

DATE: August 31, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-02486

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT

R. Wayne Pierce, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated October 15, 2003, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline H (Drug Involvement) and Guideline E (Personal Conduct). Administrative Judge Charles D. Ablard issued a favorable security clearance decision dated March 22, 2004.

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 issues have been raised on appeal: (1) whether the Administrative Judge erred by concluding Applicant's falsification was not pertinent to a determination of judgment, trustworthiness, or reliability; and (2) 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 Issues

The Administrative Judge entered formal findings in favor of Applicant with respect to Guideline H (Drug Involvement). Because those formal findings are not at issue on appeal, the Board need not consider the Administrative Judge's findings and conclusions about Applicant's past history of marijuana use, except to the extent they are relevant to the appeal issues concerning the Judge's findings and conclusions under Guideline E (Personal Conduct).

The Administrative Judge found that Applicant did not falsify a security clearance application

in September 2002 by answering "NO" to a question that asked whether his use of alcohol had resulted in any alcohol-related treatment or counseling (SOR paragraph 2.b.). That factual finding and the Judge's favorable formal finding concerning SOR paragraph 2.b are not at issue on appeal.

The Administrative Judge found that Applicant falsified a security clearance application in September 2002 by failing to disclose the full extent of his marijuana use, but concluded that the falsification was mitigated because: (a) the full extent of Applicant's marijuana use was not pertinent to a determination of judgment, trustworthiness, or reliability; and (b) the record evidence as a whole showed Applicant "is a trustworthy and reliable person whose record of conduct and employment justifies a finding that it is clearly consistent with the national interest to grant a security clearance to him." The Judge's conclusions about this falsification are the subject of this appeal.

1. Whether the Administrative Judge erred by concluding Applicant's falsification was not pertinent to a determination of judgment, trustworthiness, or reliability. Department Counsel challenges the Administrative Judge's conclusion that Applicant's falsification was mitigated because the information Applicant omitted from the security clearance application was not pertinent to a determination of judgment, trustworthiness, or reliability. Applicant contends the Judge did not err by reaching that conclusion.

Although the Administrative Judge's decision refers to Personal Conduct Mitigating Condition 2 (without quoting it), the Judge used language indicating he was actually relying on Personal Conduct Mitigating Condition 1. ⁽¹⁾ Accordingly, it is reasonable for Department Counsel to frame its argument in terms of Personal Conduct Mitigating Condition 1, not Personal Conduct Mitigating Condition 2. Even Applicant's reply brief construes Judge's decision as referring to Personal Conduct Mitigating Condition 1, not Personal Conduct Mitigating Condition 2.

Department Counsel persuasively argues that the Administrative Judge's application of Personal Conduct Mitigating Condition 1 in this case was arbitrary and capricious because the information he omitted was material and pertinent to a determination of his judgment, trustworthiness, or reliability.

Applicant's counterarguments (Reply Brief at pp. 10-12) are not persuasive. First, Applicant's reliance on the "could" and "may" language of the Adjudicative Guidelines is irrelevant to whether Applicant's omission was material. Second, an Administrative Judge does not have unfettered discretion in interpreting and applying the Adjudicative Guidelines disqualifying and mitigating conditions. The right of parties to receive a fair and impartial determination under the Directive does not translate into a right to expect the exercise of unfettered discretion by Hearing Office Judges. ⁽²⁾ Third, Applicant's argument about his disclosure to the Defense Security Service (DSS) agent is irrelevant to whether the Judge properly applied Personal Conduct Mitigating Condition 1. The materiality of Applicant's omission does not turn on whether the Applicant later made a disclosure to a DSS agent. Fourth, Applicant's argument that Department Counsel is urging "an extremely expansive interpretation" of materiality is unpersuasive. The concept of materiality in security clearance adjudications should not be more narrow than the concept of materiality in criminal prosecutions under 18 U.S.C. §1001. ⁽³⁾ Fifth, the "whole person" concept does not save the Judge's legally erroneous conclusion about materiality. The "whole person" concept pertains to a Judge's evaluation of an applicant's security eligibility in light of the record evidence, not the Judge's interpretation of language in the Directive. Sixth, Applicant is correct that the Judge did not use the word "materiality" in his decision. However, the language of Personal Conduct Mitigating Condition 1 concerning pertinency has been construed by the Board as dealing with the functional equivalent of materiality. ⁽⁴⁾ Furthermore, during the proceedings below, Applicant's attorney made statements that show he understood the materiality of Applicant's omission was an important issue in the case. ⁽⁵⁾

For all the foregoing reasons, taken cumulatively, the Board concludes the Administrative Judge erred by applying Personal Conduct Mitigating Condition 1 to Applicant's falsification. The information Applicant omitted clearly was material and pertinent to a determination of his security eligibility.

2. Whether the Administrative Judge's favorable security clearance decision is arbitrary, capricious, or contrary to law. Department Counsel also contends the Administrative Judge's favorable decision is not sustainable under the "whole person" concept because:

- (A) Applicant concealed his drug use and drug-related arrest from his family and employer;
- (B) Applicant did not disclose the extent of his drug use until questioned by the DSS agent;
- (C) Applicant did not tell his family until he received the SOR and was placed on leave;
- (D) Applicant's disclosure to his employer has been very limited;
- (E) Applicant was "exceptionally deliberate in his falsification" (*i.e.*, very calculating and premeditated);
- (F) Applicant minimized his falsification at the hearing;
- (G) Applicant's marriage after the falsification is not sufficient to support the Judge's conclusion that Applicant has significantly changed and demonstrated maturity; and
- (H) the Judge failed to give due weight to the seriousness of Applicant's falsification of the security clearance application. ⁽⁶⁾

Applicant counters by contending the Administrative Judge's decision is sustainable under the "whole person" concept because:

- (i) Department Counsel has the burden on appeal and has not met it;
- (ii) There is a presumption that the Administrative Judge considered all the record evidence, and Department Counsel does not even contend the Judge failed to do so in this case;
- (iii) The Judge properly weighed the record evidence and reached a fair and commonsense decision;
- (iv) The Judge properly found Applicant to be a credible witness;
- (v) Department Counsel is merely disagreeing with the Judge's weighing of the record evidence;
- (vi) The Judge properly weighed the record evidence as a whole and articulated a satisfactory explanation for his favorable conclusion;
- (vii) The Judge properly concluded Applicant "is not a person habitually skating on the edge, but rather, is an individual who made an isolated mistake premised upon an isolated lapse of judgment as a teenager"; and
- (viii) Department Counsel's ability to set forth an alternate interpretation of the record evidence is not sufficient to demonstrate the Judge's findings and conclusions are erroneous.

For the reasons that follow, the Board concludes Department Counsel's arguments are, on balance, more persuasive than Applicant's counterarguments.

Applicant correctly notes that there is no presumption of error and the appealing party has the burden of demonstrating error below. However, for the reasons discussed in this decision, the Board concludes Department Counsel has met its burden of demonstrating error below.

Applicant correctly notes that there is a rebuttable presumption that the Administrative Judge considered all the record evidence, and that Department Counsel does not even contend the Judge failed to do so in this case. However, Department Counsel's choice to not challenge that presumption in this case does not have the significance Applicant seems to attribute to it. Whether a Judge complied with the obligation to consider the record evidence as a whole,⁽⁷⁾ is not the same question as whether the Judge made findings of fact that are supported by substantial record evidence,⁽⁸⁾ or the same question as whether the Judge's conclusions and rulings are arbitrary, capricious, or contrary to law.⁽⁹⁾ It is possible for a Judge to consider the record evidence but fail to weigh it properly, to draw unreasonable or unwarranted inferences from the record evidence, or to apply arbitrary and capricious reasoning to the record evidence in reaching conclusions about a case. Accordingly, even though Department Counsel has not challenged the presumption that the Judge considered all the record evidence, that does not foreclose Department Counsel from raising other claims of error by the Judge.

The Administrative Judge's assessment of Applicant's credibility does not have the significance that Applicant places on it. When evaluating a witness's testimony (including that of an applicant), an Administrative Judge can assess the witness's credibility and rely on that credibility assessment as part of the process of weighing the witness's testimony.⁽¹⁰⁾ However, a credibility determination is not a substitute for record evidence supporting a Judge's findings and conclusions,⁽¹¹⁾ and it does not relieve a Judge from the obligation to decide what weight reasonably can be given to the witness's testimony in light of the record evidence as a whole.⁽¹²⁾ In short, a favorable credibility determination does not preclude an appealing party from raising claims of error unrelated to the credibility determination itself, or a claim that the Judge made an improper use of such a credibility determination. In this case, Department Counsel need not challenge the Judge's credibility determination in order to raise its claims of error.

Applicant is correct that an appealing party's mere disagreement with an Administrative Judge's weighing of the record

evidence is not sufficient to demonstrate the Judge erred. However, if an appealing party articulates a cogent argument or reason for how or why the Judge's weighing of the evidence is arbitrary, capricious, or contrary to law, then the appealing party is doing more than just expressing a conclusory disagreement with the Judge's weighing of the record evidence. Furthermore, even if the appealing party does not challenge the Judge's weighing of the record evidence, the appealing party is not precluded from raising other claims of error unrelated to evidentiary weight.

Applicant is correct that an appealing party's ability to set forth an alternate interpretation of the record evidence generally is not sufficient to demonstrate the Administrative Judge's findings and conclusions are erroneous. It is not unusual for the parties to be able to proffer plausible interpretations of the record evidence, sometimes interpretations that differ from the one made by the Judge. Accordingly, on appeal, the question is not whether the appealing party can proffer a plausible interpretation of the record evidence that differs from the Judge's interpretation,⁽¹³⁾ but whether the appealing party can articulate a cogent argument or reason as to how or why the Judge's interpretation: (a) does not reflect a reasonable or plausible interpretation of the record evidence as a whole (including evidence that runs contrary to the Judge's interpretation); (b) involves a weighing of the record evidence that is arbitrary, capricious, or contrary to law; (c) reflects or exhibits arbitrary or capricious reasoning; or (d) contains some other identifiable factual, logical, or legal defect.

In this appeal, Department Counsel does more than simply disagree with the Administrative Judge's weighing of the record evidence, or merely set forth a plausible interpretation of the record evidence that differs from the Judge's interpretation. Rather, Department Counsel makes arguments that challenge the Judge's decision on grounds that: (i) the Judge makes some findings of fact that do not reasonably take into account record evidence that runs contrary to those findings; and (ii) the Judge's decision reflects arbitrary and capricious reasoning.

The Administrative Judge concluded Applicant "is a trustworthy and reliable person whose record of conduct and employment justifies a finding that it is clearly consistent with the national interest to grant a security clearance to him." Department Counsel challenges the Judge's favorable decision on the grounds that: (a) the Judge erred by concluding Applicant's falsification was not pertinent to a determination of his security eligibility; (b) the Judge's conclusion fails to take into account significant record evidence that runs contrary to it; and (c) the Judge did not articulate a satisfactory explanation for his favorable conclusion.

As discussed earlier in this decision, Department Counsel persuasively argues the Administrative Judge erred by concluding Applicant's falsification was not pertinent to a determination of his security eligibility. That error significantly undercuts the Judge's favorable decision.

Department Counsel also identifies significant record evidence that runs contrary to the Administrative Judge's conclusion that Applicant is a trustworthy and reliable person.⁽¹⁴⁾ Specifically, Department Counsel points out the record evidence shows: Applicant concealed his drug use and drug-related arrest from his family and employer; Applicant did not disclose to the federal government the extent of his marijuana use until he was questioned by a DSS agent; Applicant did not tell his family about his marijuana use until he received the SOR and was placed on leave; Applicant's disclosure to his employer has been very limited; Applicant's falsification was calculating and premeditated; and Applicant sought to minimize his falsification at the hearing. Although the Judge was not required to specifically cite and discuss each and every piece of record evidence when making his decision,⁽¹⁵⁾ the Judge erred by issuing a decision that: (a) has the practical effect of ignoring, glossing over, or failing to acknowledge or take into account significant record evidence that runs contrary to the Judge's findings and conclusions,⁽¹⁶⁾ and (b) fails to articulate a reasonable explanation for why the Judge concluded that Applicant is a trustworthy and reliable person despite significant record evidence that runs contrary to that conclusion.⁽¹⁷⁾ Given the totality of the record evidence in this case, the Judge failed to articulate a rational, satisfactory explanation for why he concluded Applicant has shown he is a trustworthy and reliable person.

Once an applicant has admitted, or Department Counsel has proven, conduct or circumstances that raise security concerns, an applicant has the burden of presenting evidence to rebut, extenuate, or mitigate those security concerns sufficiently to warrant a favorable security clearance decision.⁽¹⁸⁾ A favorable security clearance decision should not be made unless an Administrative Judge can make an affirmative determination that it is clearly consistent with the

national interest to grant or continue access to classified information for a given applicant. ⁽¹⁹⁾ Such a determination is not committed to the unfettered discretion of the Judge, but rather must be made within the constraints of the Directive. ⁽²⁰⁾ In this case, Department Counsel proved that Applicant engaged in falsification of a security clearance application. Such falsification raised important security concerns that Applicant had the burden of rebutting or overcoming sufficiently to warrant a favorable security clearance decision. The Administrative Judge's decision fails to articulate a satisfactory explanation for his favorable conclusions that is rationally supported by the record evidence as a whole.

Applicant argues that even if the Board decides that the Administrative Judge erred, the Board should conclude such error is harmless in light of the record evidence as a whole. Applicant's argument is a proper and legally permissible one that is consistent with Board precedent. However, the Board does not find it persuasive in this case. If the Judge's only error had been to misapply Personal Conduct Mitigating Condition 1, that error would not -- standing alone -- necessarily lead to the conclusion that the Judge committed harmful error. ⁽²¹⁾ However, Department Counsel has done more than just show that the Judge erred by applying the Personal Conduct Mitigating Condition 1. Given the nature and totality of the Judge's errors, the Board concludes they are not harmless in nature.

Conclusion

Department Counsel has demonstrated harmful error that warrants reversal. Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.3, 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: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. "The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability" (Directive, Adjudicative Guidelines, Item E2.A5.1.3.1).
2. *See, e.g.*, ISCR Case No. 02-05110 (March 22, 2004) at pp. 4-6 (discussing how the Directive does not leave security clearance decisions to the unfettered discretion of security clearance adjudicators).
3. *See, e.g.*, ISCR Case No. 01-06870 (September 13, 2002) at p. 5.
4. *See, e.g.*, ISCR Case No. 98-0583 (November 18, 1999) at pp. 7-8; ISCR Case No. 98-0582 (November 12, 1999) at p. 7.

5. *See* Hearing Transcript at pp. 18, 130-131.
6. Since the Administrative Judge did not cite or otherwise appear to rely on Personal Conduct Mitigating Conditions 3, 4, 5, 6, or 7 in making his decision, Department Counsel's arguments about the nonapplicability of those mitigating conditions are irrelevant to this appeal and, therefore, need not be discussed.
7. The obligation to consider the record evidence as a whole is set forth in Directive, Section 6.3 and Adjudicative Guidelines, Item E2.2.1. Failure to fulfill that obligation would give rise to a claim of error under Directive, Additional Procedural Guidance, Item E3.1.32.2.
8. Directive, Additional Procedural Guidance, Item E3.1.32.1.
9. Directive, Additional Procedural Guidance, Item E3.1.32.3. Such a distinction follows from the language of the cited Directive provisions and the legal principle that provisions of the Directive should not be interpreted or construed in isolation or in a manner that makes any of them meaningless or superfluous. *See, e.g.*, ISCR Case No. 01-23356 (November 24, 2003) at p. 8.
10. *See Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985)(noting that credibility determinations involve more than just assessing the demeanor of a witness).
11. *See, e.g.*, ISCR Case No. 01-26893 (October 16, 2002) at p. 7.
12. *See, e.g.*, ISCR Case No. 02-02195 (April 9, 2004) at pp. 6-7.
13. Experience shows that lawyers generally argue for interpretations of the record evidence that favor their clients. Indeed, such arguments are an important facet of the lawyers' professional obligation to zealously represent their clients.
14. The Board does not find persuasive Applicant's argument that the Administrative Judge properly concluded Applicant "is an individual who made an isolated mistake premised upon an isolated lapse of judgment as a teenager." Although Applicant's marijuana use could be attributed to his immaturity as a teenager, his falsification cannot be so characterized.
15. *See, e.g.*, ISCR Case No. 02-00305 (February 12, 2003) at p. 3.
16. *See, e.g.*, ISCR Case No. 02-19479 (June 22, 2004) at p. 6 ("... the Judge's decision cannot simply be silent about what, as a matter of common sense, appears to be a relevant factor that could be an important aspect of the case") (footnote omitted); ISCR Case No. 02-02195 (April 9, 2004) at p. 4 ("Furthermore, if a Judge does not discuss or even mention a significant aspect of the case that reasonably could be expected to be explicitly taken into account in the Judge's decision, then a serious question arises as to whether the Judge forgot that aspect, ignored it, failed to take it into account, dismissed that aspect of the case for no apparent reason, failed to understand the significance of that aspect of the case, or engaged in an arbitrary or capricious analysis.").
17. As discussed earlier in this decision, an Administrative Judge's decision can be arbitrary and capricious if: 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.
18. Directive, Additional Procedural Guidance, Item E3.1.15.
19. Executive Order 10865, Section 2; Directive, Sections 3.2 and 4.2. *See also* Directive, Adjudicative Guidelines, Item E2.2.2 (noting that doubts should be resolved in favor of the national security).
20. *See, e.g.*, ISCR Case No. 02-05110 (March 22, 2004) at pp. 4-6.

21. *Cf.* ISCR Case No. 02-12329 (December 18, 2003) at p. 6 (presence or absence of a particular Adjudicative Guidelines disqualifying or mitigating condition is not solely dispositive of a case).