

DATE: December 19, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-20700

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Department Counsel

FOR APPLICANT

Barry P. Steinberg, Esq.

Administrative Judge Burt Smith issued a decision, dated May 29, 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. For the reasons set forth below, the Board affirms the decision of the Administrative Judge.

The Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6, dated January 2, 1992, as amended.

Applicant's appeal presents the following issues: (1) whether the Administrative Judge's decision is flawed because it does not indicate what standard of proof is required of Applicant to meet his burden in the case; (2) whether there is sufficient evidence in support of the Administrative Judge's decision; (3) whether the Administrative Judge committed error by not applying Personal Conduct Mitigating Factor 6; (4) whether the Administrative Judge improperly introduced a new element into Question 26 of Applicant's personnel security questionnaire to bolster the government's case; (5) whether the Administrative Judge ignored relevant precedent in deciding this case adverse to Applicant; and (6) whether the DOHA appeal process penalizes the Applicant by extending the time period during which he is precluded from making a subsequent application for a security clearance.

Procedural History

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant dated November 30, 2001. The SOR was based on Personal Conduct (Guideline E) and Sexual Behavior (Guideline D). Applicant submitted an answer to the SOR dated January 3, 2002, in which he requested a hearing. The hearing was held on April 23, 2002. On May 29, 2002, the Administrative Judge issued a decision in which he concluded it was not clearly consistent with the national interest to grant Applicant a security clearance. This case is before the Board on Applicant's appeal of that 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

The Administrative Judge found that when Applicant completed a security clearance questionnaire, he intentionally failed to list a 1996 arrest for solicitation of prostitution the disclosure of which was required by the form. Applicant's theory of the case is that he believed the 1996 arrest was not a matter he was obligated to report because he was told by local authorities "everything would be dropped, discharged. . ." as a result of his participation in a first offender program. (*See* Hearing Transcript at p. 89). Applicant claims he made an honest, reasonable and good faith mistake as to his obligations in filling out the questionnaire. The Administrative Judge's rejection of this theory is the essential subject of Applicant's appeal.

1. Whether the Administrative Judge's decision is flawed because it does not articulate what standard of proof is required of Applicant to meet his burden in the case. Applicant notes that the Administrative Judge stated in his decision, "Any doubt as to whether access to classified information is clearly consistent with the national security will be resolved in favor of the national security." From this the Judge concluded that Applicant's burden was a heavy one. Applicant complains that the decision fails to shed light as to what the burden is. Applicant also asserts that the Directive sheds no light on the problem because "clearly consistent with the national interest" is not a legal standard as it does not establish a logical yardstick against which the evidence can be measured. Applicant's contentions regarding the burden of proof are without merit.

The Directive provides adequate notice to an applicant concerning the burdens of persuasion in security clearance cases. The Directive establishes: (1) "Department Counsel is responsible for presenting witnesses and other evidence to establish facts alleged in the SOR that have been controverted" (Directive, Additional Procedural Guidance, Item E3.1.14); and (2) "The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." (Directive, Additional Procedural Guidance, Item E3.1.15). Longstanding case law developed during the history of the industrial security clearance program has established that Applicant has the ultimate burden, once the government has established a *prima facie* case against him, of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance. *See* ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4. The government's burden to prove its case is one carried by "substantial evidence," which is explained in some detail in prior decisions. *See, e.g.*, ISCR Case No. 93-0386 (April 21, 1994) at p. 4 (burden of proof in industrial security cases is "lower than that of criminal cases"); ISCR Case No. 98-0761 (December 27, 1999) at p. 2 ("[A]n Administrative Judge's findings are reviewed under the substantial evidence standard. . . Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."). Hence, Applicant was on sufficient notice as to the burdens of proof and persuasion applicable to ISCR cases.

The Administrative Judge's decision is not flawed merely because he failed to explicitly mention the substantial evidence standard. The articulation of a standard in his decision was adequate. Moreover, Applicant has failed to articulate how he was harmed by any failure of the Judge to enunciate any more of a standard than he did. A review of the Administrative Judge's decision persuades the Board that the Judge applied the correct legal standard in deciding

whether Applicant had met his burden of persuasion.

2. Whether there is sufficient evidence in support of the Administrative Judge's decision. In asserting that there was insufficient evidence to support the Administrative Judge's finding that Applicant deliberately falsified his security questionnaire, Applicant states the following: (a) Applicant's testimony as to why his failure to disclose the 1996 arrest was truthful and un rebutted by the government; (b) Applicant submitted the testimony of four witnesses and the written statement of one other person, all of whom provided evidence as to Applicant's truthfulness and honesty; and (c) in support of his finding that Applicant lied on his security questionnaire, the Judge relied on speculation that Applicant had a motive to lie and relied on the fact that Applicant had previously failed to disclose the arrest to his wife and others, factors that did not provide an adequate basis for the Judge's finding of falsification.

The record evidence shows that Applicant denied any intent to conceal his criminal record or to mislead the government about it. Applicant's denials of any intent to falsify are relevant evidence as are his explanations for why he did not list the 1996 solicitation arrest. However, this evidence is not conclusive or binding on the Administrative Judge. Rather, the Judge had to consider and weigh Applicant's denials in light of the record evidence as a whole and then make a reasonable finding as to whether Applicant falsified material facts when he completed the security questionnaire. *See, e.g.*, ISCR Case No. 00-0044 (December 22, 2000) at p. 3. Similarly, the Administrative Judge had to consider the favorable evidence offered by Applicant's various character witnesses, but the evidence offered by these witnesses did not mandate a favorable clearance decision. A Judge's weighing of the evidence will not be overturned absent a sufficient demonstration that the Judge acted in a manner that is arbitrary, capricious, or contrary to law. Considering the record as a whole, there is sufficient evidence in this case to sustain the Judge's finding that Applicant falsified material facts by failing to disclose the 1996 arrest on the security questionnaire.

Applicant also claims that the Administrative Judge's decision is based on speculation, makes unsubstantiated conclusions regarding Applicant's motive to falsify, and improperly relies on the fact that Applicant had not revealed the fact of the arrest to his wife and others. The basic issue facing the Judge in this case was the nature of Applicant's state of mind at the time he failed to list the 1996 arrest on the questionnaire. Matters of intent are rarely susceptible to proof by direct evidence. Typically, as in this case, an administrative judge must divine intent from circumstantial evidence. *See, e.g.*, ISCR Case No. 00-0601 (September 21, 2001) at pp. 2-3. Here, the Judge reasoned that a person in Applicant's position as an experienced businessman would have no difficulty understanding the plain meaning of the question regarding arrests. He found that Applicant had an incentive to conceal his arrest from the government because it might have a negative impact on his security clearance. The Judge also found that after Applicant's arrest for solicitation, the fact that Applicant chose to remain wholly silent about it tended to show that he thought disclosure would be harmful to his interests. The Board considers these findings to be based on inferences that were reasonably drawn from the evidence of record.

On appeal as well as below, Applicant has articulated at length his theory as to why he did not intentionally falsify the security questionnaire. It is well established that the ability of one party to interpret the record evidence in a different light than did the Judge is not sufficient to demonstrate error by the Administrative Judge below. *See, e.g.*, ISCR Case No. 99-0435 (September 22, 2000) at p. 4. Applicant's arguments fail to persuade the Board that the Judge weighed the record evidence in a manner that is arbitrary, capricious or contrary to law, or that he reached conclusions that are unsustainable given the record evidence.

3. Whether the Administrative Judge committed error by not applying Personal Conduct Mitigating Condition 6. Applicant argues that the Judge acted arbitrarily by not explaining why he did not apply Personal Conduct Mitigating Condition 6. ⁽¹⁾ In support of this argument Applicant asserts that he was advised by a representative of the local district attorney's office at the time of his participation in a first offender program that the 1996 arrest did not have to be disclosed. He states that he was under the mistaken impression, based on this advice, that he "was not required to comply with security processing requirements."

Applicant's claim with regard to Personal Conduct Mitigating Condition 6 is without merit. The case involves Applicant's falsification of a fully executed security questionnaire and does not involve any failure to cooperate or failure to comply with security processing requirements. On its face, Personal Conduct Mitigating Condition 6 is not applicable to falsification cases. Since Applicant states it was advice from the district attorney's office that caused him to

fill out the security questionnaire the way he did, his argument can be construed as raising the issue of whether or not Personal Conduct Mitigating Condition 4 ⁽²⁾ applies to the case. The Judge's failure to apply that mitigating condition to Applicant's benefit was not error.

Because the phrase "authorized personnel" in Personal Conduct Mitigating Condition 4 appears in the context of giving advice about answering or responding to questions pertaining to a security clearance investigation or adjudication, it must be construed or interpreted as meaning persons authorized to give such advice. Because the Executive Branch of the federal government has constitutional responsibility for protecting and safeguarding classified information, *Department of Navy v. Egan*, 484 U.S. 518, 527-528 (1988), it must be able to do so by acting through its authorized agents, whether they are part of the Executive Branch of the federal government or duly authorized officers or employees of defense contractors. A local district attorney clearly is not an agent of the Executive Branch of the federal government. Furthermore, a local district attorney does not have actual or implied authority to give advice or guidance to applicants about answering or responding to questions pertaining to a security clearance investigation or adjudication. *See, e.g.*, ISCR Case No. 01-05593 (August 5, 2002) at p. 4. Under the facts of this case, Applicant does not qualify for application of Personal Conduct Mitigating Condition 4.

4. Whether the Administrative Judge improperly introduced a new element into Question 26 of Applicant's personnel security questionnaire to bolster the government's case. Applicant notes that in dismissing his explanation of why he did not disclose the 1996 arrest, the Administrative Judge concluded that the instructions on the security questionnaire ". . . make it abundantly clear that adverse information must be provided even if charges were sealed, dropped or otherwise stricken from the record." Pointing out that the word "dropped" does not appear in the instructions for Question 26, Applicant argues that the Judge added criteria to the instructions to his disadvantage.

Applicant's assertion that the Judge was adding criteria by which he was to be judged is without merit. A reading of the Judge's decision as a whole persuades the Board that, when making the statement cited by Applicant, the Judge was offering his interpretation as to the scope and meaning of the instructions to Question 26. That interpretation was reasonable. As another part of the decision contains a verbatim recitation of the Question 26 instructions by the Judge, it is clear that the Judge was well aware of what those instructions actually said. Moreover, there is no indication that the Judge's ultimate finding on the falsification issue was dependent upon his use of the word "dropped" in the passage cited by Applicant.

5. Whether the Administrative Judge ignored relevant precedent in deciding this case adversely to Applicant. Applicant's argument regarding precedent is twofold. First, he argues that the failure of the Administrative Judge to cite any prior judicial or administrative decision in his own decision is a telling indication of the arbitrary and capricious nature of the Judge's ultimate conclusion. Second, he cites four prior decisions in other cases and compares them to his case in support of his assertion that the Judge's ultimate conclusion in this case was erroneous.

Applicant's first argument is without merit. There is no requirement that an Administrative Judge cite to prior DOHA cases when making his findings and conclusions or when reaching his final decision. Security clearance adjudications are individualized determinations where the Administrative Judge is duty bound to apply the law as represented by the Adjudicative Guidelines to the facts of the particular case in keeping with the "whole person" concept. Likewise, Applicant's second argument is not persuasive. His citation to other security clearance decisions as a point in favor of overturning the Judge's decision is misplaced. Although decisions issued by Hearing Office Administrative Judges may be cited as persuasive authority, they are not legally binding on the Administrative Judge in this case or on the Board in any case. *See, e.g.*, ISCR Case No. 98-0761 (December 27, 1999) at p. 4 (discussing precedential value of Administrative Judge decisions). Therefore, the four Administrative Judge decisions cited by Applicant are not dispositive of the merits of his case and they do not establish that the Judge erred.

6. Whether the DOHA appeal process penalizes the Applicant by extending the time period during which he is precluded from making a subsequent application for a security clearance. Applicant contends the appeal process penalizes him by extending the period during which he will be barred from reapplying for a security clearance if the Administrative Judge's adverse decision is affirmed. This contention lacks merit.

Under Directive, Additional Procedural Guidance, Item E3.1.37, "[a]n applicant whose security clearance has been

finally denied or revoked by the DOHA is barred from reapplication for 1 year from the date of the initial unfavorable clearance decision." Since the Administrative Judge's decision in this case was adverse to Applicant, the one-year period runs from the date of the Judge's decision (the initial unfavorable decision), not the date of the Board's decision in this appeal. Accordingly, Applicant's claim of prejudice is groundless.

Conclusion

The Board affirms the Administrative Judge's adverse security clearance decision because Applicant has failed to demonstrate error below.

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. "A refusal to cooperate was based on advice from legal counsel or other officials that the individual was not required to comply with security processing requirements and, upon being made aware of the requirement, fully and truthfully provided the requested information."
2. "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."