

DATE: October 25, 2001

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-06166

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Kathryn A. Trowbridge, Esq., Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge John R. Erck issued a decision, dated July 18, 2001, in which he 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 applying certain Personal Conduct Mitigating Conditions; 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 March 21, 2001. The SOR was based on Guideline E (Personal Conduct) and Guideline H (Drug Involvement). A hearing was held on May 30, 2001.

The Administrative Judge issued a decision, dated July 18, 2001, in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Department Counsel appealed the Judge's favorable 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 entered a formal finding in favor of Applicant with respect to the SOR paragraph alleged under Guideline H. That favorable formal finding has not been challenged by Department Counsel and, therefore, it is not at issue on appeal.

1. Whether the Administrative Judge erred by applying certain Personal Conduct Mitigating Conditions. The Administrative Judge found the following: (a) Applicant falsified a security questionnaire he completed in May 1999 by denying any involvement with illegal drugs; (b) in January 2000, Applicant was interviewed by a Special Agent of the Defense Security Service; (c) during that interview, Applicant initially was not truthful with the Special Agent about his involvement with illegal drugs; (d) after the Special Agent confronted Applicant with suspicions about possible marijuana use provided to the Special Agent by a neighbor, Applicant admitted one-time use of marijuana in Spring 1999; (e) upon further questioning by the Special Agent, Applicant disclosed his marijuana use while attending college; and (f) Applicant expressed regret about falsifying the security questionnaire and initially not being truthful with the Special Agent during the interview. The Judge concluded the facts and circumstances of Applicant's case warranted application of Personal Conduct Mitigating Condition 2⁽¹⁾ and Personal Conduct Mitigating Condition 3, ⁽²⁾ even though Applicant did not completely satisfy either mitigating condition, because Applicant had disclosed his marijuana use to the Special Agent during the January 2000 interview. Department Counsel challenges the Administrative Judge's application of Personal Conduct Mitigating Conditions 2 and 3.

(a) Personal Conduct Mitigating Condition 2. Department Counsel argues: (i) the Administrative Judge's application of Personal Conduct Mitigating Condition 2 is contrary to prior Board decisions that hold it is not applicable to situations involving circumstances such as Applicant's; and (ii) even if Personal Conduct Mitigating Condition 2 could be considered in connection with Applicant's case, the particular facts of Applicant's case would not support its application.

(a)(i) Prior Board decisions have discussed the meaning of Personal Conduct Mitigating Condition 2 and held that it should not be applied when the facts and circumstances of an applicant's case should be considered under the terms of Personal Conduct Mitigating Condition 3. *See, e.g.*, ISCR Case No. 99-0582 (November 12, 1999) at p. 7; ISCR Case No. 99-0557 (July 10, 2000) at p. 4; ISCR Case No. 97-0595 (May 22, 1998) at p. 4; ISCR Case No. 97-0289 (January 22, 1998) at p. 3. Applicant's case involves correction of a falsification, which calls for consideration of Personal Conduct Mitigating Condition 3, not Personal Conduct Mitigating Condition 2. Accordingly, the Judge erred by applying Personal Conduct Mitigating Condition 2.

(a)(ii) Because resolution of Department Counsel's primary argument is dispositive, the Board need not address Department Counsel's alternative argument concerning Personal Conduct Mitigating Condition 2.

(b) Personal Conduct Mitigating Condition 3. Department Counsel contends the Administrative Judge erred by applying Personal Conduct Mitigating Condition 3. In support of this contention, Department Counsel argues: (i) the Judge erred by finding Applicant provided information about his drug use before he was confronted with the facts; and (ii) the Judge erred by concluding Applicant's disclosures to the Special Agent at the January 2000 interview were prompt, good-faith disclosures. Department Counsel's arguments are persuasive.

Given the record evidence in this case, it was arbitrary and capricious for the Administrative Judge to find that Applicant provided information about his drug abuse before the Special Agent confronted him with the facts. At the

beginning of the January 2000 interview, Applicant sought to conceal his past involvement with marijuana. Applicant did not disclose his past involvement with marijuana until the Special Agent told Applicant that the Special Agent had developed information during the investigation that indicated otherwise. Merely because the information the Special Agent had developed during his investigation of Applicant was not definitive or conclusive does not change the sequence of events or the significance of Applicant's effort to conceal his past involvement with marijuana. *See, e.g.*, ISCR Case No. 99-0417 (February 24, 2000) at pp. 3-4 (case where applicant did not disclose his drug abuse history until he was faced with an allegation by his ex-wife that he had used illegal drugs in the past). The Judge's characterization of the investigative lead relied on by the Special Agent to confront Applicant at the January 2001 interview as "only a suspicion" rather than a fact reflects an artificial, hypertechnical approach to the case that runs contrary to the requirement that "[e]ach clearance decision must be a . . . common sense determination." Directive, Section 6.3. Given the record evidence in this case, it is clear that at the beginning of the January 2000 interview Applicant was trying to conceal from the government his past involvement with marijuana use and did not begin to disclose it until the Special Agent let Applicant know that the Special Agent had developed information contrary to Applicant's denial of any involvement with marijuana. Such a sequence of events does not constitute a correction of a falsification before being confronted.

Furthermore, Applicant's disclosures were not made in a prompt, good-faith manner. Applicant concealed his involvement with marijuana when he completed a security questionnaire in May 1999. Applicant made no effort to correct his falsification after the security questionnaire was submitted. Instead, Applicant passively waited until he was contacted by a Special Agent and an interview set up. Even then, Applicant made no effort to correct his earlier falsification. At the beginning of the January 2000 interview, Applicant again sought to conceal his involvement with marijuana by denying he had ever used marijuana. Applicant did not disclose his involvement with marijuana until the Special Agent told Applicant that the Special Agent had developed information during the investigation that was contrary to Applicant's denial of any marijuana use. And even then, Applicant made an incomplete and misleading disclosure about the extent of his marijuana use until the Special Agent pressed him with further questions. Considering the record as a whole, it is untenable for the Judge to conclude Applicant's belated, piecemeal disclosures constituted "prompt, good-faith efforts to correct the falsification." *See, e.g.*, ISCR Case No. 99-0201 (October 12, 1999) at pp. 3-4 (discussing what constitutes "prompt, good-faith" disclosure under Personal Conduct Mitigating Condition 3). Given the record evidence in this case, the Judge had no rational basis for applying Personal Conduct Mitigating Condition 3 in this case.

2. Whether the Administrative Judge's favorable security clearance decision should be reversed. Department Counsel contends the totality of the Administrative Judge's errors warrants reversal. In the alternative, Department Counsel contends the Judge's errors warrant remand of the case to the Judge for issuance of a new decision after correction of his errors.

The Administrative Judge found that Applicant falsified a security questionnaire in May 1999 and sought to conceal his past marijuana use at the beginning of the May 2000 interview. Those findings are supported amply by the record evidence. Given those findings, the Judge had to articulate a rational basis for concluding why Applicant's proven falsifications did not warrant an adverse security clearance decision. As discussed earlier in this decision, the Judge erred by applying Personal Conduct Mitigating Conditions 2 and 3. Furthermore, the Judge's articulated reasons for making a favorable security clearance decision are not sustainable because they lack a satisfactory explanation and do not have a rational connection with the record evidence. *See, e.g.*, ISCR Case No. 99-0228 (March 12, 2001) at p. 5 (discussing arbitrary and capricious standard). Accordingly, there is no basis for the Board to affirm the Judge's favorable decision.

Conclusion

Department Counsel has demonstrated the Administrative Judge committed error that warrants reversal. Accordingly, pursuant to Item E3.1.33.3 of the Directive's Additional Procedural Guidance the Board reverses the Judge's July 18, 2001 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 falsification was an isolated incident, was not recent, and the individual has subsequently provided information voluntarily."
2. "The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts."