

DATE: October 21, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-21123

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

P. Randall Bays, Esq.

Administrative Judge Richard A. Cefola issued a decision dated May 23, 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.

The 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 issue: Whether the Administrative Judge's conclusions are 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 December 26, 2001. The SOR was based on Guideline E (Personal Conduct) and Guideline J (Criminal Conduct). Applicant requested a hearing, which was held on May 2, 2002.

The Administrative Judge issued an unfavorable decision, dated May 23, 2002. The 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 Issue ⁽¹⁾

Whether the Administrative Judge's conclusions are arbitrary, capricious, or contrary to law? Applicant challenges only one specific finding of fact made by the Judge below. ⁽²⁾ Applicant says the Administrative Judge erred by finding Applicant did not correct his falsifications until 1999. Applicant argues that the correct year was 1998. However, a review of the record evidence shows that Applicant's 1998 disclosures were incomplete. Considering the record as a whole, the Judge had ample basis for finding Applicant did not correct his falsifications until 1999. Applicant has not demonstrated that the Judge erred.

Applicant does challenge the Judge's unfavorable conclusions related to Applicant's falsifications of various documents and drug use. Applicant asserts that the Administrative Judge should have discounted Applicant's drug use due to his immaturity at the time of the conduct. The Administrative Judge's decision contains factual findings but no analysis of Applicant's drug use. The Board cannot gauge what weight if any the Judge gave to the question of Applicant's maturity during the course of his drug use. However, since this issue is not dispositive in this case, the error is harmless.

Applicant also raises the question of his maturity with regard to his acts of falsification. The Administrative Judge never discussed Applicant's maturity, but he did analyze the falsifications. He concluded that Applicant's record of multiple falsifications carried out during 1997-1998 and left uncorrected until 1999 was of greater weight than Applicant's ultimate decision to correct the record. The Board finds the Judge's interpretation a fair reading of the record.

Applicant argues he has never engaged in conduct that falls under Directive, Item E2.A5.1.1.1 (Refusal to undergo or cooperate with required security processing, including medical and psychological testing) or Directive, Item E2.A5.1.1.2 (Refusal to complete required security forms, releases, or provide full, frank and truthful answers to lawful questions of investigators, security officials or other official representatives in connection with a personnel security or trustworthiness determination). Because the Judge did not apply either of those two disqualifying conditions, Applicant's argument fails to show any error by the Judge.

The Administrative Judge applied no mitigating conditions under Guideline E. On appeal, Applicant asserts that he has met each of the mitigating conditions under Guideline E. As to Directive, Item E2.A5.1.3.1 (The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability) and Directive, Item E2.A5.1.3.5 (The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress), Applicant offers no explanation or argument as to why those mitigating conditions should have been applied to his case. Applicant's conclusory assertions that those two mitigating conditions apply fail to raise any colorable claim of error by the Judge.

The Board will address the mitigating conditions for which Applicant offers an explanation or argument for his assertion. As to Directive, Item E2.A5.1.3.2. (The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily), Applicant asserts this condition applies because his falsifications were all prior to 1998 and he has subsequently provided correct information. The Administrative Judge found multiple falsifications (including a form prepared in 1998) so it cannot be said that Applicant was involved with an isolated incident of falsification. Furthermore, given the particular facts of this case, Directive, Item E2.A5.1.3.3 (The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts), not Item E2.A5.1.3.2 (The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily) is the mitigating condition that the Judge had to consider. *See, e.g.,* ISCR Case No. 99-0557 (July 10, 2000) at p. 4 (explaining difference between the two mitigating conditions).

Applicant asserts that Directive, Item E2.A5.1.3.3. (The individual made prompt, good-faith efforts to correct the

falsification before being confronted with the facts) applies to his conduct. However, the record clearly shows Applicant did not correct his repeated falsifications until he had been confronted by the government. Applicant has not demonstrated error.

Applicant asserts that Directive, Item 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) applies to his conduct. The Administrative Judge did not find any of Applicant's falsifications the result of inadequate advice nor did the record evidence oblige him to reach such a conclusion. Even if the Board were to assume, solely for purposes of deciding this appeal, that the first falsification had been the result of bad advice, that would not explain Applicant's other falsifications. It cannot reasonably be said that Applicant provided the omitted information promptly and fully. Applicant has not demonstrated error.

Applicant acknowledges that much of Directive, Item E2.A5.1.3.6. (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) is not applicable to his case but then asserts that the condition does apply because he has never refused to cooperate or comply with any security processing requirements. Given the record evidence in this case there is no reasonable basis for Applicant to claim this mitigating condition is applicable.

Applicant notes that he does not associate with his drug-oriented colleagues from high school anymore and asserts that Directive, Item E2.A5.1.3.7. (Association with persons involved in criminal activities has ceased) applies to his case. However, the record shows that Applicant's drug use continued two years beyond high school. Furthermore, the criminality of Applicant's multiple acts of falsification was not caused, or contributed to, by his associations with high school drug users.

Applicant asserts on appeal that Guideline J (Criminal Conduct) is not applicable to him because he does not have a criminal history. The Judge's conclusion that Applicant's acts of deliberate falsification constitute violations of 18 U.S.C. Section 1001 is sustainable. That conclusion provides a rational basis for the Judge's adverse conclusion under Guideline J. *See, e.g.*, ISCR Case No. 00-0713 (February 15, 2002) at p. 5 (government can allege and prove an applicant has engaged in criminal conduct even if the applicant has not been formally charged with a criminal offense by the relevant criminal justice authorities).

Conclusions

Applicant has failed on appeal to meet his burden of demonstrating error which warrants remand or reversal. The Administrative Judge's decision below is affirmed.

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. The Administrative Judge concluded Applicant did not falsify a security questionnaire in December 1999 (SOR paragraph 1.a). That favorable conclusion is not at issue on appeal.
2. On appeal Applicant does characterize his own misconduct as the product of bad advice and immaturity - neither of which were findings made by the Administrative Judge.