

DATE: April 9, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-00081

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Administrative Judge Kathryn Moen Braeman issued a decision, dated December 6, 2002, in which she concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant 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.

Applicant's appeal presents the following issues: (1) whether the Administrative Judge erred by finding that Applicant knowingly and wilfully omitted information from his Security Clearance Application (SF-86); 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 decision.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated March 28, 2002. The SOR was based on Guideline J (Criminal Conduct), Guideline H (Drug Involvement), and Guideline E (Personal Conduct). A hearing was held on August 13, 2002.

The Administrative Judge issued a written decision, dated December 6, 2002. In the decision, the Judge entered formal findings in favor of Applicant with respect to SOR subparagraphs 1.a, 1.b, and 1.c (Guideline J), subparagraph 2.a (Guideline H), and subparagraph 3.a (Guideline E). However, the Judge entered formal findings against Applicant with respect to subparagraphs 1.d (Guideline J), 2.b (Guideline H), and 3.b, 3.c and 3.d (Guideline E).⁽¹⁾ The Judge concluded, based on her adverse conclusions under each of the three Guidelines, that 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 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⁽²⁾

1. Whether the Administrative Judge erred by finding that Applicant knowingly and wilfully omitted information from his Security Clearance Application (SF-86). The Administrative Judge found that Applicant knowingly failed to disclose that he used marijuana five times during the period from October 1999 to December 2000. On appeal, Applicant concedes he did not disclose his post-September 1999 marijuana use to a Defense Security Service (DSS) agent in May 2001, but argues he did not falsify the SF-86.

In the SF-86, Applicant noted that he used marijuana socially at parties with peers on 15 to 20 occasions between September 1, 1995 and April 30, 1997, and that he no longer uses marijuana. He testified that he actually completed his SF-86 in September 1999 and submitted it in early October 1999, but that because it was not completed properly, his security office returned it to him. He signed and resubmitted it in December 1999, and testified that it was prepared from the same disk used to prepare the earlier questionnaire. He testified that the SF-86 he prepared in September 1999 was correct when prepared. He admitted that he then used marijuana in the Fall of 1999 and did not update the SF-86 accordingly when he submitted it in December 1999 (TR 39-44). However, Applicant has denied that he wilfully or intentionally omitted information from the SF-86 concerning his use of marijuana after September 1999.

Applicant's statements about his intent or state of mind when he completed the SF-86 are relevant evidence that the Administrative Judge had to consider. However, Applicant's statements were not binding on the Judge. The Judge had to consider Applicant's statements in light of her assessment of his credibility and the record evidence as a whole. An applicant's denials of falsification are not conclusive, and an intent to falsify can be shown by circumstantial evidence even in face of denials of any intent to falsify. *See, e.g., ISCR Case No. 99-0194 (February 29, 2000) at p. 3.* There is a sufficient basis for the Judge to have reasonably inferred that Applicant deliberately omitted from the SF-86 the Fall 1997 marijuana use. For example, Applicant testified that he knew that he was being investigated for a clearance and that the government would be concerned about the use of controlled substances (TR 35). He also testified that he knew that recent usage of marijuana would hurt his chances of obtaining a clearance (TR39-40). His use of marijuana in these circumstances occurred just a few weeks before he signed the SF-86 in December 1999. Furthermore, the Judge had the opportunity to personally observe Applicant's demeanor when he testified and assess the credibility of his explanations concerning the SF-86 omission. The Administrative Judge's finding of falsification is a reasonable, plausible interpretation of the record of evidence as a whole.

2. Whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. In addition to challenging the Administrative Judge's finding of falsification, Applicant also argues: (a) he has grown out of his youthful recklessness, and has truly become a responsible, hard-working, ambitious young man as evidenced by his personal and professional accomplishments; (b) his inability to obtain access to sensitive areas limits his overall career potential; (c) he would never jeopardize his country's security for any reason; (d) he has "great character" and always strives to do the right thing; and (e) the Judge found in his favor due to mitigation with respect to some of the conduct

alleged under the SOR. The Board construes these arguments as raising the issue of whether the Judge's adverse decision is arbitrary, capricious, or contrary to law.

Applicant presented evidence about his personal and professional accomplishments for the Administrative Judge's consideration, including company awards, favorable references, and performance evaluations. There is a rebuttable presumption that a Judge considers all of the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. A reading of the Administrative Judge's decision shows that she considered the evidence presented on Applicant's behalf that he cites on appeal, and such evidence contributed to her conclusion that Applicant had shown mitigation of part of the criminal conduct and drug use prior to the last five incidents of drug use. Applicant strongly encourages this Board to consider the Judge's favorable conclusions that (a) his criminal conduct was not recent, not likely to recur and that his accomplishments constituted clear evidence of rehabilitation; and (b) his drug use was not recent and that he has demonstrated an intent to not abuse drugs in the future.

It is significant, however, that the Administrative Judge found against Applicant on Guideline J (Criminal Conduct) because he recently violated 18 U.S.C. §1001 by his knowing failure to disclose the Fall 1999 marijuana use on the SF-86 or disclose all of the last five instances of marijuana use to the DSS agent in ay 2001. And while the Administrative Judge concluded Applicant had mitigated his marijuana usage prior to April 30, 1997, she was particularly concerned about Applicant's lack of good judgment in using marijuana as he applied for a security clearance when he knew that drug use was inconsistent with the government and his employer's policies.

Applicant's appeal arguments are undercut by the Administrative Judge's adverse conclusions with respect to three subparagraphs of the SOR relating to Guideline E (Personal Conduct) where the Administrative Judge found that Applicant failed to disclose his 1996 alcohol-related arrest to the DSS agent and that he failed to disclose recent marijuana use on the SF-86 and "consciously misled" the agent regarding all recent marijuana use. Applicant himself admits that he did not report to the DSS agent his marijuana use after the beginning of his employment with the contractor even though he introduced a written statement from his supervisor noting his "strong character." The Administrative Judge also considered the testimony of Applicant's friend and found her testimony unhelpful to Applicant. The Judge found that Applicant had told Applicant's friend only of limited marijuana use that she had assumed was during his college years; that she was surprised to learn that Applicant had used marijuana subsequently; and that she stated Applicant's use of marijuana after starting his job would demonstrate poor judgment and undermine her initial favorable endorsement of Applicant.

Additionally, Applicant's assertion that he would not jeopardize national security is not dispositive. *See, e.g.*, ISCR Case No. 99-0519 (February 23, 2001) at 12 (an applicant's opinion as to the security significance of his or her conduct is not dispositive and does not relieve the Judge of his or her responsibility to evaluate the applicant's security eligibility). Moreover, Applicant's statement that he needs the clearance to perform his job is not material because nobody has the right to a security clearance. *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988). The Administrative Judge looks at the whole person, considers the record evidence, both favorable and unfavorable, and decides whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. Accordingly, based the record evidence of Applicant's recent marijuana use and his falsifications, we conclude that the Administrative Judge had a rational basis to draw adverse conclusions about Applicant's security eligibility and conclude that it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

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: 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 formal findings under Paragraph 3 (Guideline E) refer to subparagraphs 1.a through 1.d. Reading the Judge's decision as a whole, the Board concludes the Judge's references reflects a harmless typographical error concerning the numbering of those SOR subparagraphs.

2. The Administrative Judge's formal findings in favor of Applicant with respect to the SOR subparagraphs noted above are not at issue here.