

DATE: October 30, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-16328

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

William Fields, Esq., Department Counsel

FOR APPLICANT

Elizabeth L. Newman, Esq.

Administrative Judge Paul J. Mason issued a decision, dated April 26, 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 issue of whether the Administrative Judge's finding that Applicant engaged in deliberate falsification when completing a personnel security questionnaire 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 July 27, 2001. The SOR was based on Guideline E (Personal Conduct). A hearing was held on February 8, 2002. The Administrative Judge issued a decision, dated April 26, 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, e.g.*, 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 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

Whether the Administrative Judge's finding that the Applicant engaged in deliberate falsification when completing a personnel security questionnaire is arbitrary, capricious, or contrary to law. The Administrative Judge found that Applicant deliberately falsified a personnel security questionnaire by answering "NO" to question 20. ⁽¹⁾ In making that finding, the Judge rejected Applicant's explanations for his "NO" answer, concluding Applicant's explanations were not reasonable in light of the record evidence. Applicant argues on appeal that the Judge's finding that the Applicant engaged in deliberate falsification is not 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 support of this contention, Applicant raises the following specific points: (a) Applicant knew that two possibly inconsistent facts were true, namely that he had been terminated from his employment and that he had been issued a letter from that same employer that suggested he had merely been "laid off" and that declared his eligibility for unemployment compensation; (b) knowing that termination for cause does not confer on an employee eligibility for unemployment compensation, Applicant honestly concluded that with the letter in hand, he could fairly represent that the basis for his termination was something other than being fired for cause; (c) Applicant cannot be found to have engaged in deliberate falsification when he merely restates the reason the employer authorized him to offer to a state office of unemployment compensation; (d) Applicant reasonably relied on the plain language of question 20, which did not cover his situation; (e) when he was asked about the underlying circumstances in subsequent investigations, he provided the details of the underlying circumstances voluntarily; and (f) Applicant's testimony and the testimony of his wife provide direct evidence of Applicant's state of mind. The Board views these arguments as raising the issue of whether or not the Administrative Judge's finding of deliberate falsification is arbitrary, capricious, or contrary to law.

Regarding the falsification allegation, Applicant's basic theory of the case is that, although his company CEO told Applicant he was to receive a termination letter because a customer was dissatisfied with Applicant's performance and management had discovered that Applicant was using company computers to view pornography on the Internet, the contents of the termination letter created a reasonable doubt in Applicant's mind concerning whether he was, in fact, terminated for cause. According to Applicant, the letter provided him with a reasonable basis to conclude that he had merely been laid off, and thus he honestly believed that he could truthfully answer "NO" to question 20 on his personnel security questionnaire.

The first three of Applicant's specific appeal arguments (a, b, and c) may be discussed together as they all involve consideration of the termination letter that Applicant was given on August 11, 1997. All three of Applicant's arguments fail because they are based, in part, on facts not in evidence and because they fail to demonstrate that the Judge's consideration and weighing of the evidence were erroneous.

The Judge was required to consider all the evidence in the case, including matters in addition to the contents of the termination letter, when evaluating Applicant's state of mind at the time he completed his security questionnaire and when evaluating his explanations as to why he answered the questionnaire the way he did. A review of the record and his decision indicate that the Judge met this obligation. The Judge provided a rational explanation for why he concluded that Applicant had been fired, as opposed to merely being laid off, and for why he concluded that Applicant knew he had been fired notwithstanding the contents of the termination letter. The Judge's conclusions in this regard are supported by the record. Applicant's ability to argue for an alternative interpretation of the record evidence does not establish error on the part of the Administrative Judge.

Applicant contends that he reasonably relied on the plain language of question 20 of the questionnaire, and that its language did not cover his situation. He argues that by concluding that Applicant engaged in falsification, the Administrative Judge was, in effect, deciding that OPM (the government agency responsible for formulating the

wording for question 20) should have asked Applicant a different question, and was deciding that Applicant engaged in falsification because he failed to provide information he was not asked to provide. This contention is without merit.

The Applicant is incorrect when he asserts that question 20 did not cover his specific situation. Because question 20 is broadly worded, it can reasonably be interpreted to include those situations where individuals leave employment involuntarily because of unfavorable circumstances. Considering the record evidence as a whole, the Judge had a rational basis for finding Applicant knew the facts and circumstances surrounding his termination in 1997 required a "YES" answer to question 20. The Judge's finding that Applicant engaged in falsification reflects a reasonable interpretation of the record evidence.

Although he does not explicitly argue that the Administrative Judge erred by not applying Personal Conduct Mitigating Condition 3 ⁽²⁾ in his favor, Applicant makes a passing reference to the fact that when he was asked about the underlying circumstances of his termination in a subsequent investigation, he provided the details of those circumstances voluntarily. The Administrative Judge concluded that application of Mitigating Condition 3 was not appropriate given his finding that Applicant was not being honest about why he answered question 20 the way he did and given his finding that Applicant continued to misrepresent some of the underlying circumstances (i.e., the nature and contents of the termination letter) of his termination. The Judge's conclusion regarding Mitigating Condition 3 was reasonable and is sustainable.

Applicant asserts that his testimony and the testimony of his wife provide direct evidence of Applicant's state of mind at the time he filled out the questionnaire. The testimony of Applicant and his wife was certainly evidence that the Judge was required to consider. However, he was not required to accept that evidence as controlling in the case. To the extent that their testimony conflicted with other evidence in the case, the Judge was required to weigh the conflicting evidence and to ultimately evaluate the testimony of Applicant and his wife in light of all the record evidence that fairly detracted from it. After a review of the record evidence and the Judge's decision, the Board concludes that the Judge weighed the conflicting evidence regarding Applicant's state of mind in a manner that was reasonable and not arbitrary or capricious.

Whether the Administrative Judge's unfavorable security clearance decision can be affirmed on alternate grounds. Department Counsel contends the Judge's unfavorable security clearance decision should be affirmed because the Judge's finding of deliberate falsification is sustainable. In the alternative, Department Counsel argues the Judge's adverse decision can be affirmed under Guideline E because Applicant engaged in workplace misconduct that exhibited poor judgment. It is legally permissible for Department Counsel, as the nonappealing party, to ask the Board to affirm the Judge's decision on alternate grounds. *See, e.g.,* ISCR Case No. 00-0484 (February 1, 2002) at p. 5 (nonappealing party can urge affirmance of decision below on basis of any argument supported by the record). Since the Board concludes the Judge's decision can be affirmed based on his finding of deliberate falsification, the Board need not decide whether the Judge's decision can be affirmed on the alternate ground raised by Department Counsel.

Conclusion

Applicant has failed on appeal to meet his burden of demonstrating error. Accordingly, the Board affirms the Administrative Judge's April 26, 2002 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. "**Your Employment Record** - Has any of the following happened to you within the last 10 years?- Fired from job- Quit a job after being told you'd be fired- Left a job by mutual agreement following allegations of misconduct- Left a job by mutual agreement following accusations of unsatisfactory performance- Left a job for other reason under unfavorable circumstances."

2. "The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts."