

DATE: August 5, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-05593

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Marc E. Curry, Esq., Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Elizabeth M. Matchinski issued a decision, dated March 28, 2002, 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 following issues: (1) whether the Administrative Judge erred by finding Applicant relied on the advice of an "authorized person" when he omitted two 1999 misdemeanor criminal incidents from a security questionnaire completed in June 2000; and (2) whether the Administrative Judge's favorable security clearance decision should be reversed.

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 E (Personal Conduct) and Guideline J (Criminal Conduct). A hearing was held on March 12, 2002.

The Administrative Judge issued a written decision, dated March 28, 2002 ("Judge's Decision"), 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 Issues

The Administrative Judge's favorable findings and conclusions under Guideline J concerning Applicant's involvement in two 1999 misdemeanor criminal incidents are not at issue on appeal. Therefore, the Board need not address those findings and conclusions to resolve this appeal.

1. Whether the Administrative Judge erred by finding Applicant relied on the advice of an "authorized person" when he omitted two 1999 misdemeanor criminal incidents from a security questionnaire completed in June 2000. The Administrative Judge: (a) accepted Applicant's explanation that he did not disclose two 1999 misdemeanor criminal incidents on a security questionnaire because he had relied on the advice of a local district attorney; and (b) then applied Personal Conduct Mitigating Condition 4. [\(1\)](#)

On appeal, Department Counsel contends the Administrative Judge erred by applying Personal Conduct Mitigating Condition 4. For the reasons that follow, the Board concludes Department Counsel's contention has merit.

Department Counsel correctly notes the Board has not specifically ruled on what constitutes "authorized personnel" for purposes of Personal Conduct Mitigating Condition 4. This appeal requires the Board to specifically rule on that issue.

When faced with a word or phrase in the Directive that is not defined, the undefined word or phrase must be construed or interpreted in a reasonable manner. *See, e.g.*, ISCR Case No. 99-0480 (November 28, 2000) at p. 8. Furthermore, provisions of the Directive (including the Adjudicative Guidelines) must be construed in a manner that effectuates the policies and purposes of the industrial security program. *See, e.g.*, ISCR Case No. 00-0104 (March 21, 2001) at p. 7; ISCR Case No. 99-0447 (July 25, 2000) at p. 5.

The phrase "authorized personnel" is not defined in the Directive. On its face, the phrase refers to persons in positions of authority. However, that does not end the analysis. Because the phrase "authorized personnel" appears in the context of giving advice about answering or responding to questions pertaining to a security clearance investigation or adjudication, it must be construed or interpreted as meaning persons authorized to give such advice. Because the Executive Branch of the federal government has constitutional responsibility for protecting and safeguarding classified information, *Department of Navy v. Egan*, 484 U.S. 518, 527-528 (1988), it must be able to do so by acting through its authorized agents, whether they are part of the Executive Branch of the federal government or duly authorized officers or employees of defense contractors. Whether an individual is authorized to carry out particular responsibilities in the area of protecting and safeguarding classified information is determined by applicable federal law (including federal statute, Executive Order, or implementing federal rules or regulations). These principles are pertinent to construing and interpreting the phrase "authorized personnel" in Personal Conduct Mitigating Condition 4.

Furthermore, the ability of the Executive Branch of the federal government to protect and safeguard classified information is not enhanced or promoted by any action that would have the practical effect of implicitly encouraging applicants to seek from unauthorized persons advice or guidance about their obligations in security clearance investigations or adjudications. Accordingly, Personal Conduct Mitigating Condition 4 should not be construed or interpreted in a manner that would have the practical effect of leading applicants to believe that the government approves of them seeking advice or guidance from unauthorized persons concerning their obligations in security clearance investigations or adjudications.

In this case, Applicant claims that he sought the advice of a local district attorney. A local district attorney clearly is not an agent of the Executive Branch of the federal government. Furthermore, a local district attorney does not have actual or implied authority to give advice or guidance to applicants about answering or responding to questions pertaining to a security clearance investigation or adjudication. Indeed, the Administrative Judge specifically noted that Applicant's reliance on the advice of the district attorney was misplaced. *See Judge's Decision* at p. 8. Misplaced reliance on the advice of an unauthorized person clearly falls outside the scope of the plain language of Personal Conduct Mitigating Condition 4. Accordingly, it was arbitrary and capricious for the Administrative Judge to conclude that Applicant was entitled to application of Personal Conduct Mitigating Condition 4.

The Administrative Judge's resort to an analogy to the refusal to cooperate situation (covered by another Personal Conduct Mitigating Condition) was flawed for at least two reasons. First, the plain language of Personal Conduct Mitigating Condition 4 cannot be ignored or changed. Nothing in the record of this case justified the Judge's decision to apply only part of Personal Conduct Mitigating Condition 4 by appeal to analogy. Second, the Judge's expressed dissatisfaction with the limits of Personal Conduct Mitigating Condition 4 is irrelevant. It is the responsibility of duly authorized officials of the Department of Defense to modify or amend the provisions of the Adjudicative Guidelines through appropriate channels. A DOHA proceeding is not an appropriate vehicle for making such modifications or amendments.

2. Whether the Administrative Judge's favorable security clearance decision should be reversed. Department Counsel contends the Administrative Judge's error warrant reversal of the Judge's favorable security clearance decision.

In the case before us, the Administrative Judge's erroneous finding that Personal Conduct Mitigating Condition 4 was applicable is outcome determinative. Personal Conduct Mitigating Condition 4 was the only mitigating condition the Judge explicitly analyzed in her conclusions. Since the Judge relied primarily on Personal Conduct Mitigating Condition 4 to make her favorable decision, the inapplicability of Personal Conduct Mitigating Condition 4 to this case leaves the Judge's favorable decision unsustainable.

Conclusion

Department Counsel has met its burden of demonstrating error that warrants reversal. Accordingly, the Board reverses the Administrative Judge's March 28, 2002 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. "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."