

DATE: April 18, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-21851

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Applicant has appealed the February 26, 2003 decision of Administrative Judge Joan Caton Anthony, in which the Judge concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

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 following issues: (1) whether the Administrative Judge erred by finding Applicant falsified a security clearance application; and (2) whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. For the reasons that follow, the Board affirms the Administrative Judge's adverse security clearance decision.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated October 15, 2002. The SOR was based on Guideline E (Personal Conduct) and Guideline J (Criminal Conduct). Applicant submitted an answer to the SOR, in which he did not indicate whether he wanted a hearing. In a supplemental answer to the SOR, Applicant stated "I do not request a hearing." A File of Relevant Material (FORM) was prepared. A copy of the FORM was given to Applicant, who submitted a response to the FORM. The case was assigned to the Administrative Judge for disposition. The Judge issued a written decision, in which she 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 Administrative Judge's adverse 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

1. Whether the Administrative Judge erred by finding Applicant falsified a security clearance application. The Administrative Judge found Applicant: (a) falsified an employment application in June 2000 by claiming he had a bachelor's degree from a state university; and (b) falsified a security clearance application in July 2000 by claiming he had a bachelor's degree from a state university. On appeal, Applicant does not challenge the Judge's finding that he falsified the employment application. However, Applicant denies that he tried to conceal anything from the government, claims he misunderstood the security clearance application, and asserts he corrected his incorrect answer to the security clearance application as soon as the matter was brought to his attention.

Applicant's denials of any intent to falsify the security clearance application were not binding or conclusive on the Administrative Judge. The Judge had to consider the record evidence as a whole, including Applicant's explanations for his incorrect answer to question 5 of the security clearance application, and make findings as to Applicant's intent or state of mind when he completed the security clearance application. *See, e.g.*, ISCR Case No. 99-0194 (February 29, 2000) at p. 3. Considering the record evidence as a whole, the Judge had a rational basis for finding that Applicant deliberately falsified the security clearance application. Applicant's later disclosures to a Special Agent of the Defense Security Service (DSS) in a July 2001 interview did not preclude the Judge from finding that Applicant had falsified the security clearance application in June 2000.

2. Whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. Applicant also argues: (a) he told the DSS Special Agent the truth about his educational background during an interview in July 2001; (b) he has never had any problems with handling classified materials; (c) he is not vulnerable to coercion, exploitation, duress or blackmail because his job does not require a college degree; (d) his wrong answer on the security clearance application does not show a pattern of criminal conduct under Guideline J; (e) this matter "was an isolated incident" and that has cost him a job, and he "will never make this mistake again"; and (f) he is taking steps to complete the requirements for a bachelor's degree. The Board construes these arguments as raising the issue of whether the Judge's adverse decision is arbitrary, capricious, or contrary to law.

(a) The Administrative Judge specifically addressed Applicant's disclosures to the DSS Special Agent during a July 2001 interview and explained why she did not conclude those disclosures mitigated Applicant's falsification of the security clearance application sufficiently to overcome the negative security implications of his falsification. Given the record evidence in this case, the Judge's discussion of this aspect of the case is not arbitrary, capricious, or contrary to law.

(b) Applicant's argument about his security record fails to demonstrate the Administrative Judge's decision is arbitrary, capricious, or contrary to law. Even in the absence of any evidence of a security violation the federal government can deny or revoke access to classified information based on facts and circumstances that raise security concerns. *See, e.g.*, *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. The Judge's findings about Applicant's falsification of an employment application and a security clearance application provide a rational basis for the Judge's adverse conclusions about Applicant's judgment, reliability and trustworthiness.

(c) When considering Applicant's argument about not being vulnerable to coercion or blackmail, the Board must construe the Administrative Judge's decision because it not clear whether the Administrative Judge was or was not applying Personal Conduct Disqualifying Condition 4⁽¹⁾ to evaluate Applicant's conduct. The Judge noted Applicant's July 2001 written statement "responded to the concern expressed in Personal Conduct Guideline E2.A5.1.2.4" [Personal Conduct Disqualifying Condition 4] (Decision at p. 3). However, the Judge did not indicate what weight or significance she gave to Applicant's July 2001 statement that he could not be blackmailed. When addressing the pertinent disqualifying and mitigating conditions under Guideline E, the Judge did not cite or rely on Personal Condition Disqualifying Condition 4 (Decision at p. 4). But, the Judge also indicated that she would consider Personal Conduct Disqualifying Condition 4 in adjudicating Applicant's case (Decision at p. 6). For purposes of deciding this appeal, the Board will construe the Judge's decision as applying Personal Conduct Disqualifying Condition 4 when evaluating Applicant's conduct under Guideline E.

The Administrative Judge concluded Applicant falsified his security clearance application to prevent his employer from learning about his falsification of the employment application (Decision at p. 6). Given the record evidence in this case, it was not arbitrary or capricious for the Judge to reach that conclusion. Furthermore, the Judge's conclusion describes a situation that falls within the scope of Personal Conduct Disqualifying Condition 4. Falsifying an employment application places an applicant in a position where exposure of the falsification to the employer could adversely affect the applicant's personal, professional or community standing, and where a third party could seek to pressure or coerce the applicant by threatening to disclose the falsification to the applicant's employer. Accordingly, to the extent that the Judge's decision can be construed as applying Personal Conduct Disqualifying Condition 4, Applicant has failed to demonstrate the Judge acted in a manner that is arbitrary, capricious, or contrary to law.

(d) Applicant is correct in arguing that the record evidence does not show he has engaged in a pattern of criminal conduct. However, the Administrative Judge did not characterize Applicant's falsification of the security clearance application as a pattern of criminal conduct. To the contrary, the Judge specifically concluded that, for purposes of Guideline J, Applicant's falsification of the security clearance application was an isolated incident. The Judge also explained why she concluded the falsification was not mitigated under Guideline J. Applicant's appeal argument fails to demonstrate the Judge erred.

(e) There is no record evidence concerning whether Applicant has suffered adverse job consequences because of the Administrative Judge's adverse security clearance decision. The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. And, even if there were record evidence supporting Applicant's appeal statements on this point, it would not demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. A Judge must evaluate an applicant's conduct and circumstances to assess the applicant's judgment, reliability, and trustworthiness and reach a conclusion as to whether it is clearly consistent with the national interest to grant or continue a security clearance for the applicant. The possibility of adverse job consequences following from an unfavorable security clearance decision is not relevant or material to the Judge's assessment of the applicant's judgment, reliability, and trustworthiness.

(f) Applicant's statements about what he is doing to complete the requirements for a bachelor's degree constitute new evidence, which cannot be considered on appeal. And, even if there were record evidence supporting Applicant's appeal statements on this point, it would not demonstrate the Judge's decision is arbitrary, capricious, or contrary to law.

Conclusion

Applicant has failed to demonstrate error below. Accordingly, the Board affirms the Administrative Judge's adverse security clearance 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: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

1. "Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail."