

DATE: March 21, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-08227

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Administrative Judge Burt Smith issued a decision, dated October 30, 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 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 certain findings of fact made by the Administrative Judge were erroneous; and (2) whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. For the reasons that follow, the Board affirms the Administrative Judge's decision.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) to Applicant dated November 1, 2001. The SOR was based on Guideline F (Financial Considerations), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct).

Applicant submitted an answer to the SOR, in which he stated that he wished to have a decision without a hearing. A File of Relevant Material (FORM) was prepared. A copy of the FORM was given to Applicant, who submitted a response to it. The case was then assigned to the Administrative Judge for disposition.

The Administrative Judge issued a written decision, dated October 30, 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 unfavorable 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 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⁾

1. Whether certain findings of fact made by the Administrative Judge were erroneous. Applicant was lawfully receiving unemployment benefits in 1995. Then, for a four-month period beginning in 1995 and extending into 1996, Applicant continued to receive unemployment benefits despite the fact that he had secured a new job. In 1997 he was prosecuted for his failure to report his new job earnings to the state and was required to make restitution in the amount of \$4,020. The Administrative Judge concluded that as a result of this, Applicant should not be granted a security clearance. Without denying the essential facts of his criminal misconduct and the resulting conviction, Applicant takes issue with some of the Administrative Judge's findings of fact. Specifically, he asserts: (a) he was convicted of misdemeanor falsification, which was not a "fraud conviction" as stated in the Judge's findings; (b) he was not divorced at the time he decided not to report his earnings from his new job; (c) the finding that he made restitution in the amount of \$3,000 at the time of his court appearance was erroneous in that he actually made the \$3,000 payment in advance of the court date in an attempt to get the state to drop the charge; and (d) while the Judge's decision states that Applicant is employed as an engineering technician, he is actually a senior/lead systems analyst.

Applicant is correct in his assertion that the precise criminal charge against him was termed "falsification."⁽²⁾ The Judge does not use the term "falsification" in his decision but instead refers to Applicant's conduct generally as "fraudulent deception," "fraud," and "theft." When using these terms the Administrative Judge was not making specific reference to what Applicant had been charged with by the state, but rather was characterizing the nature of Applicant's criminal conduct. Those characterizations are adequately supported by record evidence of Applicant making false representations as to his income and illegally receiving state funds as a result. Also, as the Administrative Judge specifically noted in his decision, Applicant admitted in his answer the allegation made in SOR subparagraphs 1.k. and 2.a. of the SOR, wherein the government alleged he fraudulently received overpayments and he was required to commit no further acts relating to fraud or theft for five years. A court document in the case file also makes reference to Applicant's "fraud overpayment."⁽³⁾ Applicant has failed to demonstrate error on the part of the Administrative Judge.

On appeal, Applicant takes issue with the Judge's finding that Applicant's periods of unemployment followed his divorce. He asserts that the periods of unemployment (which resulted from hospitalizations) took place while he was still married. However, there is evidence in the record from which the Judge could reasonably find that Applicant's hospitalizations and resulting periods of unemployment post-dated his divorce.⁽⁴⁾ Moreover, the Applicant fails to articulate how any error on the part of the Judge regarding this sequence of events could result in undue prejudice or materially affect the outcome of the case.

Applicant takes issue with the Judge's finding that he made partial restitution in the amount of \$3,000 (applied toward a total debt of \$4,020 that resulted from his falsifications of his income) when he was convicted. Applicant insists he made a payment of \$1,020 shortly after he became aware that the state unemployment agency had discovered his dishonesty, and he paid the balance of \$3,000 prior to his court date and conviction. His statement on appeal that he paid the \$1,020 first is nowhere corroborated in the record. It is therefore new evidence that was not before the Judge and which the Board cannot consider on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Regarding the broader issue of precisely when restitution was made by Applicant, the record evidence lends some support to

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Applicant's contention on appeal that he had made full restitution prior to his court date. However, the record evidence is vague on the point. In the absence of documentary evidence (other than representations by Applicant) substantiating the time and amount of restitution payments, the Judge found that Applicant had paid the \$3000 by the time of his conviction and that he had paid the additional \$1,020 at some unspecified time. Given the state of the record evidence, the Judge's findings are supportable. Also, even if the Board were to assume the Judge erred on the timing of restitution payments, Applicant has failed to articulate how such an error resulted in undue prejudice or adversely affected the outcome of the case. The Administrative Judge found that Applicant had made full restitution, and the timing such restitution was made is not critical to the Judge's adverse conclusions under Guideline J.

There is record evidence to support Applicant's claim that he is a senior systems analyst.⁽⁶⁾ There is also record evidence indicating Applicant was at one time an engineering technician.⁽⁷⁾ As the more recent evidence establishes that Applicant is a senior systems analyst, the Judge's finding is in error. However, as was the case with the two previous assertions of factual error, Applicant fails to articulate why the error prejudices him in any meaningful way. The Judge's finding as to Applicant's position title has little bearing, if any, on the Judge's security clearance decision. Applicant fails to establish harmful error.

2. Whether the Administrative Judge's adverse security clearance decision was arbitrary, capricious, or contrary to law.

On appeal Applicant asserts: (a) he always intended to return the money he obtained illegally; (b) after his 1997 conviction he was able to overcome a subsequent period of financial difficulty without resorting to illegal or unethical behavior; (c) he has received job promotions and his employer thinks highly of his work; and (d) he has grown immensely as a person since his conviction and he will continue to rehabilitate himself. The Board construes these various representations as an assertion that the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

Security clearance decisions are not an exact science, but rather involve predictive judgments about a person's security eligibility based on consideration of the person's past conduct and present circumstances. *Department of Navy v. Egan*, 484 U.S. 518, 528-529 (1988). The Administrative Judge is responsible for considering and weighing the record evidence, both favorable and unfavorable, when making his ultimate security clearance decision. In this case, notwithstanding the favorable evidence cited by Applicant, his 1997 conviction for falsification, which involved the unwarranted obtaining of government benefits by fraudulent means, provides a sufficient basis for the Administrative Judge's adverse conclusions about Applicant's security eligibility. The Judge's conclusion that Applicant's criminal conduct has not been mitigated is sustainable on the record in this case. Therefore, the Judge's adverse security clearance decision is not arbitrary, capricious, or contrary to law.

Conclusion

Applicant has failed to demonstrate error below that warrants remand or reversal. Therefore, the Board affirms the Administrative Judge's adverse security clearance 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 Administrative Judge made formal findings favorable to Applicant concerning all allegations under SOR Paragraph 1 (Financial Considerations) and SOR Paragraph 3 (Personal Conduct). Those favorable findings are not at issue on appeal. Accordingly, the Board need not address comments made in Applicant's appeal brief concerning his past financial difficulties.
2. *See* FORM, Item 9.
3. *See* FORM, Item 9.
4. *See* Applicant's July 19, 2002 cover letter to his submission in response to the FORM. *See also* FORM, Item 3.
5. *See* FORM, Items 5 and 9.
6. *See* Applicant's July 19, 2002 submission in response to the SOR.
7. *See* FORM, Item 4.