. Considering the record evidence as a whole, it was not arbitrary, capricious, or contrary to law for the Judge to find Applicant engaged in a deliberate, willful falsification when he gave a written statement in February 2000 in which he denied that he had engaged in any extramarital affairs.

3. Whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. Apart from the various claims of errors Applicant has raised, he also states: (a) he wants "a comprehensive review of my appeal and consideration for re-instatement of my security clearance"; (b) he has corrected his situation and gotten his life "back on track"; (c) he has performed his job "flawlessly, and with the greatest loyalty to the United States Government"; (d) he still serves as an Army reservist; and (e) he has corrected his past mistakes and has "set a path for myself that will ensure that these same mistakes are never again made by me."

With respect to Applicant's request for "a comprehensive review of my appeal and consideration for re-instatement of my security clearance," the Board must review Applicant's appeal within the terms of the relevant provisions of the Directive. As discussed earlier in this decision, the Board does not conduct a *de novo* review of an applicant's case. Rather, the Board addresses the material issues raised by the parties to determine whether there is factual or legal error, and if so, whether such error warrants remand or reversal.

As discussed earlier in this decision, an Administrative Judge must consider the record evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. Accordingly, Applicant's ability to cite to evidence that he believes is favorable to him is not sufficient to demonstrate the Judge erred. *See, e.g.*, ISCR Case No. 00-0489 (January 10, 2002) at p. 10. Considering the record as a whole, it was not arbitrary or capricious for the Judge to conclude that Applicant failed to present persuasive evidence that demonstrated extenuation or mitigation of Applicant's history of criminal conduct and falsifications.

Favorable record evidence about an applicant's job performance or performance of military reserve duties must be considered by an Administrative Judge when the Judge evaluates the record evidence as a whole. However, neither Applicant's job performance nor his performance of Army reserve duties precludes an adverse security clearance decision. Security clearance decisions are not limited to consideration of an applicant's conduct during duty hours. Even if an applicant performs his or her job duties in an appropriate or exemplary manner, the government can evaluate an applicant's security eligibility in light of conduct that is unrelated to the applicant's job. *See, e.g.*, ISCR Case No. 00-0741 (October 9, 2001) at pp. 3-4. The same reasoning can be applied to an applicant's performance of military reserve duties.

As discussed earlier in this decision, with some exceptions that constitute harmless error, the Administrative Judge's

findings about Applicant's history of criminal conduct and his falsifications of a security questionnaire in December 1998 and a written statement in February 2000 are sustainable in light of the record evidence as a whole. Furthermore, those sustainable findings provide a rational basis for the Judge's overall adverse conclusions under Guidelines E and J, as well as his overall adverse security clearance decision.

Conclusion

Applicant has failed to demonstrate factual or legal error that warrants remand or reversal. Accordingly, the Board affirms the Administrative Judge's adverse 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