

DATE: December 7, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-33714

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On November 16, 2004, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct), pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On May 10, 2005, after the hearing, Administrative Judge Charles D. Ablard granted Applicant's request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

This Board remanded the case to the Administrative Judge to explain his conclusion that Applicant's failure to list his felony conviction on the SF 86 was not deliberate. On March 8, 2006, the Administrative Judge issued a second decision, again granting Applicant's request for a clearance. Again, Department counsel has submitted a timely appeal.

Department Counsel raised the following issue on appeal: whether the Administrative Judge's decision was arbitrary, capricious, or not supported by law. We affirm the Administrative Judge's decision to grant the clearance.

II. Whether the Record Supports the Administrative Judge's Factual Findings

A. Facts

In his original decision, the Administrative Judge found that Applicant is employed as a security guard for a defense contractor. In 1996, at age 19, Applicant was charged with burglary of an automobile, entering a plea of guilty. The Court deferred the imposition of sentence for three years, during which time Applicant was on unsupervised probation, was to perform 50 hours of community service and was to pay restitution.

Applicant successfully completed the requirements imposed by the Court and was entitled to request that his record be expunged. The Administrative Judge found that, based upon Applicant's conversations with his lawyer at the time and to "some confusion" in the District Attorney's office, Applicant did not report this conviction on the SF 86. ⁽¹⁾

The Administrative Judge found that Applicant has maintained a clean record since this incident, that he has married, and that he has a good employment record.

The Board remanded the case to the Administrative Judge to explain how even an honest belief that his conviction had been expunged provided "a reasonable basis for believing that he fell within the terms of the single exception set forth in Question 21. . ." In his remand opinion, the Administrative Judge again found that Applicant actually believed that his record had been expunged, due to advice of counsel and to the above referenced "confusion" in the District Attorney's office. Although Applicant's belief was, in fact, untrue, the Judge determined that it was nevertheless honestly held. As a result, Applicant "reasonably concluded he was not required to report the charge or conviction on his SF 86 . . . [and that] he believed at the time of submission of the SF 86 that he had legally resolved the question of his criminal record."

B. Discussion

The Appeal Board's review of the Administrative Judge's finding of facts is limited to determining if they are supported by substantial evidence--such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record." Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620-21, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966)). In evaluating the Administrative Judge's findings, we are required to give deference to the Administrative Judge's credibility determinations. Directive ¶ E3.1.32.1

The principal issue is whether substantial evidence supports the Judge's finding that Applicant reasonably believed he did not have to report his conviction. The Judge's remand opinion, in our view, does not really explain why he finds Applicant to be credible on this point, only that he does so. However, in our examination of the record, we note the following:

Department Counsel: . . . So when this form asked you, "Have you ever been charged with or convicted of a felony offense" why did you answer, "No."

A: Because it was my understanding when it was expunged from my record that nobody would know about it.

Q: Okay, so you didn't think the Government would know about it?

A: It was my understanding that they wouldn't know about it . . . You couldn't find out about it because it was taken from my record. It was written off or whatever they do to it, black it out, I guess.

Q: Now, your arrest, or charge, didn't have anything to do with drugs?

A: No.

Q: So you knew it didn't fall under the Federal Controlled Substances Act. Right?

A: Well, since you said that, the Federal Controlled Substances Act, I knew it probably did fall under that . . . I didn't know if stricken was the same as expunged. I mean, it's expunged, it's taken from your record. ⁽²⁾

From this colloquy one could infer that Applicant genuinely misunderstood Question 21, believing that the purported expungement of his record placed his case within that question's exception. Although a reasonable person might conclude that Applicant was being disingenuous, this Board is satisfied that the Administrative Judge's finding that Applicant lacked an intent to deceive is supported by record evidence. Therefore, we conclude that there is no basis to disturb his findings of fact.

III. Whether the Record Supports the Administrative Judge's Ultimate Conclusions.

An Administrative Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Appeal Board may reverse the Administrative Judge's decision to grant,

deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. Our scope of review under this standard is narrow and we may not substitute our judgment for that of the Administrative Judge. We may not set aside an Administrative Judge's decision "that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency ..." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42. We review matters of law *de novo*.

In light of our conclusion as to the sufficiency of the Administrative Judge's findings of fact, it is not a difficult matter to assess the legal sufficiency of the Judge's decision. The essence of the case is that Applicant engaged committed burglary when he was 19 years old but, on the SF 86, denied that he had been charged or convicted of a felony. We find no basis to disturb the Judge's conclusion that the crime itself was not recent, (3) was isolated, (4) and that Applicant had demonstrated clear evidence of successful rehabilitation. (5) Furthermore, given the fact that the Judge found that Applicant did not intend to deceive, he properly concluded that Applicant's answer on the SF 86 was not a basis to apply a Disqualifying Condition. Therefore, his decision in favor of Applicant, both as to Guideline E and Guideline J, is neither arbitrary, capricious, nor contrary to law.

IV. Order

The judgment of the Administrative Judge granting Applicant a clearance is AFFIRMED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: James E. Moody

James E. Moody

Administrative Judge

Member, Appeal Board

1. Question 21 of the SF 86 reads as follows: "Your Police Record - Felony Offenses Have you ever been charged with or convicted of any felony offense . . . For this item, report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607." Applicant answered "No" to this question.

2. Transcript at 20 *et seq.*

3. Directive ¶ E2.A10.1.3.1.

4. Directive ¶ E2.A10.1.3.2.

5. Directive ¶ E2.A10.1.3.6