

DATE: November 20, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-04926

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Administrative Judge Elizabeth M. Matchinski issued a decision, dated September 25, 2002, 2001, 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 Applicant engaged in deliberate falsification; and (2) whether the Administrative Judge's adverse decision is unwarranted. 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 April 9, 2002. The SOR was based on Guideline E (Personal Conduct), Guideline H (Drug Involvement), and Guideline J (Criminal Conduct).

A hearing was held on August 2, 2002. At the hearing, SOR paragraph 2.a was amended and SOR paragraph 2.b was withdrawn. The Administrative Judge issued a written decision, dated September 25, 2002. In the decision, the Judge: (a) entered formal findings for Applicant concerning SOR paragraphs 1.e, 2.a, and 3.b; (b) entered formal findings against Applicant concerning the rest of the SOR paragraphs; and (c) 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, 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 Issues

The Administrative Judge's formal findings in favor of Applicant concerning SOR paragraphs 1.e, 2.a, and 3.b are not at issue on appeal.

1. Whether the Administrative Judge erred by finding Applicant engaged in deliberate falsification. The Administrative Judge found that Applicant falsified material facts about his use of marijuana in November 1997, March 2000, and October 2001. On appeal, Applicant states "I never me[a]nt to deceive any one by not being forthcoming with the truth. I just want to look good in the eyes of the DOD and keep my job." The Board construes Applicant's statement as raising the issue of whether the Judge erred by finding Applicant engaged in deliberate falsification.

Given the record evidence in this case, the Administrative Judge had a rational basis for finding that Applicant deliberately failed to fully disclose his marijuana use. Applicant's motivation to keep his job did not make his lack of candor about his marijuana use any less deliberate or dishonest. It was not arbitrary or capricious for the Judge to conclude Applicant's failure to be candid and forthcoming about his marijuana use constituted acts of deliberate falsification.

2. Whether the Administrative Judge's adverse decision is unwarranted. Applicant's brief also: (a) claims he is not a security risk because he has not had any security violations; (b) states that loss of his job "far outweighs the crime"; and (c) asks the Board to consider imposing "another punishment more like a fine, a suspension with random drug testing or all three." The Board construes these statements as raising the issue of whether the Administrative Judge's adverse security clearance decision is unwarranted.

Applicant's argument about the absence of security violations does not demonstrate the Administrative Judge's adverse decision is unwarranted. The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). The federal government need not wait until an applicant fails to properly handle classified information before it can deny or revoke access to such information. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). The absence of security violations does not preclude an Administrative Judge from considering facts and circumstances that indicate an applicant poses a security risk. Security requirements include consideration of a person's judgment, reliability, and trustworthiness. *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961). Acts of falsification by an applicant provide a rational basis for concluding the applicant should be not allowed to have access to classified information. *See, e.g.*, ISCR Case No. 01-06852 (August 21, 2002) at p. 3. The Judge's findings about Applicant's falsifications provide a rational basis for her adverse conclusions about Applicant's security eligibility.

Applicant's punishment argument is flawed. Adverse security clearance decisions are not punitive sanctions and cannot be equated with punishment. *See Chesna v. U.S. Department of Defense*, 850 F. Supp. 110, 119 (D. Conn. 1994) (noting that adverse security clearance decision is not a criminal sanction). Furthermore, the adverse effect an unfavorable security clearance could have on Applicant's employment is not relevant to deciding the security significance of his acts of deliberate falsification.

By requesting an alternative result, short of an adverse security clearance decision, Applicant seeks relief that cannot be granted. First, there is no authority under Executive Order 10865 or the Directive to impose a fine on an applicant. Second, authority to suspend security clearances is granted to DoD officials other than Administrative Judges or the Board. *See* Directive, Section 6.4. Third, neither Executive Order 10865 nor the Directive authorizes an Administrative Judge or the Board to order an applicant to undergo random drug testing.

Conclusion

Applicant has failed to demonstrate error below and seeks relief that cannot be granted to him. 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: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board