

DATE: August 1, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-10168

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Timothy W. Barbrow, Esq.

Applicant has appealed the April 25, 2003 decision of Administrative Judge Burt Smith, 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 engaged in criminal conduct in connection with incidents that occurred in 1994 and 1997; (2) whether the Administrative Judge erred by finding that Applicant falsified material facts in a security clearance application he completed in July 2001; and (3) whether the Administrative Judge erred by entering formal findings against Applicant under Guideline F (Financial Considerations). 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 30, 2002. The SOR was based on Guideline J (Criminal Conduct), Guideline E (Personal Conduct), and Guideline F (Financial Considerations). A hearing was held on December 13, 2002. The Administrative Judge issued a written decision, dated April 25, 2003, in which he 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 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 engaged in criminal conduct in connection with incidents that occurred in 1994 and 1997. The Administrative Judge found that Applicant engaged in criminal conduct in connection with a 1994 incident and a 1997 incident. Applicant contends the Judge erred because: (a) there is no record evidence that Applicant was convicted in connection with the 1994 incident; (b) Applicant's 1994 arrest was expunged; (c) the 1997 charges against Applicant were dismissed; and (d) absent a conviction, Applicant is presumed innocent of any criminal charges.

The absence of a conviction does not preclude Department Counsel from presenting evidence that an applicant engaged in criminal conduct. Furthermore, the fact that criminal charges against an applicant were dropped or dismissed does not preclude an Administrative Judge from finding an applicant engaged in the conduct underlying those criminal charges. *See, e.g.*, ISCR Case No. 99-0119 (September 13, 1999) at p. 2.

Given the record evidence that Applicant received a sentence in connection with the 1994 incident, it was not unreasonable for the Administrative Judge to draw the factual inference that Applicant was convicted in connection with that incident. The evidence that the matter later was expunged did not preclude the Judge's factual inference of a conviction. *Cf.* ISCR Case No. 00-0423 (June 8, 2001) at p. 3 ("[W]hatever effect that expungement of an applicant's criminal record might have under state law, such an effect is not binding on the federal government in investigating or adjudicating an applicant's security eligibility.").

Given the totality of the record evidence, the Administrative Judge could find that Applicant engaged in criminal conduct in connection with the 1997 incident even though the criminal charges were dropped later. [\(1\)](#)

Applicant correctly notes that he has had no criminal charges filed against him since 1998. However, Applicant's observation fails to take into account the Administrative Judge's finding that his acts of falsification in 2001 constituted a violation of 18 U.S.C. §1001 (as alleged in SOR subparagraph 1.d). Given that finding, the Judge properly considered Applicant's acts of falsification as evidence of more recent criminal conduct for purposes of evaluating Applicant's case under Guideline J.

2. Whether the Administrative Judge erred by finding that Applicant falsified material facts in a security clearance application he completed in July 2001. The Administrative Judge found that Applicant falsified a security clearance application he completed in July 2001 by: (a) failing to disclose that he had been fired from a job in January 2001; (b) failing to disclose a 1986 arrest, a 1994 arrest, and a 1998 arrest; and (c) failing to disclose four debts that were more than 180 days past due. Applicant challenges the Judge's findings of falsification, arguing that his various omissions were the result of innocent misunderstanding of the questions, inadvertence, or carelessness.

Applicant's denials of any intent to falsify the security clearance application are relevant and material evidence. However, those denials are not binding or conclusive on the Administrative Judge. The Judge had to assess Applicant's denials in light of his assessment of Applicant's credibility and the record evidence as a whole. *See, e.g.*, ISCR Case No. 98-0583 (November 18, 1999) at p. 3. Given the record evidence in this case, the Judge could accept or reject Applicant's denials of an intent to falsify, depending on his assessment of Applicant's credibility. The Judge had the opportunity to observe Applicant's demeanor when he testified and form an impression as to the credibility of

Applicant's testimony. Applicant's appeal arguments fail to demonstrate the Judge's adverse credibility determination is unsustainable. *See, e.g.*, ISCR Case No. 97-0184 (December 8, 1998) at p. 5 (discussing circumstances under which a credibility determination may be set aside or reversed). Accordingly, the Judge's findings of falsification are sustainable.

3. Whether the Administrative Judge erred by entering formal findings against Applicant under Guideline F (Financial Considerations). Applicant does not challenge the Administrative Judge's findings of fact concerning his history of financial difficulties. However, Applicant argues that his financial history "is not such that it should disqualify [him] from a security clearance," and that as of the hearing he had resolved most of his debt issues. The Board construes Applicant's argument as raising the issue of whether the Judge erred by entering formal findings against Applicant under Guideline F.

Applicant's appeal argument does not appear to challenge the Administrative Judge's conclusion that Applicant's overall history of financial difficulties raised security concerns under Guideline F. However, Applicant's appeal argument does raise the question whether the Judge erred by concluding Applicant had not presented evidence of extenuation, mitigation, or changed circumstances sufficient to warrant favorable formal findings under Guideline F.

Applicant places emphasis on the amount of unresolved debt that he still has, arguing that it is not large enough to raise security concerns. Nothing in Guideline F indicates that there must any particular threshold amount of delinquent or otherwise unresolved debts that must be reached before an applicant's financial difficulties raise security concerns. However, the absence of any such threshold amount being listed in Guideline F does not relieve an Administrative Judge of the obligation to consider the record evidence as a whole and reach reasonable, common sense conclusions about an applicant's overall history of financial difficulties and whether it raises security concerns. *See Directive, Section 6.3; Enclosure 2, Item E2.2.1.*

Considering the record evidence as a whole, the Board concludes it was not arbitrary, capricious, or contrary to law for the Administrative Judge to conclude Applicant had failed to demonstrate sufficient evidence of reform and rehabilitation to warrant entry of favorable formal findings under Guideline F.

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: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. Under the substantial evidence standard, an Administrative Judge's findings of fact must be based on more than a scintilla of evidence, but can be based on less than a preponderance of the evidence. *See, e.g.*, ISCR Case No. 98-0761 (December 27, 1999) at p. 2.