

DATE: March 7, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-08565

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Marc E. Curry, Esq., Department Counsel

FOR APPLICANT

William R. Merryman, Esq.

Administrative Judge Joseph Testan issued a decision, dated September 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 the Administrative Judge erred by not taking administrative notice of a provision of state law; (2) whether the Administrative Judge erred by finding that Applicant deliberately falsified a security clearance application; and (3) 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 to Applicant a Statement of Reasons (SOR) dated January 31, 2002. The SOR was based on Guideline E (Personal Conduct) and Guideline J (Criminal Conduct). A hearing was held on September 10, 2002.

The Administrative Judge issued a written decision, dated September 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 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 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 the Administrative Judge erred by not taking administrative notice of a provision of state law. On appeal, Applicant contends the Administrative Judge erred by not taking administrative or official notice of a provision of the state penal code for the jurisdiction in which Applicant was arrested and charged with a drug-related offense in 1990. Applicant argues the Judge's failure to do so contributed to his finding that Applicant engaged in deliberate falsification by not disclosing that incident when she completed a security clearance application.

It is legally permissible for an Administrative Judge to take administrative or official notice of any provision of a state statute that may be pertinent to a case, regardless of whether that provision of state law is ultimately dispositive of any issue before the Judge.⁽²⁾ However, if neither party asks the Judge to take administrative or official notice of a provision of state law, any party complaining about the Judge's failure to do so has a heavy burden on appeal of demonstrating the Judge's inaction was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 00-0484 (February 1, 2002) at p. 4.

In this case, neither Applicant nor Department Counsel asked the Administrative Judge to take administrative or official notice of any provision of state law. Furthermore, during the proceedings below, Applicant gave more than one explanation for her failure to disclose the 1990 drug incident when she completed a security clearance application; none of those explanations indicated that Applicant had relied on any provision of state law to justify her not disclosing the 1990 drug incident on the security clearance application. Considering all the circumstances, it was not arbitrary or capricious for the Judge to not take administrative or official notice of the provision of state law relied on by Applicant for the first time on appeal.

2. Whether the Administrative Judge erred by finding that Applicant deliberately falsified a security clearance application. The Administrative Judge found that Applicant deliberately falsified a security clearance application in January 1999 when she did not disclose the fact that she had been arrested and charged with a drug-related offense in August 1990 (SOR subparagraph 1.a). Applicant challenges the Judge's finding of falsification. In support of that challenge, Applicant makes several overlapping arguments: (a) the record evidence does not support the Judge's finding of falsification; (b) the record evidence shows Applicant omitted the 1990 incident based on a good faith belief that negates a finding that she knowingly, willfully, or deliberately lied about or concealed the 1990 incident; and (c) Applicant's explanation for her failure to disclose the 1990 incident "is both reasonable and essentially unchallenged."

Applicant's statements about her state of mind and intent when she completed the security clearance application in January 1999 are relevant and material evidence that the Administrative Judge had to consider. However, those statements were not binding on the Judge; rather, the Judge had to consider Applicant's statements in light of his assessment of her credibility and the record evidence as a whole. Considering the record as a whole, and giving due deference to the Administrative Judge's assessment of Applicant's credibility (Directive, Additional Procedural Guidance, Item E3.1.32.1), the Board concludes the Judge's finding of falsification reflects a reasonable interpretation of the record evidence that is sustainable.

Applicant's ability to argue for an alternate interpretation of the record evidence is not sufficient to demonstrate the Administrative Judge's finding of falsification is erroneous. *See, e.g.*, ISCR Case No. 99-0435 (September 22, 2000) at p. 4. Furthermore, Applicant's citation of a provision of state law on appeal does not demonstrate the Judge's finding of

falsification is erroneous. As noted earlier in this decision, prior to this appeal Applicant did not refer to any provision of state law when explaining her failure to disclose the 1990 incident in response to pertinent questions in the security clearance application. Since there is no record evidence that Applicant relied on that provision of state law when she completed the security clearance application, Applicant cannot reasonably rely on the provision of state law to challenge the Judge's finding of falsification. Applicant's current reliance on a provision of state law has no factual or logical bearing on her state of mind and intent when she completed a security clearance application in January 1999.

3. Whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. The Administrative Judge concluded: (i) Applicant's falsification of a security clearance application in January 1999 constituted a violation of 18 U.S.C. 1001; (ii) Applicant's violation of 18 U.S.C. 1001 was an isolated incident because a drug charge brought against her in 1990 had been dismissed; and (iii) Applicant's falsification of the security clearance application raised sufficient questions about her judgment, reliability, and trustworthiness to warrant an adverse security clearance decision.

On appeal, Applicant argues: (a) a significant amount of time passed between the time DoD received information concerning Applicant's arrest record and the issuance of the SOR; (b) the Judge's finding of falsification is erroneous; (c) even the Judge indicated that the 1990 drug-related incident was isolated and dated and probably not sufficient to warrant an adverse security clearance decision; (d) the Judge concluded that Applicant's violation of 18 U.S.C. 1001 was an isolated incident; and (e) the Judge erred by concluding that Applicant's falsification was recent and that she still was unable or unwilling to acknowledge it. The Board construes these arguments as raising the issue of whether the Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

(a) The Administrative Judge's decision is not rendered arbitrary, capricious, or contrary to law by the passage of time between when DoD received information about Applicant's arrest record and issuance of the SOR. Because the doctrine of laches cannot be invoked against the federal government, it cannot be applied in security clearance cases. *See, e.g.*, ISCR Case No. 00-0030 (September 20, 2001) at pp. 3-4. Furthermore, Applicant fails to articulate how she has been prejudiced in any meaningful way by the passage of time between when DoD received information about her arrest record and issuance of the SOR. Absent a showing of how Applicant was prejudiced in any meaningful way, she cannot rely on the passage of time as a basis for claiming the Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 00-0030 (September 20, 2001) at p. 4 ("[A]bsent a showing of prejudice to an applicant's rights, the mere passage of time in the handling of a case does not constitute error that warrants remand or reversal."). Furthermore, the security significance of Applicant's falsification is not reduced or diminished by the passage of time between when DoD received information about her arrest record and issuance of the SOR. For all these reasons, the Board concludes the passage of time between when DoD received information about Applicant's arrest record and issuance of the SOR does not render the Judge's decision arbitrary, capricious, or contrary to law.

(b) The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. A finding of falsification provides a rational basis for an Administrative Judge to draw adverse conclusions about an applicant's judgment, reliability, and trustworthiness. As discussed earlier in this decision, the Judge's finding of falsification is sustainable. Given that finding, the Judge's adverse conclusions about Applicant's security eligibility are not arbitrary, capricious, or contrary to law.

(c) As Applicant correctly notes, the SOR did not allege her involvement in the 1990 drug-related incident as an independent basis for denying or revoking her access to classified information. Accordingly, the Administrative Judge's statement about the significance of the 1990 drug-related incident was mere dictum that has no real bearing on this case. Furthermore, the Judge based his adverse security clearance decision on his finding that Applicant falsified a security clearance in January 1999. Applicant's act of falsification in 1999 is separate and distinct from her conduct in connection with the 1990 incident. Whatever favorable conclusions the Judge might have reached about the 1990 incident, those conclusions had no bearing on the security significance of Applicant's act of falsification in 1999.

(d) The Administrative Judge's statement about the isolated nature of Applicant's violation of 18 U.S.C. 1001 was made in connection with his decision to apply Criminal Conduct Mitigating Condition 2 ("The crime was an isolated incident"). The Judge's decision to apply that mitigating condition did not preclude him from reaching an overall adverse security clearance decision. The mere presence or absence of any Adjudicative Guidelines disqualifying or

mitigating condition is not solely dispositive of a case. Rather, a Judge must apply pertinent provisions of the Adjudicative Guidelines in light of various considerations, including: the plain meaning of pertinent provisions of the Adjudicative Guidelines; the applicability of pertinent provisions of the Adjudicative Guidelines in terms of other relevant provisions of the Directive; the record evidence as a whole; application of the whole person concept; and the clearly consistent with the national interest standard. *See, e.g.*, ISCR Case No. 01-27371 (February 19, 2003) at pp. 3-4. Under the particular facts of this case, it was not arbitrary, capricious, or contrary to law for the Judge to apply Criminal Conduct Mitigating Condition 2 and still conclude that Applicant's falsification of the security clearance application warranted an adverse security clearance decision.

(e) The Board has declined to make any "bright line" holding as to what constitutes "recent" misconduct. The Board does not need to make such a holding to decide this appeal. Considering the record evidence as a whole, it was not unreasonable for the Administrative Judge to find that "Applicant has given different explanations" for why she did not disclose the 1990 incident when she completed the security clearance application, and to conclude that those different explanations undercut her credibility. Accordingly, it was not arbitrary or capricious for the Judge to conclude Applicant was unable or unwilling to acknowledge her falsification. Given that conclusion, the Judge was not required to draw favorable inferences from the mere passage of time since Applicant's falsification of the security clearance application.

Conclusion

Applicant has failed to demonstrate error below. Accordingly, 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 entered formal findings in favor of Applicant with respect to SOR subparagraphs 1.b and 1.c. Those favorable formal findings are not at issue on appeal.

2. Department Counsel correctly notes that, under the doctrine of federal supremacy, applicable federal law supersedes any state law to the contrary. However, that general legal principle does not automatically foreclose a party from asking an Administrative Judge or the Board to consider a provision of state law that may be pertinent to the case. Until a Judge or the Board examines the pertinent provisions of federal and state law and considers their actual or potential application, it would be premature for the Judge or the Board to conclude that there is a conflict between the provisions of federal and state law that has to be resolved through application of the doctrine of federal supremacy.