

DATE: June 30, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-15233

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued the Applicant a Statement of Reasons (SOR), dated April 24, 2003, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guideline J (Criminal Conduct) and Guideline E (Personal Conduct). Administrative Judge Wilford H. Ross issued an unfavorable security clearance decision, dated March 16, 2004.

Applicant appealed the Administrative Judge's unfavorable decision. The 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 the Applicant's falsification of his security clearance questionnaire was deliberate, and (2) whether the Administrative Judge erred in the application of the "whole person" concept. For the reasons that follow, the Board affirms 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 Issues⁽¹⁾

1. Whether the Administrative Judge erred by finding the Applicant's falsification of his security clearance questionnaire was deliberate. The Administrative Judge found Applicant falsified a security clearance questionnaire he executed in April 2001 by failing to disclose he had a criminal record, which included charges of elder abuse, battery, and child endangerment, and a plea of no contest to assault (all arising out of a single incident). Applicant argues that his failure to disclose that information on his security questionnaire was not deliberate because: (a) he had not been arrested, but only charged, and (b) he did not realize the charges against him were criminal in nature.⁽²⁾ Applicant's arguments do not persuade us that the Judge erred.

An applicant's statements about his or her intent and state of mind when completing a security clearance questionnaire are relevant evidence, but they are not binding on the Administrative Judge. As the trier of fact, the Judge has to consider an applicant's statements in light of the record evidence as a whole, and an applicant's denial of any intent to falsify does not preclude the Judge from weighing the record evidence and making a finding that contradicts the applicant's denial. *See* ISCR Case No. 01-19278 (April 22, 2003) at pp. 6-7; ISCR Case No. 99-0194 (February 29, 2000) at p. 3. This case involved the omission of information which was of obvious security significance by an educated applicant familiar with the security clearance process. Given the record evidence in this case and giving due deference to the Administrative Judge's credibility determination, it was not unreasonable for the Judge to conclude that the Applicant's failure to disclose the relevant information had been intentional--despite his denials to the contrary. Accordingly, the Judge's finding that Applicant deliberately falsified his questionnaire arises from legally permissible inferences drawn from the record evidence. Applicant's ability to argue for an alternate interpretation of the record evidence is not sufficient to demonstrate the Judge's finding of falsification is unsustainable.

2. Whether the Administrative Judge erred in the application of the "whole person" concept. Applicant argues that the

Administrative Judge's decision is arbitrary, capricious, or contrary to law because the Judge erred in the application of the "whole person" concept.⁽³⁾ In support of that argument, Applicant reiterates the omissions from his questionnaire were not deliberate, and further contends that: (a) he disclosed the omitted information in subsequent interviews with the government's agent, (b) his employment history has been outstanding, and (c) the work he performs is vital to the defense effort. Applicant's arguments do not persuade us that the Judge erred.

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). *See also Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960)(security requirements include consideration of a person's honesty, judgment, sobriety, and sense of obligations), *aff'd*, 367 U.S. 886 (1961). Falsification of a security clearance application raises serious questions about an applicant's judgment, reliability, and trustworthiness. *See Harrison v. McNamara*, 228 F. Supp. 406, 408 (D. Conn. 1964)(lying on application for government position requiring a security clearance raises questions as to person's reliability and justifies dismissal), *aff'd per curiam*, 380 U.S. 261 (1965).

An Administrative Judge is not required to conclude the security concerns raised by an applicant's falsification are mitigated by the fact that the information was subsequently disclosed. *See* ISCR Case No. 01-19513 (January 22, 2004) at p. 5 (not arbitrary or capricious for Judge to conclude the government's security concerns not mitigated by the fact that applicant voluntarily disclosed his falsifications to an investigator the first time he was interviewed); ISCR Case No. 01-03767 (December 5, 2003) at p. 4 (Judge had rational basis for concluding the government's security concerns not mitigated by the fact the applicant had "come clean" and "had nothing left to hide"). Likewise, such concerns are not necessarily mitigated by an applicant's favorable professional and work record. *See, e.g.*, ISCR Case No. 01-01642 (June 14, 2002) at p. 6 (security clearance decisions not limited to consideration of an applicant's conduct during duty hours; off-duty conduct that raises security concerns can be considered in assessing an applicant's security eligibility). Finally, an applicant's ability to contribute to the defense effort is not a measure of whether that applicant demonstrates the high degree of judgment, reliability, or trustworthiness that must be reposed in persons granted access to classified information. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at pp. 7-8.

After reviewing the Judge's decision in this case, it is our view that -- with one exception that constitutes harmless error⁽⁴⁾ -- the Judge reasonably considered the "whole person" factors, such as the circumstances surrounding the conduct, his motivation, and the likelihood of continuance or recurrence, and nevertheless concluded that the evidence presented in the case was insufficient to overcome the security concerns raised by Applicant's conduct. Considering the record as a whole, the Judge's application of the relevant factors of Section 6.3 and Adjudicative Guidelines, Items E2.2.1.1 through E2.2.1.9, and his weighing of the record evidence was not arbitrary, capricious, or contrary to law.

Conclusion

Applicant has failed to demonstrate harmful error below. Therefore, the Board affirms the Administrative Judge's adverse security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge found in favor of the Applicant with respect to SOR paragraph 1.a (Criminal Conduct). That favorable finding is not at issue on appeal.
2. In his Appeal Brief, Applicant submitted further information to rebut, explain, extenuate, or mitigate the government's security concerns. This information constitutes new evidence. The Board is not permitted to consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. To the extent Applicant makes arguments about the incident that resulted in the criminal charges against him, those arguments are moot because of the Administrative Judge's formal finding in favor of Applicant under Guideline J (Criminal Conduct).
3. Directive, Section 6.3 and Adjudicative Guidelines, Items E2.2.1.1 through E2.2.1.9.
4. Applicant correctly notes the Administrative Judge erred by finding he is 51 years of age. However, reading the Judge's decision in its entirety, the Board concludes that there is not a significant chance that the Judge's findings and conclusions about Applicant's falsification would be different if the Judge had correctly found Applicant is 41 years of age.