

DATE: December 18, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-12329

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Catherine Engstrom, Esq., Department Counsel

FOR APPLICANT

Richard Murray, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated October 25, 2002 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), Guideline E (Personal Conduct), and Guideline M (Misuse of Information Technology Systems). Administrative Judge Matthew E. Malone issued a favorable security clearance decision dated July 18, 2003.

Department Counsel appealed the Administrative Judge's favorable 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 issue has been raised on appeal: whether the Administrative Judge's favorable security clearance decision is arbitrary, capricious, or contrary to law. For the reasons that follow, the Board reverses the Administrative Judge's 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. 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 Issue

The Administrative Judge entered favorable formal findings with respect to Guideline J (Criminal Conduct) and Guideline M (Misuse of Information Technology Systems). Those favorable formal findings are not at issue on appeal.

Department Counsel contends the Administrative Judge's favorable security clearance decision is arbitrary, capricious, or contrary to law because: (1) it is not consistent with the Judge's finding that Applicant falsified a security clearance application, the Judge's conclusion that no Personal Conduct mitigating condition applied to Applicant's falsification, and Applicant's testimony at the hearing about the falsification was not credible; (2) the Judge erred by concluding that "Applicant's falsification in this matter is not so security significant as to be disqualifying"; and (3) the Judge's favorable decision is based on an impermissible piecemeal analysis.

Applicant responds by arguing that the Administrative Judge's decision should be affirmed because: (i) Department Counsel's appeal is based on a misreading of Board precedent concerning the application of the Adjudicative Guidelines; (ii) the Judge had a rational basis to conclude that Applicant is "credible and sincere in taking responsibility for his past misconduct"; and (iii) the Judge's decision does not reflect any arbitrary or capricious reasoning.

The Administrative Judge's finding that Applicant falsified a security clearance application in December 2000 has not been challenged on appeal. Having found that Applicant engaged in deliberate falsification on that occasion, did the Judge err by concluding that "Applicant's falsification in this matter is not so security significant as to be disqualifying"? For the reasons that follow, the Board concludes that Department Counsel persuasively argues that the Judge did err.

Having concluded that Applicant deliberately falsified a security clearance application in December 2000, the Administrative Judge failed to articulate a rational basis for his conclusion that

"Applicant's falsification in this matter is not so security significant as to be disqualifying." The conduct or circumstances that an applicant seeks to conceal from the federal government when the applicant engages in a deliberate falsification can have negative security significance independent from the act of falsification. Similarly, the act of falsification has negative security significance independent from the conduct or circumstances that the applicant seeks to conceal. Apart from the security significance of the conduct or circumstances that an applicant may try to conceal, the Department of Defense is entitled to conduct a background investigation of applicants, unimpeded by deliberate falsifications, so that it can obtain relevant information to make an informed, reasoned decision about an applicant's security eligibility. *See, e.g.*, ISCR Case No. 01-06870 (September 13, 2002) at pp. 5-6. Accordingly, even if an applicant's conduct or circumstances are not deemed sufficient to warrant an adverse security clearance decision, it does not follow that the applicant's act of falsification lacks security significance. *See, e.g.*, ISCR Case No. 95-0560 (August 16, 1996) at pp. 3-4; ISCR Case No. 94-1159 (December 4, 1995) at pp. 6-7.

It is well-established that there is no right to lie in a criminal trial, a grand jury proceeding, an affidavit required by statute, or an agency investigation. *See Lachance v. Erickson*, 522 U.S. 262, 266-268 (1998). Furthermore, falsification of a security clearance application could result in a federal prosecution under 18 U.S.C. §1001. *See United States v. Yermian*, 468 U.S. 63 (1984). Apart from the potential for criminal prosecution, lying to the government in connection with a security clearance investigation raises serious security concerns. 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). 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). Falsification of a security clearance application raises serious questions about the person's trustworthiness and reliability. *See Harrison v. McNamara*, 228 F. Supp. 406, 408 (D.Conn. 1964), *aff'd per curiam*, 380 U.S. 261 (1965). Furthermore, the Merit Systems Protection Board has noted that falsification provides strong grounds for termination from the civil service. *See, e.g., Kirkpatrick v. U.S. Postal Service*, 74 M.S.P.R. 583, 591 (1997) ("We have long recognized that removal for falsification and engaging in dishonest activity promotes the efficiency of the service since such behavior raises serious doubts regarding the employee's reliability, trustworthiness, and continued fitness for employment."). Since a security clearance adjudication involves "a situation where the acceptable degree of risk to the national security is less than the risk to the efficiency of the service with respect to civil service employment generally," *Gayer v. Schlesinger*, 490 F.2d 740, 750 (D.C. Cir. 1973), misconduct that can result in dismissal from a civil service position surely cannot be considered to be less serious in the context of security clearance investigations and adjudications.

There is no right to a security clearance. *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988). Furthermore, there is no presumption in favor of granting or continuing access to classified information. *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). Indeed, a favorable security clearance decision should not be made unless there is an affirmative finding that it is clearly consistent with the national interest to grant or continue access to classified information. Executive Order 10865, Section 2; Directive, Enclosure 2, Items E2.2.2 and E2.2.3. Once the Judge found that Applicant deliberately falsified a security clearance application in December 2000, the Judge could not render a favorable security clearance decision without articulating a rational basis for why it would be clearly consistent with the national interest to grant or continue a security clearance for Applicant despite the falsification.

The Administrative Judge's one-sentence conclusion that Applicant's falsification lacks sufficient security significance is arbitrary, capricious, and contrary to law. The Judge's conclusion runs contrary to the legal precedents cited earlier in this decision, and fails to articulate an explanation for why it is warranted. Furthermore, the Judge's conclusion runs contrary to the Judge's rejection of Applicant's explanation for the security clearance application falsification. Given the Judge's rejection of Applicant's explanation as not being credible, it follows that the Judge could not have concluded Applicant was acknowledging his past falsification, showing remorse, and accepting responsibility for it. Having found that Applicant falsified a security clearance application, and having found Applicant's explanation not to be credible, the Judge failed to articulate a rational basis for his conclusion that, nevertheless, the falsification lacked security significance.

Both parties make arguments concerning Applicant's credibility that warrant discussion. Department Counsel correctly notes that the Administrative Judge found Applicant's explanation concerning the security clearance application falsification was not credible (Decision at p. 6). Applicant correctly notes that the Judge found "Applicant credible and

sincere in taking responsibility for his past misconduct" (Decision at p. 4). Reading the Judge's decision in its entirety, the Board concludes the Judge's reference to Applicant taking responsibility for his past misconduct pertained to Applicant's conduct other than the security clearance application falsification. Once the Judge rejected, as not credible, Applicant's explanation concerning the security clearance application falsification, it would have been illogical for the Judge to then characterize Applicant's rejected explanation as "credible and sincere in taking responsibility for his past misconduct."

Applicant argues the Administrative Judge properly gave him the benefit of Personal Conduct Mitigating Condition 2. (1) That argument is not persuasive. Although the Judge concluded Applicant satisfied part of Personal Conduct Mitigating Condition 2, the Judge specifically declined to apply it because Applicant's falsification was "a recent event." And, even if the Board were to assume solely for the purpose of deciding this appeal that the Judge meant to give Applicant the benefit of Personal Conduct Mitigating Condition 2, that assumption would not help Applicant. First, the Board has held that Personal Conduct Mitigating Condition 2 does not apply in cases such as Applicant's. *See, e.g.*, ISCR Case No. 97-0289 (January 22, 1998) at p. 3 (explaining difference between Personal Conduct Mitigating Condition 2 and Personal Conduct Mitigating Condition 3). Second, even if that precedent did not bar consideration of Personal Conduct Mitigating Condition 2 for possible application in Applicant's case, the Judge's finding that Applicant's falsification "is an isolated incident" is contrary to the Judge's rejection of Applicant's testimony that he inadvertently omitted information from the security questionnaire. Having rejected Applicant's testimony (that he inadvertently omitted information from the security questionnaire), the Judge could not then reasonably find the falsification "is an isolated incident."

Department Counsel correctly notes that an Administrative Judge should not engage in a piecemeal analysis of the facts and circumstances of an applicant's case. *See, e.g.*, ISCR Case No. 00-0628 (February 24, 2003) at pp. 5-6 (discussing whole person concept and the need for the Administrative Judge to evaluate the totality of an applicant's conduct and circumstances). However, Department Counsel has failed to demonstrate the Judge committed that type of error in this case.

Applicant correctly notes that the Board has ruled that the Adjudicative Guidelines should not be applied in a mechanical manner. However, Applicant's argument does not demonstrate a fatal flaw in Department Counsel's appeal. To the extent that Department Counsel's brief seems to argue that the Judge could not make a favorable security clearance decision without a finding that one or more Personal Conduct mitigating conditions apply to Applicant's case, it makes an argument that has been repeatedly rejected by the Board. *See, e.g.*, ISCR Case No. 02-08052 (June 23, 2003) at p. 3 (presence or absence of a disqualifying or mitigating condition is not solely dispositive of a case). However, that flaw in Department Counsel's appeal brief is not fatal to the remainder of its appeal arguments.

Conclusion

Department Counsel has met its burden of demonstrating error below that warrants reversal. Pursuant to Item E3.1.33.3 of the Directive's Additional Procedural Guidance, the Board reverses the Administrative Judge's favorable 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 falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily." Directive, Enclosure 2, Item E2.A5.1.3.2.