

DATE: June 23, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-08052

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esq., Department Counsel

FOR APPLICANT

Joseph W. Kirby, Esq.

Applicant has appealed the March 24, 2003 decision of Administrative Judge James A. Young, 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 failed to properly consider pertinent Personal Conduct Mitigating Conditions; and (2) whether the Administrative Judge erred by basing his adverse decision, in part, on Guideline J (Criminal Conduct). 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 July 17, 2002. The SOR was based on Guideline E (Personal Conduct) and Guideline J (Criminal Conduct). A hearing was held on February 25, 2003. The Administrative Judge issued a written decision, dated arch 24, 2003, in which the Judge 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 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

1. Whether the Administrative Judge failed to properly consider pertinent Personal Conduct Mitigating Conditions. The Administrative Judge found: (a) Applicant used marijuana several times between 1981 and 1987, and once in 1998 when he was holding a security clearance; (b) Applicant falsified a security clearance application in 1988 by denying that he had ever used marijuana; (c) Applicant falsified a security clearance application in 1999 by denying that he had used illegal drugs while possessing a security clearance; and (d) Applicant falsified a security clearance application in 2000 by denying that he had used illegal drugs in the past seven years or while holding a security clearance. On appeal, Applicant does not challenge the Judge's findings about his past use of marijuana, or the Judge's findings of falsification in 1988, 1999, and 2000. However, Applicant contends the Judge erred by not applying Personal Conduct Mitigating Condition 3, ⁽¹⁾ and the Judge failed to give sufficient weight to Personal Conduct Mitigating Condition 5. ⁽²⁾

Applicant concedes that disclosure of his past marijuana use to an investigator in July 2000 was not a prompt disclosure for purposes of applying Personal Conduct Mitigating Condition 3 to his falsifications in 1988 or 1999. However, Applicant argues his disclosure to the investigator in July 2000 was prompt in relation to his 2000 falsification and, therefore, the Administrative Judge should have applied Personal Conduct Mitigating Condition 3 to his falsification in 2000. The Board does not find Applicant's argument persuasive. Applicant's falsification in 2000 was a repetition of his earlier falsifications in 1988 and 1999. Furthermore, the Judge found that Applicant did not fully admit his falsifications until pressed by Department Counsel at the hearing. That finding reflects a sustainable interpretation of the record evidence. Whatever mitigating effect Applicant's disclosures to the special agent in July 2000 might have had, the Judge reasonably could reach adverse conclusions about Applicant's candor and truthfulness based on the Judge's conclusion that Applicant was still trying to rationalize his falsifications as late as the date of the hearing. Under the circumstances, it was not arbitrary or capricious for the Administrative Judge to conclude Personal Conduct Mitigating Condition 3 was not applicable.

Applicant's argument concerning Personal Conduct Mitigating Condition 5 is not persuasive. The Administrative Judge's conclusion that Personal Conduct Mitigating Condition 5 was applicable did not compel the Judge to render a favorable security clearance decision. The presence or absence of an Adjudicative Guidelines disqualifying or mitigating condition is not solely dispositive of a case. Rather, the application of a disqualifying condition or a mitigating condition requires the exercise of sound discretion in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 01-14740 (January 15, 2003) at p. 7. Furthermore, Applicant's argument concerning Personal Conduct Mitigating Condition 5 fails because acts of falsification give rise to two distinct security concerns: (a) acts of falsification can place an applicant in a position of possible vulnerability *vis-a-vis* third parties who might threaten to reveal to the government the substance of what the applicant is trying to conceal; and (b) apart from any such vulnerability, acts of falsification demonstrate poor judgment, unreliability, and untrustworthiness by the applicant. Even if a Judge were to conclude that application of Personal Conduct Mitigating Condition 5 eliminates an applicant's possible vulnerability to blackmail, such a conclusion does not extenuate or mitigate the poor judgment, unreliability, and untrustworthiness inherent in an applicant's acts of falsification. *Cf.* ISCR Case No. 01-08410 (May 8, 2002) at p. 3 (an adverse security clearance decision can be made even if there is no evidence that the applicant is vulnerable to blackmail).

2. Whether the Administrative Judge erred by basing his adverse decision, in part, on Guideline J (Criminal Conduct). In making an adverse security clearance decision, the Administrative Judge concluded that Applicant's falsifications constituted a violation of 18 U.S.C. §1001 and warranted an adverse formal finding with respect to SOR subparagraph 2.a. On appeal, Applicant contends the Judge erred because: (a) Applicant was not criminally charged with a violation of 18 U.S.C. §1001; and (b) the Board has held that it is error for a Judge to based an adverse security clearance

decision on uncharged conduct. Applicant's argument fails to demonstrate the Judge erred.

There is no record evidence that Applicant has ever been criminally charged with violating 18 U.S.C. §1001. However, the absence of formal criminal charges does not preclude the government from alleging an applicant has engaged in criminal conduct and presenting evidence to support that allegation in a security clearance adjudication. *See, e.g.*, ISCR Case No. 00-0713 (February 15, 2002) at p. 5. Here, the SOR issued to Applicant specifically alleged that his falsifications constituted a violation of 18 U.S.C. §1001 and made that allegation under Guideline J (Criminal Conduct). Applicant is correct in asserting that the Board has held that a Judge cannot base an adverse security clearance decision on uncharged conduct. But those Board decisions are readily distinguishable. Specifically, in those decisions, the Board was dealing with conduct (regardless of whether it was criminal conduct or not) that was not alleged in the SOR issued to the applicant. Because Applicant's falsifications were specifically alleged as a violation of 18 U.S.C. §1001 under Guideline J, the Judge properly considered Applicant's falsifications under that Guideline. Accordingly, the Judge did not base his adverse decision in this case on uncharged conduct.

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: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. "The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts."
2. "The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress."