

DATE: March 3, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-14990

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 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 falsified a security clearance application; 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 May 31, 2002. The SOR was based on Guideline E (Personal Conduct) and Guideline G (Alcohol Consumption). A hearing was held on September 12, 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 Guideline G, but against him with respect to one SOR subparagraph under Guideline E. The Judge concluded, based on her adverse conclusions under Guideline E, 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 ⁽¹⁾

1. Whether the Administrative Judge erred by finding that Applicant falsified a security clearance application. The Administrative Judge found that Applicant falsified a security clearance application in July 2000 by failing to disclose an alcohol-related incident that resulted in his being arrested in April 1996 (SOR subparagraph 1.a). On appeal, Applicant challenges the Judge's finding of falsification, contending that his omission of the April 1996 arrest from the security clearance application was not due to any intent by him to conceal it from the government.

During the proceedings below, Applicant denied that he had any intent to deceive or mislead the government when he omitted the April 1996 arrest from the security clearance application. Applicant's statements about his intent or state of mind when he completed the security clearance application are relevant evidence that the Administrative Judge had to consider. However, Applicant's statements were not binding on the Judge. Rather, the Judge had to consider Applicant's statements in light of her assessment of his credibility and the record evidence as a whole. *See, e.g.*, ISCR Case No. 99-0194 (February 29, 2000) at p. 3. Considering the record as a whole, the Board concludes that the Judge's finding of falsification reflects a reasonable interpretation of the record evidence. Applicant's arguments fail to demonstrate the Judge's finding is erroneous.

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) his personal and professional histories demonstrate he has good judgment, and is reliable and trustworthy; (b) the testimony of his supervisor shows he is trustworthy and reliable; and (c) the DSS investigation of him resulted in people recommending him for a position of trust. The Board construes these arguments as raising the issue of whether the Judge's adverse decision is arbitrary, capricious, or contrary to law.

Applicant's appeal arguments rely, in part, on factual assertions that go beyond the record evidence below. ⁽²⁾ Such factual assertions constitute new evidence, which the Board cannot consider. Directive, Additional Procedural Guidance, Item E3.1.29. The Board will consider Applicant's appeal arguments only to the extent that they rely on record evidence.

Applicant presented evidence about his personal and professional histories for the Administrative Judge's consideration. Applicant's supervisor also testified on his behalf. There is a rebuttable presumption that a Judge considers all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. Apart from that rebuttable presumption, a reading of the Administrative Judge's decision persuades the Board that the Judge considered the evidence presented on Applicant's behalf that he cites on appeal.

The favorable record evidence cited by Applicant on appeal does not demonstrate the Administrative Judge's decision is arbitrary, capricious, or contrary to law. The mere presence of favorable record evidence does compel a Judge to make a favorable security clearance decision. The Judge had to consider the record evidence as a whole, both favorable and unfavorable, and make findings of fact and reach conclusions about the security significance of Applicant's conduct and circumstances. In weighing the record evidence, the Judge had to consider whether the favorable evidence outweighed the unfavorable evidence, or *vice versa*.

As discussed earlier in this decision, the Administrative Judge's finding that Applicant falsified a security clearance application is sustainable. Based on that finding of falsification, it was not arbitrary or capricious for the Judge to draw negative inferences about Applicant's judgment, reliability, and trustworthiness. Furthermore, the Judge's finding of falsification provides a rational basis for a Judge 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: 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

1. The Administrative Judge's formal findings in favor of Applicant with respect to SOR subparagraphs 1.b, 2.a, and 2.b are not at issue on appeal.
2. Applicant's statements about the results of the DSS investigation, and some of his statements about his personal and professional history go beyond the record evidence that was before the Administrative Judge.