

DATE: January 16, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-00500

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Albert W. Laisy, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated February 12, 2003 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline J (Criminal Conduct) and Guideline E (Personal Conduct). Administrative Judge James A. Young issued an unfavorable security clearance decision dated September 15, 2003.

Applicant appealed the Administrative Judge's unfavorable decision. The Board has jurisdiction under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

The following issues have been raised on appeal: (1) whether the Administrative Judge erred by finding that Applicant falsified a security clearance application; (2) whether Administrative Judge erred by not concluding that Applicant's past criminal conduct was mitigated under Guideline J; (3) whether the Administrative Judge erred by not recommending that this case be considered for a waiver under 10 U.S.C. §986(d); and (4) whether the Administrative Judge erred by not making a favorable security clearance decision. For the reasons that follow, the Board affirms the Administrative Judge's decision, and does not make a recommendation as to whether this case should be considered further for a waiver under 10 U.S.C. §986(d).

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. 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 the rulings or conclusions of an Administrative Judge are challenged, the Board must consider whether they are: (1) arbitrary or capricious; or (2) contrary to law. Directive, Additional Procedural Guidance, Item E3.1.32.3. In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider

relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See, e.g.*, ISCR Case No. 97-0435 (July 14, 1998) at p. 3 (citing Supreme Court decision). In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. Compliance with state or local law is not required because security clearance adjudications are conducted by the Department of Defense pursuant to federal law. *See* U.S. Constitution, Article VI, clause 2 (Supremacy Clause). *See, e.g.*, ISCR Case No. 00-0423 (June 8, 2001) at p. 3 (citing Supreme Court decisions).

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, and whether the Judge's findings reflect a reasonable interpretation of the record evidence as a whole. Although a Judge's credibility determination is not immune from review, the party challenging a Judge's credibility determination has a heavy burden on appeal.

When an appeal issue 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).

If an appealing party demonstrates factual or legal error, then the Board must consider the following questions:

Is the error harmful or harmless? *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine);

Has the nonappealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds? *See, e.g.*, ISCR Case No. 99-0454 (October 17, 2000) at p. 6 (citing federal cases); and

If the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded? (Directive, Additional Procedural Guidance, Items E3.1.33.2 and E3.1.33.3).

Appeal Issues

1. Whether the Administrative Judge erred by finding that Applicant falsified a security clearance application. The Administrative Judge found that Applicant falsified a security clearance application in August 1999 by failing to disclose that he had been arrested for alcohol-related offenses, that he had been fired from a job for going to work drunk, and that he had received treatment for alcohol-related problems. Applicant challenges the Judge's findings of falsification on appeal. In support of that challenge, Applicant argues: (a) the Judge erred by not considering Applicant's August 1999 security clearance application and Applicant's September 2001 interview "as the entirety of [Applicant's] request for clearance" and then finding Applicant had been truthful with the federal government about his past alcohol-related problems; and (b) the record evidence shows that Applicant did not knowingly and willfully lie about his past alcohol-related problems. These arguments fail to demonstrate the Judge erred.

(a) Applicant's completion of the security clearance application in August 1999 is an event that is separate and distinct from Applicant's September 2001 interview. There is no logical or legal reason why the Administrative Judge should treat the two events, separated by about 24 months, as a single event for purposes of making findings about the SOR allegations pertaining to falsification. If an applicant deliberately omits relevant and material information from a security clearance application, the act of falsification occurs when the applicant completes the security clearance application, and subsequent disclosures by the applicant that occur months later do not retroactively turn the deliberate omission into a disclosure. To use an analogy: perjury is not transformed into truthful testimony if the person who committed the perjury tells the truth months later.

(b) The Administrative Judge had to consider the record evidence concerning Applicant's explanation for why he did not

disclose various alcohol-related matters when he completed the security clearance application in August 1999. However, the Judge was not compelled to accept Applicant's explanation. Rather, the Judge had to consider and weigh Applicant's explanation in light of his assessment of the credibility of Applicant's testimony and the record evidence as a whole. *See, e.g.*, ISCR Case No. 00-0601 (September 21, 2001) at pp. 2-3. Considering the record as a whole and giving due deference to the Judge's credibility determination, the Board concludes the Judge's finding of falsification is sustainable. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1.

2. Whether Administrative Judge erred by not concluding that Applicant's past criminal conduct was mitigated under Guideline J. The Administrative Judge noted that Applicant's past alcohol-related criminal incidents were not recent, but concluded that they were not sufficiently mitigated by the passage of time because Applicant's falsification of the security clearance application was a violation of 18 U.S.C. §1001, a federal felony. On appeal, Applicant contends the Judge should have concluded that Applicant's past criminal conduct was mitigated under Guideline J because: (a) the Judge erred by finding that Applicant was arrested for assault and battery in 1993; (b) none of Applicant's past offenses were felonies under state law; and (c) the Judge should have given Applicant the benefit of Criminal Conduct Mitigating Condition 1. ⁽¹⁾

(a) The Board need not decide whether the sparse record evidence in this case pertaining to SOR paragraph 1.d is sufficient to sustain the Administrative Judge's finding that Applicant was arrested for assault and battery in 1993. Even if the Board were to conclude that the Judge erred by making this finding against Applicant, it would be harmless error because there are ample grounds, independent from that alleged incident, to support the Judge's adverse conclusions under Guideline J.

(b) Whether Applicant's past criminal conduct was not felonious under state law is not dispositive under Guideline J. Adverse conclusions can be drawn against an applicant under Guideline J based on a history of misdemeanor conduct. *See, e.g.*, ISCR Case No. 98-0448 (April 19, 1999) at p. 2. Furthermore, state law concerning the nature of Applicant's past criminal incidents is not relevant to the Administrative Judge's conclusion that Applicant's falsification of the security clearance application was a violation of 18 U.S.C. §1001, a federal felony. ⁽²⁾

(c) The Administrative Judge specifically noted that Applicant's past alcohol-related incidents were not recent in time and cited Criminal Conduct Mitigating Condition 1 in reference to those past incidents. However, the Judge's conclusion that Criminal Conduct Mitigating Condition 1 was applicable to Applicant past alcohol-related incidents did not compel the Judge to enter favorable formal findings under Guideline J. It was not arbitrary or capricious for the Judge to conclude that the passage of time did not sufficiently mitigate those past incidents because of his more recent falsification. *See, e.g.*, ISCR Case No. 01-27371 (February 19, 2003) at pp. 3-4 (the application of pertinent provisions of the Adjudicative Guidelines is not reducible to a simple formula, but rather requires the Judge to exercise sound judgment in light of the record evidence as a whole).

3. Whether the Administrative Judge erred by not recommending that this case be considered for a waiver under 10 U.S.C. §986(d). The Administrative Judge concluded that Applicant's conviction for a 1992 alcohol-related incident fell under 10 U.S.C. §986 because Applicant was sentenced to one year and fifteen days in jail (suspended) as a result of that conviction. ⁽³⁾ The Judge also concluded that he should not make a recommendation as to whether Applicant's case should be considered further for a waiver under 10 U.S.C. §986(d) because the Judge was not basing his adverse security clearance decision solely on 10 U.S.C. §986. On appeal, Applicant does not challenge the applicability of 10 U.S.C. §986 to his conviction, but contends that a common sense evaluation of Applicant's case in light of all the record evidence warrants the granting of a waiver under 10 U.S.C. §986(d).

In a June 7, 2001 memorandum implementing the provisions of 10 U.S.C. §986, the Deputy Secretary of Defense indicated: "The decision as to whether a particular case involves a meritorious case that would justify pursuing a request for waiver shall be the province of the DoD Component concerned (i.e. all Components authorized to grant, deny or revoke access to classified information) beginning with the Director of the Component Central Adjudication Facility (CAF), the Component appellate authority or other appropriate senior Component official." For purposes of the June 7, 2001 memorandum, the Director, DOHA is the Director of the Component Central Adjudication Facility for industrial security clearance cases.

To implement the June 7, 2001 memorandum, the Director, DOHA issued an operating instruction (dated July 10, 2001) which indicates the following:

"Administrative Judges are responsible for initial resolution as to whether or not 10 U.S.C. 986 applies to the facts of the case." (Operating Instruction, paragraph 2.e.)

"In the event of an appeal raising an issue as to the applicability of 10 U.S.C. 986, the Appeal Board is responsible for final resolution of the issue." (Operating Instruction, paragraph 2.f.)

"In the event of a final determination that 10 U.S.C. 986 applies to the facts of a case, the Director is solely responsible for the discretionary decision as to whether to recommend to the Deputy General Counsel (Legal Counsel) that 10 U.S.C. 986 should be waived by the Secretary of Defense." (Operating Instruction, paragraph 2.g.)

"If an Administrative Judge issues a decision denying or revoking a clearance solely as a result of 10 U.S.C. 986, the Administrative Judge shall include without explanation either the statement 'I recommend further consideration of this case for a waiver of 10 U.S.C. 986' or 'I do not recommend further consideration of this case for a waiver of 10 U.S.C. 986.'" (Operating Instruction, paragraph 3.e.)

"If the Appeal Board issues a decision denying or revoking a clearance solely as a result of 10 U.S.C. 986, the Appeal Board shall include without explanation either the statement 'The Appeal Board recommends consideration of this case for a waiver of 10 U.S.C. 986' or 'The Appeal Board does not recommend consideration of this case for a waiver of 10 U.S.C. 986.'" (Operating Instruction, paragraph 3.f.)

"In any case in which [the] Administrative Judge, or [the] Appeal Board in the event of an appeal, recommends consideration of a waiver of 10 U.S.C. 986, the Director shall within his sole discretion determine whether or not to forward the case to the Deputy General Counsel (Legal Counsel) for further consideration of a possible waiver of 10 U.S.C. 986 by the Secretary of Defense together with such rationale as may be requested by the Deputy General Counsel (Legal Counsel)." (Operating Instruction, paragraph 3.g.)

Since Applicant has not challenged the Administrative Judge's conclusion about the applicability of 10 U.S.C. §986, all that remains for the Board to do is consider Applicant's contention that his case merits a waiver under 10 U.S.C. §986(d).

The Administrative Judge specifically noted that he was not basing his adverse security clearance decision solely on the applicability of 10 U.S.C. §986. Given the language of paragraph 3.e of the Operating Instruction, the Judge properly declined to make any recommendation as to whether Applicant's case should be considered for a waiver under 10 U.S.C. §986(d). Because the Judge's adverse security clearance decision can be affirmed for reasons not solely based on the applicability of 10 U.S.C. §986, under paragraph 3.f. of the Operating Instruction, there is no need for the Board to make a recommendation as to whether Applicant's case should be considered for a waiver under 10 U.S.C. §986(d). *See, e.g.*, ISCR Case No. 01-12452 (January 27, 2003) at p. 6.

4. Whether the Administrative Judge erred by not making a favorable security clearance decision. In addition to Applicant's other appeal arguments, Applicant contends that the totality of the record evidence demonstrates that: (a) Applicant "has lead a model life since [his last misconduct about seven-and-a-half years ago]"; (b) various military officers and civilians "have commended him"; (c) Applicant now has a "faultless lifestyle and complete turn-around over seven years ago"; and (d) "[t]here is no likelihood that Applicant will return to his lifestyle of over seven years ago." Applicant goes on to argue that a common sense evaluation of his case should result in a favorable security clearance decision. The Board construes these arguments as raising the issue of whether the Administrative Judge erred by not making a favorable security clearance decision -- *i.e.*, whether the Judge's unfavorable decision is arbitrary, capricious, or contrary to law.

Applicant's ability to cite to favorable record evidence is not sufficient to demonstrate the Administrative Judge's decision is arbitrary, capricious, or contrary to law. The Judge must consider the record evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. Absent a showing that the Judge acted in a manner that is arbitrary, capricious, or contrary to law, the Board will not disturb the Judge's weighing of the

record evidence. *See, e.g.*, ISCR Case No. 97-0783 (August 7, 1998) at p. 5. As discussed earlier in this decision, the Judge's finding of falsification is sustainable, and the Judge's adverse conclusions under Guideline J are not arbitrary, capricious, or contrary to law. Given the Judge's findings and conclusions under Guidelines E and J, the Judge had a rational basis for his adverse security clearance decision. Finally, application of 10 U.S.C. §986 would preclude a favorable security clearance decision even if the Judge had reached favorable conclusions about the rest of Applicant's conduct.

Conclusion

Except for one possible instance of harmless error, Applicant has failed to demonstrate error below. Therefore, the Board affirms the Administrative Judge's 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: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. "The criminal behavior was not recent."

2. Applicant correctly notes no criminal charges were brought against him under 18 U.S.C. §1001. However, in these proceedings, a finding of criminal conduct can be made even if an applicant has not had criminal charges brought against him. *See, e.g.*, ISCR Case No. 02-08052 (June 23, 2003) at p. 4.

3. Under 10 U.S.C. §986, the Department of Defense may not grant or renew a security clearance for a defense contractor official or employee that falls under any of four statutory categories [10 U.S.C. §986(c)(1) through (c)(4)]. Convictions which result in a sentence of imprisonment for more than one year fall under 10 U.S.C. §986(c)(1).