

DATE: July 3, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-06270

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Administrative Judge Joseph Testan issued a decision, dated February 19, 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. 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 certain factual findings; and (2) whether the Administrative Judge erred by making an adverse security clearance decision.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated September 17, 2001. The SOR was based on Guideline J (Criminal Conduct) and Guideline E (Personal Conduct). A hearing was held on January 9, 2002.

The Administrative Judge issued a written decision, dated February 19, 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 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

1. Whether the Administrative Judge erred with respect to certain factual findings. On appeal, Applicant challenges the Administrative Judge's findings concerning falsification and one of the Judge's findings about his past criminal history.

(a) Falsification. The Administrative Judge found that Applicant falsified a security questionnaire in November 1998 by: (a) not disclosing that he had been arrested or charged in March 1994, September 1994, and April 1998; and (b) not disclosing that he had used crystal methamphetamine as late as 1993. The Judge specifically considered Applicant's explanations for his failure to disclose that information, assessed the credibility of Applicant's testimony, and concluded Applicant's explanations were not credible. On appeal, Applicant argues he did not intentionally omit or falsify information, and that he had various reasons for completing the security questionnaire the way he did. For the reasons that follow, the Board concludes Applicant has failed to demonstrate the Judge erred.

During the proceedings below, Applicant denied any intent to falsify the security questionnaire he completed in November 1998. Applicant's statements about his intent or state of mind were relevant and material evidence, but they were not binding on the Administrative Judge. The Judge had to consider and weigh the written and testimonial statements made by Applicant concerning his intent or state of mind in light of the record evidence as a whole, as well as the Judge's assessment of the credibility of Applicant's hearing testimony. *See, e.g.,* ISCR Case No. 00-0044 (December 22, 2000) at p. 3. Considering the record as a whole, it was not arbitrary, capricious, or contrary to law for the Judge to reject Applicant's explanations and conclude that Applicant had intentionally tried to conceal the full extent of his criminal record, as well as his use of crystal methamphetamine as late as 1993. Applicant's appeal arguments fail to persuade the Board that the Judge weighed the record evidence in a manner that is arbitrary, capricious, or contrary to law, or that the Judge's findings of falsification are not sustainable on the record evidence in this case. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1 (setting forth Board's standard for reviewing a Judge's factual findings).

(b) Applicant's criminal history. The Administrative Judge found Applicant "has a long history of criminal conduct" that began in 1988 and continued to November 1998. On appeal, Applicant does not challenge most of the Judge's findings about his past criminal conduct. However, Applicant argues: (i) the 1998 incident involved a false accusation made against him by the alleged victim; (ii) the criminal charge against him was dropped; and (iii) his criminal history only covers the period 1988-1994. The Board construes Applicant's arguments as raising the issue of whether the Judge erred by finding Applicant's criminal history continued to November 1998.

In a security clearance adjudication, an Administrative Judge can find that an applicant has engaged in criminal conduct even if the criminal charges were dropped. *See, e.g.,* ISCR Case No. 99-0119 (September 13, 1999) at p. 2 ("[T]he fact that criminal charges were dropped, dismissed, or resulted in an acquittal does not preclude an Administrative Judge from finding an applicant engaged in the conduct underlying those criminal charges."). Considering the record as a whole, the Judge had sufficient evidence to find that the 1998 incident involved criminal conduct by Applicant even though the criminal charge was later dropped. Applicant's arguments fail to demonstrate the Judge erred.

2. Whether the Administrative Judge erred by making an adverse security clearance decision. Applicant also argues: (a) he has changed his life for the better; (b) he has demonstrated his trustworthiness through hard work and changing his lifestyle for the better; (c) he has no intention of "stepping backward from a good life I've worked long and hard to rebuild"; and (d) he would never misuse a security clearance. The Board construes these arguments as raising the issue of whether the Administrative Judge erred by making an adverse security clearance decision.

Applicant's ability to refer to favorable record evidence is not sufficient to demonstrate the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. The Judge must consider the record evidence as a whole, both favorable and unfavorable, and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. Applicant's appeal arguments do not persuade the Board that the Judge weighed the record evidence in this case in a manner that is arbitrary, capricious, or contrary to law.

As discussed earlier in this decision, the Administrative Judge's findings about Applicant's falsification and his past criminal history are sustainable. Those findings provide a rational basis for the Judge's adverse conclusions about Applicant's security eligibility. The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). The federal government need not wait until an applicant actually mishandles or fails to properly safeguard classified information before it can deny or revoke access to such information. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. *See, e.g.*, ISCR Case No. 00-0601 (September 21, 2001) at p. 3. Given the totality of the record evidence in this case, it was not arbitrary, capricious, or contrary to law for the Judge to conclude that Applicant's past criminal record and his falsification of a security questionnaire in November 1998 reflect adversely on his judgment, reliability and trustworthiness and warrant an adverse security clearance decision.

Conclusion

The Board affirms the Administrative Judge's adverse security clearance decision because Applicant has failed to demonstrate error below.

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