

DATE: August 8, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-03132

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Department Counsel

Matthew E. Malone, Department Counsel

FOR APPLICANT

August Bequai, Esq.

Administrative Judge Burt Smith issued a decision, dated January 31, 2002, in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Department Counsel appealed. For the reasons set forth below the Board reverses the Administrative Judge's decision.

The 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. Did the Judge find that Applicant may be excused for concealing information about his involvement in illegal activity when he was not asked specifically about engaging in that activity, and, if so, did the Judge err? 2. Did the Judge err by concluding that Applicant is not susceptible to blackmail? and 3. Was the Judge's decision arbitrary, capricious or contrary to law?

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated June 21, 2001. The SOR was based on Guideline E (Personal Conduct).

Applicant requested a hearing which was held on November 20, 2001. The Administrative Judge issued a favorable decision, dated January 31, 2002. The case is before the Board on Department Counsel's appeal of that 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

1. Did the Judge find that Applicant may be excused for concealing information about his involvement in illegal activity when he was not asked specifically about engaging in that activity, and, if so, did the Judge err? At his initial interview with an agent of the Defense Security Service (DSS) in February 2000, Applicant was asked whether he had been involved in any type of illegal activity within the past seven years. In answering the question, Applicant mentioned only a few traffic-related incidents, even though he had engaged in the hiring of prostitutes from 1994 through 1999 and had engaged in illegal gambling from 1993 to 1997. Department Counsel contends that the Administrative Judge concluded that Applicant's deliberate concealment of his involvement in illegal gambling and prostitution was excused because Applicant was not asked specific questions about those activities.

Department Counsel's contention seeks to impute to the Administrative Judge a conclusion that is not specifically articulated in the Judge's decision. However, Applicant's counsel correctly notes that the thrust of Department Counsel's arguments is the contention that the Judge erred by not finding that Applicant was untruthful during the first interview.

Applicant's counsel correctly notes that the investigator testified Applicant was cooperative during the February 2000 interview. However, the investigator's opinion as to whether Applicant was cooperative during the February 2000 interview is not dispositive. Regardless of the investigator's opinion of Applicant's cooperation, the question before the Administrative Judge was whether the record evidence shows Applicant gave full, frank, and candid answers to the investigator during the February 2000 interview.

Evidence that Applicant responded to the investigator's specific questions is not necessarily sufficient to demonstrate he gave full, frank, and candid answers during the February 2000 interview. A witness in a trial takes an oath to tell the truth, the whole truth, and nothing but the truth. If a witness answers questions, but deliberately fails to tell the whole truth, then the witness is not abiding by the oath. Although a deliberate omission could be distinguished from a falsehood, such a deliberate omission can serve to impede the search for truth. If an applicant gives narrowly worded, technically correct answers to an investigator's questions, but deliberately fails to tell the investigator the whole truth, then the applicant is not providing full, frank and candid answers to the investigator. An interview conducted as part of a security clearance investigation is not a forum for an applicant to split hairs or parse the truth narrowly. The federal government has a compelling interest in protecting and safeguarding classified information. *Department of Navy v. Egan*, 484 U.S. 518, 527 (1988). That compelling interest includes the government's legitimate interest in being able to make sound decisions (based on complete and accurate information) about who will be granted access to classified information. An applicant who deliberately fails to give full, frank, and candid answers to the government in connection with a security clearance investigation or adjudication interferes with the integrity of the industrial security program.

By claiming that during the February 2000 interview he did not disclose his use of prostitutes or his illegal gambling due to embarrassment, Applicant essentially conceded he understood the investigator's questions. The record evidence shows Applicant understood the meaning and import of the investigator's questions, not that the investigator's questions were so broad as to impose on him "an impossible burden of recall." While Applicant may have given the appearance of being cooperative with the investigator by answering various specific questions and volunteering information unrelated to the matters he claimed to be embarrassed about, he failed to give full, frank, and candid answers to the investigator when he chose to not reveal any information about his use of prostitutes or his illegal gambling in response to questions that reasonably called for disclosure of such information to the investigator.

In view of the foregoing, the record evidence does not support the Administrative Judge's finding that the investigator's questions were so broad as to impose on Applicant "an impossible burden of recall" during the February 2000 interview. Accordingly, the Judge's conclusion that Applicant engaged in a single instance of "willful failure to reveal material information to the Government" (*i.e.*, only during the April 2000 interview) is not sustainable. Department Counsel is correct in arguing the record evidence shows Applicant also engaged in a willful omission of material facts during the February 2000 interview.

2. Did the Judge err by finding that Applicant is not susceptible to blackmail? Department Counsel persuasively argues that the Administrative Judge erred by finding that Applicant is not susceptible to blackmail. The Judge himself noted that Applicant had put himself in a position of vulnerability to outside pressures before he ceased his gambling and his activities with prostitutes. Given that finding, Applicant faced a heavy burden of presenting evidence to demonstrate reform, rehabilitation or changed circumstances⁽¹⁾ sufficient to warrant the conclusion that it is clearly consistent with the national interest to grant him access to classified information. The Administrative Judge erred by finding that Applicant is not susceptible to blackmail.

The Judge relied in large part on 24 letters from character witnesses in support of Applicant. Those letters are notable for their failure even to claim any knowledge of the issues in the case. Absent such acknowledgment, their probative value as testaments to Applicant's true character is limited. It is error for a Judge to rely on character letters that do not reveal any knowledge of the underlying issues in the case on the part of the author, and then to reach the conclusion that Applicant is not vulnerable to blackmail or coercion because of those same issues. The Board notes that Applicant testified that he had told 2 of the 24 authors about some of the issues in the case.

3. Was the Judge's decision arbitrary, capricious or contrary to law? In addition to the issues discussed above, Department Counsel argues that the Administrative Judge's conclusion that Applicant's falsification is mitigated because Applicant has learned a lesson from these experiences and there is no reason to believe that he will be anything other than honest in the future is arbitrary and capricious in light of the record evidence. The Board agrees.

Because Applicant engaged in deliberate omission of material information on two separate occasions, he had a heavy burden of demonstrating evidence of reform, rehabilitation, or changed circumstances sufficient to justify a conclusion that it is clearly consistent with the national interest to grant him access to classified information. In his decision, the Administrative Judge does not articulate a basis for his conclusion that Applicant has "learned a lesson." There is a paucity of record evidence showing that Applicant has developed a positive track record of honesty generally and honesty with the government specifically since his falsifications regarding his illegal conduct. In the decision, the Judge cited to a variety of other favorable evidence, such as Applicant's social life, his participation in amateur sports, his involvement in fund raising for worthy causes, and his job performance in the defense industry. However, the Judge articulated no rational connection between Applicant's participation in those activities and his conclusion that Applicant will be honest in the future. Since Applicant's participation in those activities did not prevent him from engaging in the misconduct that was the subject of the SOR (including his lack of candor with the investigator in two interviews), it is difficult to discern how the Judge could rely on Applicant's continued participation in those activities as evidence that he will not engage in future similar misconduct. The record evidence as a whole does not support the conclusion that Applicant has learned his lesson and will be honest in the future.

Conclusion

Department Counsel has met its burden on appeal of demonstrating reversible error below. The Board reverses the Administrative Judge's favorable 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. Directive, Additional Procedural Guidance, Item E3.1.15.