

DATE: February 10, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-07651

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Christopher F.D. Ryder, Esq., Department Counsel

FOR APPLICANT

Stephen C. Glassman, Esq.

Administrative Judge Claude R. Heiny issued an amended decision dated June 27, 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.

This Board has jurisdiction under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive) dated January 2, 1992, as amended.

Applicant's appeal raises the following issues: 1. Whether the Judge failed to consider all the record evidence. 2. Whether the Judge erroneously found that Applicant had falsified security clearance forms regarding circumstances of an employment termination and an instance of 1997 drug use. 3. Whether the Judge gave Applicant's testimony adequate weight. and 4. Whether the Judge failed to apply appropriate mitigating factors. For the reasons discussed below, the Board affirms the Administrative Judge's decision.

Procedural History

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) dated September 19, 2001 to Applicant. The SOR was based on Guideline E (Personal Conduct) and Guideline J (Criminal Conduct). Applicant requested a hearing which was held on March 22, 2002. The Administrative Judge issued a decision dated June 25, 2002. He issued an amended decision dated June 27, 2002 in which he concluded that it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed.

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 also* 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 the same record. 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 Judge failed to consider all the record evidence. Applicant argues on appeal that the Administrative Judge failed to consider all the record evidence. Specifically, Applicant points to the testimony of two witnesses which was never referred to in the Judge's decision. Applicant notes that in the Judge's statement of the case he wrote "The Applicant relied on his own testimony and three exhibits." Applicant interprets the Judge's language to mean that the Judge did not consider the testimony of the two witnesses. There is a rebuttable presumption that a Judge considered all the evidence. Additionally, an Administrative Judge is not required to mention every piece of evidence in his decision. Applicant's appeal argument points to language which, when viewed in isolation, may rebut the presumption. However, the Board has reviewed the testimony of the two witnesses and the whole of the Judge's decision. Some of the background evidence concerning Applicant that is discussed in the Judge's decision derives in part from the testimony of the two witnesses Applicant claims the Judge ignored. On balance, the Board concludes that Applicant has failed to overcome the presumption that the Administrative Judge considered all the record evidence. Even if the Board accepts Applicant's assertion that the Judge ignored the witnesses' testimony, the Board concludes that the witnesses' testimony is not of sufficient weight to diminish the magnitude of Applicant's multiple false official statements on security clearance forms over several years beginning in 1990. Therefore the Board concludes that any failure to consider the testimony on the part of the Administrative Judge would constitute harmless error.

2. Whether the Judge erroneously found that Applicant had falsified security clearance questionnaires regarding circumstances of an employment termination and an instance of 1997 drug use. Applicant argues on appeal that his responses on security clearance questionnaires concerning the circumstances of his termination from the Navy and the circumstances of his contact with cocaine in 1997 were not false, and there was no basis for the Administrative Judge to conclude that Applicant had engaged in falsification when answering the questions. Applicant answered "no" to a question requiring him to disclose instances when he left employment under less than favorable circumstances. Applicant also failed to disclose a 1997 contact with cocaine when answering a question about illegal drug use. The record evidence showed that because of illegal drug use while on active duty, Applicant was facing a show cause hearing that could have resulted in his involuntary discharge from the Navy. Applicant accepted a general discharge from the Navy in lieu of proceeding through the hearing process. In 1997, Applicant was at a social gathering where his hosts, a couple, offered him cocaine. Applicant did not "snort" the cocaine with his hosts, but at one point ran his finger through some cocaine residue on a mirror and then touched his finger to his tongue. On appeal, Applicant argues that the fact that he was discharged from the Navy with a general discharge does not mean that the discharge was granted based on misconduct, and that acceptance of the discharge was done in order to expedite his longstanding request to get out of the service. He also argues that the amount of the substance he ingested during the 1997 incident was too small to be considered "use."

The Board concludes Applicant's arguments lack merit. The Judge's adverse findings and conclusions on both events are sustainable interpretations of the record evidence. The ability of an appealing party to argue for an alternative interpretation of the record evidence does not establish arbitrary or capricious reasoning on the part of the Administrative Judge. Applicant has failed to demonstrate error.

3. Whether the Judge gave Applicant's testimony adequate weight. Applicant cites an extensive passage of his testimony from the hearing which the Board construes as an argument that the quoted passage should have been given great weight in support of mitigating Applicant's falsifications. The Administrative Judge did not conclude that Applicant's falsifications were mitigated. The Judge did cite Applicant's faith and family in the decision, both of which are discussed in the quoted passage. The Board cannot conclude that the quoted passage is of sufficient weight to have

required the Judge to conclude that Applicant's disqualifying conduct was mitigated. Nor does the Board have any basis to conclude that Judge weighed the evidence in an arbitrary and capricious manner. Absent such a conclusion, the Board will not disturb the Judge's weighing of the evidence. Applicant has failed to demonstrate error.

4. Whether the Administrative Judge failed to apply appropriate mitigating factors. Applicant argues that, setting aside the conclusion that his answers concerning the circumstances of the termination of his Navy employment and his 1997 cocaine involvement were false, then his giving of false answers on security clearance questionnaires at other times was remote in time, there was evidence of rehabilitation and there is an overwhelming probability that the conduct will not recur. In the alternative, Applicant argues that, even when his failure to disclose the circumstances of his employment termination and his 1997 drug use are viewed negatively, the "elements in the Directive which mitigate against an adverse decision are met." The Board construes this argument as raising the issue of whether the Judge properly considered mitigating factors.

The Administrative Judge is required to weigh the evidence of record, both favorable and unfavorable, before reaching his ultimate security clearance decision. Absent a showing by Applicant that the Judge weighed the evidence in a manner that was arbitrary, capricious or contrary to law, the Judge's evaluation will not be disturbed on appeal. A review of the totality of the record evidence indicates that the Judge's conclusion that the various mitigating factors did not operate to overcome the government's case is sustainable. Moreover, the Judge listed the applicable mitigating factors in his decision and discussed in some detail why they did not apply. Applicant has failed to proffer an argument on appeal that cites with specificity why the Judge erred in his consideration of the mitigating factors.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating harmful error. The Administrative Judge's decision is affirmed.

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, concurring

On appeal, Applicant contends the Administrative Judge ignored certain record evidence, specifically the testimony of two witnesses who appeared on his behalf at the hearing. Applicant's claim is not frivolous. However, I conclude that Applicant's appeal arguments demonstrate, at most, harmless error by the Judge that does not warrant remand or reversal.

Applicant contends the Administrative Judge did not properly apply the whole person concept because he failed to consider important evidence favorable to Applicant. In support of this contention, Applicant notes that the decision below states "The Applicant relied on his own testimony and three exhibits" (Decision at p. 2), and that the decision below does not refer to or cite the testimony of either of the two witnesses who testified on Applicant's behalf. Applicant's arguments raise a nonfrivolous issue.

There is a rebuttable presumption that an Administrative Judge considered all the evidence unless the Judge specifically states otherwise. Furthermore, Administrative Judges have broad latitude and discretion in how they write their decisions, and there is no requirement that a Judge specifically cite and discuss each and every piece of record evidence. The ability of an appealing party to point to favorable evidence not cited or discussed by a Judge, standing alone, is not sufficient to overcome the rebuttable presumption that the Judge considered all the evidence. *See, e.g.*, ISCR Case No. 00-0621 (January 30, 2002) at p. 3. However, Applicant's appeal contention goes beyond pointing to the Judge's failure to cite or discuss the testimony of Applicant's two witnesses and identifies an erroneous characterization of Applicant's evidence in the decision below. Given the erroneous characterization of Applicant's evidence in the decision, the Judge's failure to cite or discuss the testimony of Applicant's two witnesses takes on added significance.

Assuming, solely for the purposes of deciding this appeal, that the Administrative Judge erred by failing to cite or discuss the testimony of Applicant's two witnesses, would such error warrant remand or reversal? Error is harmless if: (1) there is not a significant chance that, but for the error, the Judge would have reached a different result; or (2) there is not a significant chance that the error fatally affects an otherwise sustainable decision. *See* ISCR Case No. 00-0250 (July 11, 2001) at p. 6. Under that standard, the Judge's failure to cite or discuss the testimony of Applicant's two witnesses would be harmless error in this case.

The Administrative Judge found that Applicant engaged in deliberate falsifications on six separate occasions: in September 1990 (SOR 1.a); in October 1995 (SOR 1.b); in November 1997 (SOR 1.c); in April 1998 (SOR 1.d); in October 1999 (SOR 1.e and SOR 1.f); and March 2000 (SOR 1.g). The Judge's findings of falsification on those six occasions reflect a reasonable interpretation of the record evidence and are sustainable. To the extent Applicant challenges some of the Judge's findings of falsification, his appeal arguments are not persuasive.

Given the Administrative Judge's sustainable findings that Applicant engaged in deliberate falsification on six separate occasions during the period 1990-2000, it is highly unlikely that remanding the case to the Judge with instructions to explicitly discuss the testimony of Applicant's wife and the President of Applicant's employer would result in a favorable decision. Even if the Judge were to accept the testimony of both those witnesses as sincere, credible, and truthful, their testimony did not undercut or undermine the Judge's findings of Applicant's multiple acts of falsification. Furthermore, the testimony of those two witnesses does not really support Applicant's contention that the two witnesses helped establish that his "prior misdeeds are remote from all foreseeable future conduct." Applicant's contention is arguable with respect to his past use of cocaine, but it is not arguable with respect to his multiple acts of falsifications, which the Judge found occurred as late as March 2000. Since the Judge based his adverse decision on Applicant's multiple acts of falsification, not Applicant's past cocaine use, Applicant's contention on this point fails to show harmful error by the Judge. Moreover, to the extent Applicant cites the testimony of the two witnesses as demonstrating his "moral and religious reformation and his dedication to family and community," the favorable nature of their testimony cannot be considered in isolation from the record evidence that Applicant engaged in multiple acts of falsification, including acts of falsification during the period of his moral and religious reformation and his dedication to family and community.

For all these reasons, no useful purpose would be served by remanding the case to the Judge with instructions to issue a new decision in which he specifically discussed the testimony of Applicant's two witnesses.

I concur with my colleagues' conclusions that Applicant's other appeal arguments fail to demonstrate error below.

For all the foregoing reasons, I concur with my colleagues' determination to affirm the Administrative Judge's adverse security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board