

DATE: February 28, 2003

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 01-17000

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Peregrine D. Russell-Hunter, Chief Department Counsel

#### **FOR APPLICANT**

*Pro Se*

Administrative Judge Barry M. Sax issued a decision dated November 1, 2002, in which he 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 under Executive order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant appeal presents the following issues 1. Whether the Administrative Judge's findings of fact were reasonable in light of the contrary record evidence; and 2. Whether the Administrative Judge erred by not applying certain mitigating conditions. For the reasons set forth below the Board affirms the Administrative Judge's decision.

### **Procedural History**

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated June 6, 2002. The SOR was based on Guideline J (Criminal Conduct) and Guideline E (Personal Conduct). Applicant requested a determination without a hearing. Department Counsel submitted a File of Relevant Material (FORM). Applicant did not submit a response to the FORM. The Administrative Judge issued a decision dated November 1, 2002 in which he concluded that it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

### **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. Whether the Administrative Judge's findings of fact were reasonable in light of the contrary record evidence.

Applicant argues on appeal that the Administrative Judge's findings that Applicant's failure to report on a security questionnaire his arrests and a conviction constitute deliberate falsifications are unreasonable given Applicant's repeated denials that he intended to deceive the government. Applicant argues those denials and his alternate explanation (that when he prepared the questionnaire he thought his arrest history was too old to be of interest) constitute sufficient contrary evidence to render the Judge's findings unsustainable. The Board disagrees. While Applicant offers a plausible alternate reading of the record, it is not sufficient to invalidate the Judge's findings. The Judge's findings are supported by substantial record evidence. Applicant's explanations of innocent intent are not binding on the Judge. The Judge had to make his own assessment of the record. While the Judge was required to consider Applicant's statements the Judge was not required to find the statements persuasive. The Judge's finding of falsification is sustainable.

2. Whether the Administrative Judge erred by not applying certain mitigating conditions. Applicant cites two mitigating conditions under Guideline E which he believes should have been applied to his case. The two cited conditions are E2.A5.1.3.2 (The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily) and E2.A5.1.3.4 (Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided).

Applicant's reliance on E2.A5.1.3.2 is misplaced. His security questionnaire was dated August 30, 2000. The Board has previously explained that E2.A5.1.3.2 is applicable in circumstances where a falsification is old and an applicant subsequently provides correct information about other matters not covered by the falsification. *See* ISCR Case No. 99-0557 (July 10, 2000) at p. 4. In contrast, in a situation where an applicant seeks to correct a falsification the potentially applicable factor is E2.A5.1.3.3. (The Board notes Applicant makes no claim that E2.A5.1.3.3 applies to his situation). Under the particular facts of this case, it was not arbitrary, capricious, or contrary to law for the Administrative Judge to not apply E2.A5.1.3.2.

Applicant also argues that E2.A5.1.3.4 is applicable to his case. Applicant's argument follows from his claim in answer to the SOR that his false answers were the result of bad advice from a coworker. Even if the Judge had believed Applicant's claim, it would not have met the terms of the mitigating condition which requires that the improper or inadequate advice come from authorized personnel.

### **Conclusion**

Applicant has failed to meet his burden on appeal of demonstrating error in the Administrative Judge's decision. Accordingly, the Board affirms the Judge's 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