

DATE: February 20, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-13894

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Administrative Judge Roger C. Wesley issued a decision, dated October 22, 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 Applicant can submit additional information for consideration in his case; 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 to Applicant a Statement of Reasons (SOR) dated April 16, 2002. The SOR was based on Guideline E (Personal Conduct), Guideline D (Sexual Behavior), and Guideline J (Criminal Conduct). A hearing was held on September 5, 2002. The Administrative Judge issued a written decision, dated October 22, 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 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 Issues

The Administrative Judge entered formal findings in favor of Applicant with respect to all the SOR paragraphs, except SOR paragraph 1.c (which dealt with falsification of a security clearance application). The Judge's favorable formal findings are not at issue on appeal.

1. Whether the Applicant can submit additional information for consideration in his case. On appeal, Applicant indicates that the program in which he is involved is prepared to submit statements of compelling need on his behalf. Applicant's proffer cannot be accepted for two reasons.

First, the Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Because the statements referred to Applicant's appeal brief would go beyond the record before the Administrative Judge, they would constitute new evidence.

Second, Applicant has waived his right to have the proffered statements considered in his case. During the proceedings below, Applicant had the opportunity to submit written and testimonial evidence on his behalf. At the hearing, Applicant did not offer any evidence, either documentary or testimonial, of compelling need. By failing to do so, Applicant waived his right to have such evidence considered in his case.

2. Whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. The Administrative Judge found that Applicant falsified a security clearance application by failing to disclose a 1996 arrest for public indecency which resulted in a conviction, fine, and some court-ordered conditions. The Judge also found that Applicant did not disclose the 1996 arrest until after a Defense Security Service agent confronted him during an interview. The Judge concluded that Applicant had not presented evidence sufficient to mitigate the negative security implications of his falsification of the security clearance application.

On appeal, Applicant does not challenge the Administrative Judge's finding of falsification, but argues: (a) his falsification "was an isolated aberration that would never reoccur"; (b) apart from the falsification, he "has an otherwise unblemished record in both criminal and in security matters"; (c) he has "unique abilities" that are beneficial to DoD's defense efforts; and (d) under the whole person concept, he should be allowed to retain a security clearance. These arguments raise the issue of whether the Judge's adverse decision is arbitrary, capricious, or contrary to law. For the reasons that follow, Applicant's arguments fail to demonstrate the Judge erred.

Applicant's belief that his falsification was an isolated aberration, however sincere, was not binding on the Administrative Judge. The Judge had to make his own assessment as to whether Applicant's conduct was disqualifying and as to whether it had been mitigated. The Judge's conclusions follow rationally from his findings of fact.

Applicant's argument about "an otherwise unblemished record" is not persuasive for two reasons. First, although the Administrative Judge entered formal findings in favor of Applicant with respect to all the SOR paragraphs except SOR paragraph 1.c, the Judge found that Applicant had engaged in multiple acts of public indecency (Decision at p. 3). The record evidence supports that finding and undercuts Applicant's claim that his record is unblemished apart from his falsification of a security clearance application. Second, the absence of any security violations by Applicant does not render the Judge's adverse decision arbitrary, capricious, or contrary to law. The federal government need not wait until an applicant commits a security violation before it can deny or revoke access to classified information. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). *See also Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960)(security requirements include consideration of a person's honesty, judgment, sobriety, and sense of

obligations), *aff'd*, 367 U.S. 886 (1961). Falsification of a security clearance application raises serious questions about an applicant's judgment, reliability, and trustworthiness. *See Harrison v. McNamara*, 228 F. Supp. 406, 408 (D. Conn. 1964)(lying on application for government position requiring a security clearance raises questions as to person's reliability and justifies dismissal) , *aff'd per curiam*, 380 U.S. 261 (1965). Given the Judge's finding that Applicant falsified a security clearance application, the Judge had a rational basis for drawing negative inferences about Applicant's judgment, reliability, and trustworthiness for purposes of evaluating his security eligibility.

During the proceedings below, Applicant did not present evidence concerning his professional abilities. Accordingly, Applicant's statement (in his appeal brief) about his "unique abilities" constitutes new evidence, which the Board cannot consider. However, even if Applicant had presented evidence about his professional abilities during the proceedings below, such evidence would not have the security significance he seems to attribute to it. An applicant's trustworthiness and reliability does not turn on whether the applicant possesses professional abilities. It is entirely possible for: (a) an applicant to be trustworthy and reliable without possessing any professional ability or talent; (b) an applicant to be untrustworthy and unreliable despite possessing a professional ability or talent; or (c) *vice versa*. Furthermore, the negative security implications of falsification do not turn on whether an applicant possesses a professional ability or talent. Accordingly, even if Applicant had presented evidence about his professional abilities, such evidence would not have precluded the Administrative Judge from drawing negative inferences about Applicant's judgment, reliability, and trustworthiness based on his falsification of the security clearance application.

Finally, a review of the decision below persuades the Board that the Administrative Judge considered the record evidence as a whole and reached conclusions about Applicant's security eligibility that are consistent with the whole person concept, as required by the Directive (Section 6.3 and Enclosure 2, Item E2.2.1). Applicant's appeal argument to the contrary is not persuasive.

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