

DATE: January 16, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-08892

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Administrative Judge Kathryn Moen Braeman issued a decision dated September 3, 2002 in which she concluded that it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed.

The 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 issue of whether the Administrative Judge's adverse 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 February 19, 2002. The SOR was based on Guideline E (Personal Conduct) and Guideline J (Criminal Conduct). A hearing was held on May 6, 2002.

The Administrative Judge issued a written decision dated September 3, 2002 in which she 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 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 Issue

On appeal, Applicant makes representations concerning why he failed to disclose on a security clearance questionnaire his alleged misconduct while he was a police officer. Specifically, Applicant asserts: (a) after the criminal case against him was dismissed, he felt he was free to pick up his life, move on, and seek employment opportunities; (b) the federal forms he filled out left a lot to interpretation and he made the best decision on how to answer each question with the information he had at his disposal; and (c) he gave truthful answers based on his understanding of his legal situation. In addition to these explanations as to why he answered the security clearance questionnaire the way he did, Applicant also asserts: (d) the police department that employed him never provided him with copies of the adverse information against him and he did not know about the derogatory information until the DOHA hearing discovery process, after which he objected to its admission before the Administrative Judge; (e) he was denied due process by the police department because of the length of time it took the department to process his case; and (f) the Administrative Judge concluded that the underlying misconduct was mitigated. The Board construes these various assertions by Applicant as raising the issue of whether the Judge's adverse security decision is arbitrary, capricious, or contrary to law.

Some of Applicant's assertions on appeal concerning the police department that employed him go beyond the record evidence below. As such, they constitute new evidence, which the Board cannot consider on appeal.

Applicant's assertions concerning why he filled out the security clearance questionnaire the way he did fail to demonstrate the Administrative Judge erred. The Judge is responsible for weighing the record evidence. At the hearing she was presented with evidence that Applicant, while a police officer, came under investigation for an incident that occurred while he was off duty. Department Counsel produced evidence indicating that as a result of this incident Applicant was investigated, indicted (the indictment was eventually dismissed), given notice that he would be removed from the police force, and later named as a defendant in a civil action. The evidence also showed that when filling out his security clearance questionnaire, Applicant did not report the incident or the various repercussions it had caused him. He answered "No" to all questions involving criminal involvements, adverse employment actions and civil law suits. The Judge also heard Applicant's explanations concerning why he filled out the security clearance questionnaire the way he did. Absent a showing that the Judge weighed the evidence as a whole in a manner that is arbitrary or capricious, the Board will not disturb the Judge's findings of fact. The Judge considered Applicant's explanations about his various "No" answers on the security clearance questionnaire and she found his explanations unconvincing. An applicant's denial of any intent to falsify does not preclude the Judge from making a finding of falsification. *See, e.g.*, ISCR Case No. 99-0194 (February 29, 2000) at p. 3. Here, there is sufficient record evidence to sustain the Judge's finding of falsification.

Applicant's remaining arguments contain statements that challenge the actions of his former employer, the police department, and to a lesser extent, the prosecutor's office and the criminal court. Neither the Board nor the Hearing Office Administrative Judges have jurisdiction or authority over the actions of police department personnel, or the actions of persons assigned to prosecutor's offices or courts. Accordingly, the Board cannot consider the actions of such personnel. Furthermore, the actions or inactions of the police department, the prosecutor's office, and the criminal court have no bearing on whether Applicant falsified the security clearance questionnaire.

On a related point, Applicant's appeal brief can be construed as raising an objection to the Administrative Judge's admission of documentary evidence obtained from the police department and the criminal court. Notwithstanding Applicant's claim that he was denied due process or was otherwise treated unfairly by these entities, he fails to establish a connection between his concerns and the admission of documents by the Judge. At the hearing below, Applicant's

objections to the documentary evidence appeared to have been based on his surprise and discomfort at having to confront documents that involved matters he considered long closed and his previous unfamiliarity with certain police documents. ⁽⁴⁾ None of Applicant's objections to the documentary evidence demonstrate that the Judge erred in admitting them or giving them weight when considering the record evidence.

At the close of his appeal brief, Applicant mentions that the Administrative Judge considered his underlying conduct during the off-duty incident and found that such conduct had been mitigated under Guideline J. Such a finding by the Judge does nothing to undercut her separate finding that Applicant willfully falsified his answers to the security clearance questionnaire. Applicant's ability to point to a favorable ruling by the Administrative Judge regarding a different aspect of the case fails to demonstrate the Judge's adverse decision is arbitrary, capricious, or contrary to law.

Conclusion

Applicant has failed to meet his burden of demonstrating error in the Administrative Judge's September 3, 2002 decision. Accordingly, that decision is affirmed.

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. Applicant did not claim that he had not been afforded the opportunity to review the documents prior to the hearing. The record indicates that Department Counsel provided Applicant with copies of the government's documentary evidence in advance of the hearing (*See* Hearing Transcript at pp. 10, 17).