

DATE: November 22, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-30039

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

-----, Personal Representative

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated March 12, 2004, 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) and Guideline E (Personal Conduct). Administrative Judge Elizabeth M. Matchinski issued an unfavorable security clearance decision, dated May 23, 2005.

Applicant appealed the Administrative Judge's unfavorable 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 issues have been raised on appeal: (1) whether the Administrative Judge erred in concluding that security concerns stemming from Applicant's 1991 felony larceny conviction could not be mitigated; (2) whether the Administrative Judge improperly shifted the burden to Applicant to prove that she did not falsify her security clearance application; and (3) whether the Administrative Judge's conclusion that Applicant had not mitigated security concerns stemming from her falsifications is arbitrary, capricious or contrary to law. 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 in concluding that security concerns stemming from Applicant's 1991 felony larceny conviction could not be mitigated. Applicant argues that the Administrative Judge erred by not mitigating the security significance of her 1991 conviction because the following Criminal Conduct Mitigating Conditions applied: (a) it was not recent;⁽²⁾ (b) it was an isolated incident⁽³⁾ as her only brush with the criminal justice system; (c) she was pressured into committing the act because she was a single mother with two children and with "a lot of uncertainties," little education, and a lot of expenses, but these conditions are no longer present in her life;⁽⁴⁾ (d) the factors leading to the violation are not likely to recur⁽⁵⁾ because she no longer works in the "hopeless" conditions that existed in the past; and (e) there is clear evidence of successful rehabilitation⁽⁶⁾ because she completed her sentence, did not commit any further criminal behavior, went to school and earned her degree, and now works for an employer who has given her positive work reviews. Applicant seeks a "plenary review" by the Board because the Administrative Judge "did not consider nor make note of any of the positive changes and possible mitigating security concerns" described above.

The Board is not persuaded by Applicant's arguments. There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. The presumption that the Judge considered all the record evidence is not rebutted by a showing that the Judge did not give certain evidence as much weight as the appealing party would have liked. *See, e.g.*, ISCR Case No. 03-09485 (July 8, 2004) at p. 3. Here, the Judge found that Applicant had not engaged in theft-related conduct after 1991, and concluded that such criminal behavior was not recent. The Judge also concluded that Applicant's pursuit of her college degree and work contributions reflect positively on her. But the mere presence or absence of any Adjudicative Guidelines disqualifying or mitigating factor is not dispositive of the case. *See, e.g.*, ISCR Case No. 03-

11448 (August 10, 2004) at pp. 3-4. In addition to applying pertinent provisions of the Adjudicative Guidelines, a Judge must evaluate an applicant's security eligibility in light of the record evidence as a whole and in terms of the general factors of Directive, Section 6.3 and Adjudicative Guidelines, Item E2.2.1. The Administrative Judge also concluded that Applicant's conduct was neither remote in time nor isolated in nature because Applicant intentionally misrepresented material facts to the government regarding her 1991 conviction and lacks remorse for the 1991 incident. (7) The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision. Directive, Additional Procedural Guidance, Item E3.1.15. The Judge concluded that significant doubts persist about Applicant's judgment, reliability and trustworthiness. (8) The Judge's conclusions reflect a reasonable, plausible interpretation of record evidence and are sustainable.

2. Whether the Administrative Judge improperly shifted the burden to Applicant to prove that she did not falsify her security clearance application. Applicant correctly points out that when a falsification allegation is controverted, the Department Counsel has the burden of proving an intent to falsify or mislead. Directive, Additional Procedural Guidance, Item E3.1.14. We construe Applicant's position to be that Department Counsel had demonstrated the omission of information only and not an intent to falsify. The Board is not persuaded by Applicant's argument.

Applicant is correct that proof of an omission of information, standing alone, does not establish or prove the intent or state of mind of the person who omitted the information. Rather, an Administrative Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind when the omission occurred. *See, e.g.*, ISCR Case No. 02-23133 (June 9, 2004) at p. 5. In this case, the Judge had a legally sufficient basis for finding that Applicant engaged in deliberate falsification.

A review of the record below shows that the Administrative Judge had more than just evidence of an omission. At the hearing, Applicant admitted that she lied to an investigator in her June 2002 written statement about the 1991 larceny (SOR paragraph 2.c). *See* Hearing Transcript at p. 13. *See also* Government Exhibit 5 (Applicant's August 2002 written statement)(admitting Applicant's previous statements about 1991 incident "were not truthful"). Moreover, there are inconsistencies among Applicant's various statements about her omissions on the security clearance application. In addition to observing Applicant's demeanor during her hearing testimony, the Judge could consider the inconsistencies among Applicant's statements in assessing her credibility and veracity. Given the totality of the documentary evidence, Applicant's hearing testimony, and the deference owed to the Judge's credibility determination, the Board concludes there is sufficient circumstantial evidence to support the Judge's finding that Applicant falsified the security clearance application as alleged in SOR paragraphs 2.a and 2.b. The Judge's findings of falsification reflect a reasonable, plausible interpretation of the record evidence.

3. Whether the Administrative Judge's conclusion that Applicant had not mitigated security concerns stemming from her falsifications is arbitrary, capricious or contrary to law. Applicant asserts that the Judge erred by not concluding that the security significance of any falsifications on her part had been mitigated. Applicant argues that the Judge only considered Personal Conduct Mitigating Condition 3 (9) and did not consider other mitigating conditions that applied to her. Applicant argues that Personal Conduct Mitigating Condition 2 (10) applied to her because her falsification of the clearance application was an "isolated" event that happened "three years ago," and the subsequent "correct information" was introduced by the Department Counsel at the hearing. (11) Applicant also contends that two other mitigating conditions applied to her: (a) Personal Conduct Mitigating Condition 5 (12) because she "left the retail environment," completed her education, got married, and acquired a better and higher paying jobs with great job reviews; and (b) Personal Conduct Mitigating Condition 7 (13) because she is now closely associated with her husband, children and work associates, and her husband has no criminal history.

As in the application of the Criminal Conduct Mitigating Conditions, the burden of persuasion in mitigation lies with Applicant. The Administrative Judge properly considered mitigation here under Mitigating Condition 3 and would not have been justified in applying Mitigating Condition 2. *See, e.g.*, ISCR Case No. 02-15003 (March 17, 2005) at p. 4; and ISCR Case No. 01-06166 (October 25, 2001) at p. 3 (discussing the difference between Personal Conduct Mitigating Condition 2 and Personal Conduct Mitigating Condition 3). Moreover, as discussed above, the Administrative Judge specifically considered much of the favorable evidence that Applicant claims that the Judge failed to consider, but found

such evidence to be insufficient to overcome security concerns in this case given Applicant's current lack of candor and remorse with respect to the 1991 incident. Applicant has not demonstrated that the Judge weighed the evidence as a whole in an arbitrary or capricious manner. Nor has Applicant demonstrated that the Judge erred in her application of the Adjudicative Guidelines pertaining to Guideline E (Personal Conduct). The Judge's conclusions under Guideline E are sustainable.

Conclusion

Applicant has failed to demonstrate 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: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. The Administrative Judge made a favorable formal finding for Applicant under SOR paragraph 1.b. That formal finding is not in issue in this appeal.

2. Directive, Adjudicative Guidelines, Item E2.A10.1.3.1

3. Directive, Adjudicative Guidelines, Item E2.A10.1.3.2.

4. Directive, Adjudicative Guidelines, Item E2.A10.1.3.3.

5. Directive, Adjudicative Guidelines, Item E2.A10.1.3.4.

6. Directive, Adjudicative Guidelines, Item E2.A10.1.3.6.

7. There is also an obvious conflict between Applicant's arguing for application of Criminal Conduct Mitigating Condition 3 (Directive, Adjudicative Guidelines, Item E2.A10.1.3.3) after she testified at her hearing that she was not guilty of any crime.

8. In this regard, the decision below reflects the Judge considered Applicant's security eligibility under the whole person concept.

9. "The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts"

(Directive, Adjudicative Guidelines, Item E2.A5.1.3.3).

10. "The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily" (Directive, Adjudicative Guidelines, Item E2.A5.1.3.2).

11. While Applicant's brief does not specifically identify the exhibit, the only apparent possibility that she could be referring to is Government Exhibit 5. The Administrative Judge reasonably concluded that Applicant's hearing testimony (in which Applicant denied culpability in the 1991 incident) contradicts the statement Applicant gave in Government Exhibit 5 (Decision at p. 5).

12. "The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress" (Directive, Adjudicative Guidelines, Item E2.A5.1.3.5).

13. "Association with persons involved in criminal activities has ceased" (Directive, Adjudicative Guidelines, Item E2.A5.1.3.7).