

DATE: September 13, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-06870

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esq., Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge John R. Erck issued a decision, dated May 31, 2002, in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Department Counsel 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.

Department Counsel's appeal presents the following issues: (1) whether the Administrative Judge erred by finding Applicant did not falsify a security questionnaire; (2) whether the Administrative Judge erred by applying Personal Conduct Mitigating Condition 1; and (3) whether the Judge's decision should be reversed. For the reasons that follow, the Board reverses the Administrative Judge's decision.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated November 5, 2001. The SOR was based on Guideline E (Personal Conduct) and Guideline J (Criminal Conduct). A hearing was held on May 7, 2002. The Administrative Judge issued a written decision, dated May 31, 2002, in which he 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 of the Administrative 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

On appeal, Department Counsel has not challenged the Administrative Judge's findings and conclusions under Guideline J with respect to the incident covered by SOR paragraph 1.a. Accordingly, the Board will discuss those findings and conclusions only to the extent necessary to address the appeal issues raised by Department Counsel concerning Guideline E. [\(1\)](#)

1. Whether the Administrative Judge erred by finding Applicant did not falsify a security questionnaire. The Administrative Judge found that Applicant did not falsify a security questionnaire by failing to list a June 1998 arrest and conviction for misdemeanor criminal domestic violence on that form. Department Counsel contends the Administrative Judge erred by finding Applicant did not falsify the security questionnaire she completed in August 2000. In support of that contention, Department Counsel argues: (i) Applicant did not provide consistent explanations about her failure to list the 1998 incident on the security questionnaire; (ii) the record as a whole undercuts the Judge's favorable credibility determination; (iii) Applicant's claim that a Defense Security Service Special Agent added language in her written statement without her knowledge "is incredible"; and (iv) the Judge erred by concluding Applicant lacked a motive to falsify.

Applicant's denial that she intended to falsify the security questionnaire was relevant and material evidence that the Administrative Judge had to consider. However, Applicant's denial of an intent to falsify the security questionnaire was not binding on the Judge; rather the Judge had to consider Applicant's denial in light of the record evidence as a whole. A review of the decision below shows the Judge relied heavily on his conclusions that: (a) Applicant was a credible witness; and (b) Applicant gave a consistent explanation for her failure to disclose her 1998 arrest and conviction on a security questionnaire.

Although the Board must give deference to the credibility determinations made by an Administrative Judge (Directive, Additional Procedural Guidance, Item E3.1.32.1), that deference does not immunize credibility determinations from review. *See, e.g.,* ISCR Case No. 99-0710 (March 19, 2001) at p. 4. As the Supreme Court noted in *Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985):

"[T]he trial judge may [not] insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable fact-finder would not credit it. Where such factors are present, the court of appeals may well find clear error even on a finding purportedly based on a credibility determination."

Accordingly, whether to accept an applicant's explanation about a matter cannot simply turn on a Judge's assessment of the applicant's demeanor when the applicant testifies. Thus, the Board must consider whether a Judge's acceptance of an applicant's explanation for his or her conduct is consistent with a reasonable interpretation of the record evidence as a whole. *See, e.g.,* ISCR Case No. 00-0620 (October 19, 2001) at p. 3.

Department Counsel is correct in asserting the record evidence does not support the Administrative Judge's conclusion that Applicant provided a consistent explanation of her completion of the security questionnaire. A review of the record evidence shows Applicant provided several different explanations for her failure to disclose the 1998 incident when she completed the security questionnaire:

- (a) she checked "NO" to question 26 because when she had checked with a local sheriff's department it reported she had no criminal record, and "I was young and stupid and I believed what the background check said" (Answer to SOR; Government Exhibit 2 at p. 3; Hearing Transcript at pp. 20-21);
- (b) "I tried very hard to forget that period of my life" (Hearing Transcript at p. 21);
- (c) she does not know why she did not list the 1998 incident (Hearing Transcript at p. 23);
- (d) she is embarrassed that she did not believe the 1998 incident was on her record (Hearing Transcript at pp. 24-25);
- (e) she checked "NO" to question 26 out of habit (Hearing Transcript at p. 29);
- (f) she did not read the questionnaire carefully (Hearing Transcript at pp. 33, 39-40);
- (g) she did not think when she read the question concerning arrests (Hearing Transcript at p. 39); and
- (h) she did not think about her 1998 arrest and conviction when she filled out the security questionnaire (Hearing Transcript at pp. 46, 48).

Some of Applicant's explanations are similar and could be grouped together as follows: (a) and (d); (b) and (h); and (e), (f) and (g). However, those three groups of explanations are somewhat inconsistent. Furthermore, Applicant's explanation (c) is inconsistent with her proffer of other explanations. Also, Applicant's explanation (h) is contradicted by her testimony that she remembered the 1998 incident when she completed the security questionnaire (Hearing Transcript at p. 38). Given Applicant's various explanations, some of which are inconsistent and one of which is clearly contradicted by her own testimony, it was untenable for the Judge to find Applicant provided a consistent explanation for her completion of the security questionnaire.

Applicant's inconsistent explanations for her failure to disclose the 1998 incident when she completed the security questionnaire seriously undercut the Administrative Judge's favorable credibility determination. Given Applicant's inconsistent explanations for her failure to disclose the 1998 incident, the Judge failed to articulate a rational basis for why he found her to be a credible witness. *See, e.g.*, ISCR Case No. 86-2256 (January 6, 1988) at pp. 2-4, 6 (when there are nontrivial inconsistencies or discrepancies in an applicant's statements and testimony, the Examiner must specifically address them). Considering the record evidence as a whole, the Board concludes the Judge's favorable credibility determination is not sustainable.

Department Counsel's third and fourth arguments should be discussed together. Applicant failed to list her arrest and conviction in her August 2000 security questionnaire. Applicant signed a statement (prepared with the assistance of a special agent) in which she acknowledged that a reason for her failure to list the arrest was "I also thought that I possibly wouldn't get the job as a federal contractor if the arrest was listed." (Applicant initialed every paragraph twice, one set of her initials appear next to the quoted sentence.) As noted earlier in this decision she has presented several alternative inconsistent explanations for this failure. At the hearing Applicant recanted her admission from the signed statement and denied having said or agreed to the language in question. She asserted that the language was added without her knowledge by the special agent. Department Counsel argues that the Administrative Judge erred both by accepting her recantation and by concluding that she lacked a motive to falsify. The Board agrees. The Board reviews a Judge's findings according to the standard requiring them to be "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 the same record." Here the signed and initialed language was a statement against interest, a type of statement with a quantum of intrinsic credibility. Applicant's recantation is uncorroborated except by her other testimony on the same point, which, as noted earlier, is inconsistent and therefore not credible. On this record it is not reasonable to find that the recantation is more credible than the signed, initialed statement against interest. Since the more credible language demonstrates motive for the falsification it was error for the Administrative Judge to conclude that Applicant lacked a motive.

Considering the record evidence as a whole, the Administrative Judge's finding that Applicant did not try to conceal the 1998 incident is not sustainable. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1.

2. Whether the Administrative Judge erred by applying Personal Conduct Mitigating Condition 1. The Administrative Judge applied Personal Conduct Mitigating Condition 1-⁽²⁾ to Applicant's failure to list the 1998 incident in the security questionnaire because "I find Applicant and her account of the events credible." Department Counsel contends the Judge erred in applying Personal Conduct Mitigating Condition 1 because Applicant's 1998 arrest and conviction were material and relevant to her background investigation. Department Counsel's contention is persuasive.

The Board has held that, for purposes of falsification, materiality is not limited to consideration of whether the information involved would result in an adverse security clearance adjudication, but rather also covers information that is relevant to a security clearance investigation. *See, e.g.*, ISCR Case No. 98-0583 (November 18, 1999) at p. 5. Falsification of a security clearance application constitutes violation of 18 U.S.C. §1001, a federal felony. *See United States v. Yermian*, 468 U.S. 63 (1984). The case law concerning 18 U.S.C. §1001 makes clear that materiality is not limited to consideration of whether the information involved would affect a final agency decision. *See, e.g.*, ISCR Case No. 95-0560 (August 16, 1996) at pp 3-4 (citing federal cases); ISCR Case No. 95-0495 (March 22, 1996) at p. 5 (citing federal case); DISCR Case No. 91-0109 (July 1, 1993) at pp. 5-6 (citing federal cases). There is no good reason to apply in security clearance cases a narrower standard of materiality than is applied in criminal prosecutions under 18 U.S.C. §1001. Furthermore, the federal government is entitled to conduct a thorough and complete background investigation of applicants, unimpeded by deliberate falsifications, so that it can obtain information to make a fully informed, reasoned decision about an applicant's security eligibility. *See* ISCR Case No. 94-1159 (December 4, 1995) at pp. 6-7. Without a thorough and complete background investigation, security clearance adjudicators could be hampered in their ability to make reasoned security clearance decisions. Construing materiality to apply only to the final security clearance adjudication fails to recognize the important governmental interest in conducting a complete and thorough background investigation, which is an important predicate for a reasoned security clearance adjudication. A narrow interpretation of materiality that fails to take into account such an important governmental interest runs contrary to the principle that the Directive should be construed and interpreted in a manner that effectuates its purpose of protecting classified information. *See, e.g.*, ISCR Case 97-0783 (August 7, 1998) at p. 4.

It was arbitrary, capricious, and contrary to law for the Administrative Judge to characterize the information Applicant failed to disclose as not relevant or material.

3. Whether the Administrative Judge's decision should be reversed. Department Counsel contends the totality of the Administrative Judge's errors warrants reversal of the Judge's favorable security clearance decision. Considering the record evidence as a whole, the Board concludes Department Counsel's contention is correct.

Conclusion

Department Counsel has met its burden of demonstrating harmful error below. Pursuant to Item E3.1.33.3 of the Directive's Additional Procedural Guidance, the Board reverses the Administrative Judge's favorable security clearance decision.

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

**Separate opinion of Chairman Emilio Jaksetic,
dissenting in part**

I agree with the decision to reverse the Administrative Judge's favorable security clearance decision. I fully concur with the majority decision except for its discussion and resolution of Department Counsel's third and fourth appeal arguments under the first appeal issue.

Department Counsel contends the Administrative Judge erred by accepting Applicant's claim that a Defense Security Service Special Agent added language in her written statement without her knowledge, arguing Applicant's claim "is incredible." There is no rule of law that precludes a Judge from considering testimony from an applicant who seeks to repudiate a portion of a written statement that the applicant signed. *See, e.g.*, DISCR Case No. 93-1234 (May 19, 1995) at p. 6 (although an applicant is not precluded from seeking to explain or retract his earlier statements, the Judge is not bound to accept those explanations or retractions; rather the Judge must consider them in light of the record evidence as a whole). Although I fully concur with the majority opinion's discussion and resolution of Department Counsel's challenge to the Judge's favorable credibility determination of Applicant, I respectfully disagree with its conclusion that the Judge erred by accepting Applicant's recantation. Given the record evidence in this case, Applicant's recantation is suspect. However, given the particular record evidence in this case, I conclude that Department Counsel's argument falls short of demonstrating error by the Judge.

Department Counsel's argument concerning Applicant's motivation is based, in large part, on its argument concerning Applicant's repudiation of a portion of her written statement. To the extent Department Counsel's earlier argument fails to persuade me that the Administrative Judge erred, it lacks persuasive force in connection with Department Counsel's argument concerning Applicant's motivation. However, I note that "motive" and "intent" are separate and distinct. *See, e.g., Black's Law Dictionary, 6th Edition* (West Publishing, 1990) at p. 1014. Accordingly, although evidence that an applicant has a particular motive to falsify may be probative of an intent to falsify for purposes of Guideline E, there is no legal requirement that a particular motive to falsify be established in order to prove an applicant had an intent to falsify. Accordingly, even if a Judge concludes Department Counsel has failed to prove an applicant had a particular motive to falsify, the Judge still must consider whether the record evidence indicates the applicant intended to falsify material facts. In this case, the Judge erred by concluding that if (a) Department Counsel failed to prove Applicant had a specific motive to falsify, then (b) Department Counsel failed to prove Applicant intended to falsify the security questionnaire.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

1. Department Counsel's brief contains a short argument that the Administrative Judge erred by giving undue weight to the fact that Department Counsel did not introduce certain types of evidence. However, Department Counsel's brief fails to articulate how this alleged error has any bearing on its claim that the Judge erred by finding Applicant did not falsify a security questionnaire, or how it relates to the Judge's findings and conclusions under Guideline J.
2. "The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability."