

DATE: January 8, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-02871

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Chief Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Wilford H. Ross issued a decision dated July 10, 2002, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed.

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 issue: Whether the Administrative Judge's findings and conclusions are supported by the record evidence?

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated November 9, 2001. The SOR was based on Guideline J (Criminal Conduct) and Guideline E (Personal Conduct). A hearing was held on March 29, 2002.

The Administrative Judge issued a written decision dated July 10, 2002, 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.

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

The Administrative Judge entered formal findings in favor of Applicant with respect to SOR paragraphs 1.a, 2.b, and 2.c. To the extent that Applicant's appeal brief could be construed as raising objections to the Judge's findings and conclusions concerning those SOR paragraphs, the Board need not discuss them. Applicant was not prejudiced by the Judge's favorable formal findings as to SOR paragraphs 1.a, 2.b, and 2.c, and no useful purpose would be served by addressing them in connection with Applicant's appeal.

Whether the Administrative Judge erred by finding Applicant falsified a personnel security questionnaire. The Administrative Judge found: (1) that Applicant was involved in an alcohol-related incident in December 1999 that resulted in a conviction and Applicant being placed on probation until March 2003; and (2) Applicant falsified a personnel security questionnaire by denying that he had ever been arrested, charged, held, or detained.

On appeal, Applicant challenges the Administrative Judge's finding that he falsified the personnel security questionnaire. Since the Judge made formal findings in favor of Applicant with respect to two of the SOR paragraphs alleging falsification (*i.e.*, SOR paragraphs 2.b and 2.c), the only adverse finding about falsification the Judge made concerns SOR paragraph 2.a.

Applicant's appeal brief contains statements that challenge the actions of security personnel handling his investigation. Neither the Board nor Hearing Officer Administrative Judges have jurisdiction or authority over the actions of security personnel conducting background investigations. Accordingly, the Board cannot consider the actions of security personnel unless an appealing party demonstrates how the actions of such personnel are pertinent to a factual or legal issue that falls within the jurisdiction of DOHA. ⁽¹⁾ To the extent that Applicant's appeal statements about the actions of security personnel can be construed as raising the issue of whether the Administrative Judge should have applied Personal Conduct Mitigating Condition 4, they raise an issue that the Board has the jurisdiction and authority to address.

Applicant's appeal statements about the actions by security personnel do not persuade the Board that the Administrative Judge erred by finding Applicant falsified the security questionnaire. First, to a large degree, Applicant's appeal statements about the actions by security personnel go beyond the record evidence. As such, they constitute new evidence, which the Board cannot consider. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Second, to the extent Applicant's appeal statements about the actions by security personnel can be construed as pertinent to SOR paragraph 2.a, they raise a defense that is inconsistent with the defense Applicant raised during the proceedings below. Third, to the extent Applicant's appeal statements about the actions by security personnel have some basis in the record evidence, they reflect record evidence that the Judge had to consider in making his findings of fact. The Judge is responsible for weighing the record evidence. Absent a showing that the Judge weighed the evidence as a whole in a manner that is arbitrary or capricious, the Board will not disturb the Judge's weighing of the evidence. The Judge considered Applicant's explanation about his "NO" answer to Question 21 on the personnel security questionnaire and found that explanation unconvincing. A Judge can make a finding of falsification even in the face of an applicant's denial of any intent to falsify. *See, e.g.*, ISCR Case No. 99-0194 (February 29, 2000) at p. 3. In this case, there is sufficient record evidence to sustain the Judge's finding of falsification. Applicant's appeal arguments to the contrary fail to demonstrate the Judge erred.

Conclusion

Applicant has failed to meet his burden of demonstrating error in the Administrative Judge's July 10, 2002 decision. Hence, that decision is affirmed.

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. For example, if an appealing party shows that there is record evidence requiring an Administrative Judge to decide whether to apply Personal Conduct itigating Condition 4 ("Omission of material facts was caused or significantly contributed to be improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided.").