

DATE: January 10, 2003

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-20906

**APPEAL BOARD DECISION AND REVERSAL ORDER**

**APPEARANCES**

**FOR GOVERNMENT**

Kathryn D. MacKinnon, Esq., Department Counsel

**FOR APPLICANT**

James R. Klimaski, Esq.

Administrative Judge John R. Erck issued a decision, dated June 18, 2002, in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Department Counsel 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.

Department Counsel's appeal presents the following issues: (1) whether the Administrative Judge erred by finding that Applicant did not falsify a personnel security questionnaire; and (2) whether the Administrative Judge erred by applying Personal Conduct Mitigating Condition 1. For the reasons that follow, the Board reverses the Administrative Judge's decision.

**Procedural History**

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated February 12, 2002. The SOR was based on Guideline B (Foreign Influence), and Guideline E (Personal Conduct).

A hearing was held on May 23, 2002. The Administrative Judge issued a written decision, dated June 18, 2002, in which he: (a) entered formal findings in favor of Applicant with respect to Guideline B and Guideline E; and (b) concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Department Counsel's appeal of the Judge's favorable 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<sup>(1)</sup>

1. Whether the Administrative Judge erred by finding that Applicant did not falsify a personnel security questionnaire. There is no dispute about the following facts: (a) From 1995 to 1997, Applicant worked as an intern at an institute in the United States, and in that capacity he had regular or frequent contacts with foreign military personnel and other representatives of foreign governments; (b) Applicant completed a security questionnaire in July 1998; (c) Applicant answered "NO" to Question 14 on the security questionnaire<sup>(2)</sup>

; and (d) Applicant's "NO" answer to Question 14 was incorrect.

The Administrative Judge found that Applicant's "NO" answer to Question 14 was not a falsification. On appeal, Department Counsel contends the Administrative Judge erred by finding Applicant's answer to Question 14 was not a falsification. In support of this contention, Department Counsel argues the Administrative Judge erred because:

(a) in finding Applicant did not engage in falsification, the Judge relied on a narrow reading of Question 14 that is contrary to its plain language;

(b) in finding that Applicant "erroneously interpreted" Question 14, the Judge acted in an arbitrary and capricious manner because that finding accepts a reading of Question 14 by Applicant that is contrary to its plain language;

(c) the record evidence as a whole does not support the Judge's acceptance of Applicant's assertion that he answered "NO" to Question 14 with innocent intent; and

(d) the Judge's finding is based on applying a standard that allows Applicant to substitute his personal judgment of what is relevant and material information for the judgment of the federal government.

In reply, Applicant responds to Department Counsel's appeal arguments and contends the Board should sustain the Judge's finding that he did not falsify the personnel security questionnaire by answering "NO" to Question 14. For the reasons that follow, the Board concludes Department Counsel's claim of error is persuasive.

Department Counsel persuasively argues that the Administrative Judge acted in an arbitrary and capricious manner by making a finding of no falsification based on a reading of Question 14 that is contrary to its plain language and intent. The Administrative Judge stated that "Question 14 is written to elicit the broadest possible response; the Government wants applicants for security clearance to disclose all contacts with representative[s] of foreign governments, except for those contacts that are specifically identified as being excluded. The Government, not an applicant, is responsible for deciding if there has been a foreign contact that warrants further inquiry" (Decision at p. 8)(emphasis in original). However, the Judge then proceeded to analyze Applicant's "NO" answer to Question 14 and Applicant's explanation for that "NO" answer in terms inconsistent with his characterization about the scope and purpose of Question 14. Specifically, the Judge found Applicant's "NO" answer was not a falsification because: (a) there is no evidence that Applicant had contacts with representatives of foreign governments "that he wanted or needed to conceal in order to be granted a security clearance"; and (b) "Applicant erroneously interpreted [Question 14] as requiring him to report only foreign contacts that were more substantive than the superficial contacts he had while employed at Institute X" (Decision at p. 8). Given the plain language of Question 14, and the government's strong interest in obtaining complete and accurate information to conduct a thorough background investigation of an applicant, the Judge's statement about

the scope and purpose of Question 14 is correct. However, it was arbitrary and capricious for the Judge to evaluate Applicant's "NO" answer to Question 14 and Applicant's explanation for his "NO" answer in a manner contrary to the plain language, scope, and purpose of Question 14.<sup>(3)</sup>

Department Counsel also persuasively argues that, under the reasonable person standard,<sup>(4)</sup>

Applicant knew or should have known that his numerous contacts with representatives of foreign governments while he was an intern required him to answer "YES" to Question 14. The record evidence shows that when Applicant worked as an intern, he had regular or frequent contacts with numerous foreign military personnel and other representatives of foreign governments. Considering the fact that Applicant completed the security questionnaire within a year after he had completed his internship, it is simply not credible for Applicant to claim he believed he did not need to report his

numerous contacts with representatives of foreign governments in response to the plain language of Question 14.<sup>(5)</sup>

Department Counsel also contends the Administrative Judge erred by accepting Applicant's explanation for his "NO" answer to Question 14 because there is record evidence that shows Applicant has a propensity for untruthfulness and deception. In support of this contention, Department Counsel points to the record evidence that shows Applicant was found guilty of academic dishonesty for cheating on an assignment, and he had a history of making illegal, pirated copies of computer software for his personal use. Department Counsel argues that record evidence makes it implausible for the Judge to accept Applicant's claim that he erroneously interpreted Question 14. In reply, Applicant argues the conduct cited by Department Counsel does not prove a pattern of dishonesty that shows Applicant intentionally lied when he answered "NO" to Question 14. The Judge specifically concluded that Applicant's academic dishonesty and his making illegal, pirated copies of computer software "demonstrated questionable judgment, a lack of candor, dishonesty, and an unwillingness to comply with rules and regulations" (Decision at p. 7).<sup>(6)</sup>

However, having reached that adverse conclusion, the Judge appears to have ignored it when making findings and conclusions about Applicant's alleged falsification. Prior dishonest conduct is material and relevant, under the whole person concept, to evaluate whether an applicant's incorrect answer to a question on a security questionnaire was the result of innocent mistake or deliberate falsification. Reading the Judge's decision as a whole, the Board concludes the Judge considered Applicant's conduct in a piecemeal fashion that is inconsistent with the requirements of the Directive. *See, e.g.*, ISCR Case No. 99-0601 (January 30, 2001) at p. 8 ("Under the whole person concept, an Administrative Judge must assess the totality of an applicant's conduct and circumstances in order to evaluate the applicant's security eligibility, not just consider an applicant's conduct and circumstances in a piecemeal manner.").

In arguing that the Administrative Judge's favorable decision should be affirmed, Applicant correctly notes the Administrative Judge also reasoned that Applicant's "NO" answer to Question 14 was not a falsification because "If Applicant had had substantive foreign contacts which were of a security concern, information about them would have surfaced during the earlier interviews when he disclosed cheating in college and copying computer software, or during his recent DoD background investigation" (Decision at p. 8). Applicant's reliance on this reason is misplaced. There is no factual or logical connection between Applicant's intent or state of mind when he answered "NO" to Question 14 and what federal investigators later discovered or failed to discover during their investigation of Applicant. Whether Applicant's answer to Question 14 was the result of innocent mistake or misunderstanding, or the result falsification, turns on Applicant's intent or state of mind when he completed the security questionnaire, not the actions or inactions of the investigators conducting his background investigation. Furthermore, the Judge's statement is arbitrary and capricious because it is inconsistent with the Judge's own characterization of the plain language, scope and purpose of Question 14. Accordingly, the Judge's statement, cited by Applicant on appeal, does not provide a rational basis for the Judge's finding that no falsification occurred.

Applicant also urges the Board to reject Department Counsel's appeal arguments because: (a) Applicant's contacts with foreigners during his internship were superficial and not material; and (b) there is no record evidence that any of Applicant's contacts with foreigners during his internship led to any relationship between Applicant and a foreign national. These arguments are unpersuasive. First, Applicant's arguments run contrary to the plain language, scope and purpose of Question 14. As discussed earlier in this decision, Question 14 is broadly worded and cannot reasonably be interpreted in the narrow manner proposed by Applicant's appeal argument. The Board declines to accept an argument

that would have the practical effect of allowing applicants to justify answering questions on a security questionnaire in a manner that ignores the plain language of those questions and undercuts the federal government's strong interest in obtaining information relevant to a background investigation. Second, Applicant's arguments are based on reasoning that is inconsistent with the broad scope of materiality in security clearance investigations. For purposes of falsification cases, materiality is not limited to information that would result in an adverse security clearance adjudication, but rather also covers information that is relevant to a security clearance investigation. *See, e.g.*, ISCR Case No. 01-06870 (September 13, 2002) at pp. 5-6. Regardless of what an investigation of Applicant's contacts with representatives of foreign governments might produce, the federal government had a strong interest in knowing about those contacts so that it could make reasoned decisions in connection with its background investigation of Applicant and its adjudication of his security eligibility. [\(7\)](#)

2. Whether the Administrative Judge erred by applying Personal Conduct Mitigating Condition 1. The Administrative Judge applied Personal Conduct Mitigating Condition 1 [\(8\)](#)

based on his conclusion that Applicant's "NO" answer to Question 14 "was not a concealment of information pertinent to a determination of Applicant's judgment, trustworthiness, or reliability" (Decision at p. 8). Department Counsel contends the Judge erred because: (a) Personal Conduct Mitigating Condition 1 was not applicable to the facts and circumstances of Applicant's case; and (b) because Applicant's falsification of Question 14 fell under Personal Conduct Disqualifying Condition 2, [\(9\)](#)

the Judge should have considered whether other Personal Conduct Mitigating Conditions were applicable. Applicant contends Department Counsel's argument concerning Personal Conduct Mitigating Condition 1 is wrong because: (i) "nothing in Guideline E dictates which mitigating condition to use against a disqualification"; and (ii) it would be "unjust" to deny an applicant the availability of the defense afforded by Personal Conduct Mitigating Condition 1.

The Board rejects Department Counsel's argument to the extent it suggests that application of Personal Conduct Mitigating Condition 1 can never be appropriate in a case involving an allegation of falsification. Applicant is correct in noting that nothing in the Adjudicative Guidelines specifies how an adjudicator is to decide what mitigating conditions may be applied in a given case to mitigate the negative security implications of disqualifying conditions applicable to the facts and circumstances of an applicant's case. However, the absence of such a specific rule does not leave an adjudicator unfettered discretion in applying the Adjudicative Guidelines for or against clearance. [\(10\)](#)

Rather, an adjudicator must:

(a) evaluate the possible applicability of disqualifying and mitigating conditions under the pertinent Adjudicative Guidelines according to their plain meaning; [\(11\)](#)

(b) assess the applicability of particular disqualifying and mitigating conditions under the pertinent Adjudicative Guidelines in terms of other relevant provisions of the Directive; [\(12\)](#)

(c) apply provisions of the Adjudicative Guidelines in a manner that is consistent with the adjudicator's obligation to render an overall commonsense decision based on consideration of an applicant's security eligibility under the whole person concept; [\(13\)](#)

and

(d) construe and apply provisions of the Adjudicative Guidelines in a manner consonant with the "clearly consistent with the national interest" standard. [\(14\)](#)

Accordingly, the application of Adjudicative Guidelines for or against clearance is not reducible to a simple formula, but rather requires an adjudicator to exercise sound judgment within the parameters set by the Directive when deciding which Adjudicative Guidelines for or against clearance are applicable to a given case.

In this case, the Administrative Judge's application of Personal Conduct Mitigating Condition 1 was arbitrary and capricious because: (i) the falsification allegation was substantiated; and (ii) the information Applicant failed to disclose when he answered "NO" to Question 14 was pertinent to a determination of his judgment, trustworthiness, or reliability. Accordingly, the Board finds persuasive Department Counsel's argument that Personal Conduct Mitigating Condition 1 is not applicable to the facts and circumstances of Applicant's case.

### Conclusion

Department Counsel has demonstrated error below that warrants reversal. Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.3, the Board reverses the Administrative Judge's favorable security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. The Administrative Judge's findings and conclusions under Guideline B are not at issue on appeal.
2. Question 14 reads: "**Your Foreign Activities - Contact with Foreign Government** Have you ever had any contact with a foreign government, its establishments (embassies or consulates), or its representatives, whether inside or outside the U.S., other than on official U.S. Government business? (Does not include routine visa applications and border crossing contacts.)"
3. Applicant's reply to Department Counsel's argument on this point relies on a view of materiality that is not persuasive for reasons stated later in this decision.
4. In security clearance adjudications, an applicant's conduct should be evaluated in terms of the reasonable person standard. *See, e.g.,* ISCR Case No. 00-0713 (February 15, 2002) at p. 3 n.1.
5. Applicant's appeal arguments to the contrary are not persuasive. Applicant's examples of a person asking for directions from a gendarme in Paris or giving directions to a foreigner in Washington, D.C. are distinguishable from the facts of this case.
6. Applicant's contention that the conduct cited by Department Counsel does not prove a pattern of dishonesty runs afoul of the simple fact that the Administrative Judge concluded Applicant's conduct demonstrated a pattern. *See* Decision at p. 7.

7. A falsification can impair the integrity of the security clearance adjudication process by inducing a decision not to issue an SOR. A decision not to issue an SOR is a form of security clearance adjudication that is no less important than an Administrative Judge's adjudication of an applicant's case.
8. "The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability."
9. "The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities."
10. *See, e.g.*, ISCR Case No. 98-0611 (June 3, 1999) at p. 2 (Judge does not have unlimited discretion when applying disqualifying or mitigating conditions of the Adjudicative Guidelines).
11. *See, e.g.*, ISCR Case No. 99-0144 (February 11, 2000) at p. 5 ("A Judge does not have the authority or discretion to ignore the plain language of a pertinent Adjudicative Guideline and seek to apply another Adjudicative Guideline that, on its face, does not apply to the particular facts of a case.").
12. *See, e.g.*, ISCR Case No. 00-0104 (March 21, 2001) at p. 7 ("Provisions of the Directive should not be interpreted and construed in isolation from other pertinent provisions of the Directive.").
13. Directive, Section 6.3; Item E2.2.1; Item E2.2.3. *See, e.g.*, ISCR Case No. 00-0016 (October 23, 2000) at p. 4 ("[A] Judge must consider applicable Adjudicative Guidelines in light of the record evidence as a whole.").
14. *See, e.g.*, ISCR Case No. 99-0511 (December 19, 2000) at p. 14 n.2; ISCR Case No. 97-0783 (August 7, 1998) at p. 4.