DATE: October 12, 2006

In Re:

SSN: ---------

Applicant for Security Clearance

ISCR Case No. 03-16819

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Sebrina E. Redd, Esq., Department Counsel

FOR APPLICANT

Tyler L. Randolph, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On October 27, 2004, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline E (Personal Conduct), pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On January 24, 2006, following the hearing, Administrative Judge ichael J. Breslin denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised numerous issues on appeal that can be broadly characterized as follows: (a) whether the Administrative Judge is biased against Applicant; (b) whether the Administrative Judge's findings of fact are supported by relevant evidence; (c) whether the Administrative Judge's findings that Applicant falsified certain material facts are arbitrary, capricious, or contrary to law; (d) whether the Administrative Judge's rulings and conclusions are arbitrary, capricious, or contrary to law; and (e) whether the Administrative Judge's ultimate security clearance decision is arbitrary, capricious, or contrary to law.

Applicant contends that the Administrative Judge was biased because he failed to note for the record that he had engaged in *ex parte* discussions with Applicant immediately preceding the hearing without identifying himself to Applicant as the Judge. Applicant contends that this violates his right to due process and resulted in bias. Applicant does not describe the nature of the alleged conversation with the Judge, nor any details concerning it, or why it results in bias.

Applicant's claim of bias lacks merit. There is a rebuttable presumption that an Administrative Judge is impartial and unbiased, and a party seeking to rebut that presumption has a heavy burden of persuasion. *See* ISCR Case No. 02-08032 at 4 (App. Bd. May 14, 2004). The issue is not whether Applicant personally believes the Judge was biased or prejudiced against Applicant. Rather, the issue is whether the record contains any indication the Judge acted in a manner that would lead a reasonable person to question the fairness and impartiality of the Judge. *See* ISCR Case No. 01-04713 at 3 (App. Bd. Mar. 27, 2003). Bias is not demonstrated merely because the Judge made adverse findings or reached unfavorable conclusions. *See* ISCR Case

No. 94-0954 at 4 (App. Bd. Oct. 16, 1995). After reviewing the record and the Judge's decision, which included a favorable formal finding,[(1)] the Board concludes that Applicant has not met his heavy burden of persuasion on the issue

of bias. Applicant fails to identify anything in the record that indicates or suggests a basis for a reasonable person to question the fairness or impartiality of the Judge. *See* ISCR Case No. 03-00740 at 2 (App. Bd. June 6, 2006).

Applicant contends that the Administrative Judge made several erroneous findings of fact. First, he claims that the Judge erroneously concluded that Applicant had admitted to the factual allegations in SOR paragraphs 1.a, 1.a.1, 1.a.2, 1.a.3, 1.c, 1.d and 1.e, when in fact, Applicant provided specific, detailed statements denying these allegations. The first four paragraphs of the SOR (1.a through 1.d) focus on Applicant's failure to disclose three driving under the influence (DUI) convictions in the period of 1988 through 1997, the last resulting in a sentence that included confinement. These DUIs are not the issue. Applicant falsified the following: (a) in January 2001 Applicant deliberately omitted them from a Registered Employee Information form that required him to reveal whether he had been "convicted of any crime" involving the illegal use "alcoholic beverages;" (b) Applicant altered forms to eliminate facts regarding one of the convictions; (c) Applicant falsified material facts when he applied in April 2001 for unemployment benefits stating that he was separated for "lack of work," when in fact he failed to disclose that he was fired for poor performance and not adhering to company requirements; and (d) Applicant falsified an employment application with his current employer in May 2001 when he responded "No" to the question of whether he had ever pled guilty, no contest or had ever been convicted of a crime. The last SOR paragraph (1.e) states that Applicant falsified question 20 of his security clearance application when he provided untruthful responses in connection with his discharges from past employers.

As to SOR paragraphs 1.a, 1.c, and 1.d, Applicant emphasizes that he stated in his response to the SOR that he did not realize that a traffic violation involving alcoholic beverages is a crime, and that his response to the last allegation in the SOR, paragraph1.e, was prefaced with the words "I believe" and "in my opinion." Applicant argues that these cannot be considered as admissions.

Applicant began each SOR Response, except SOR ¶1.b, with the words "I ADMIT," and his response to SOR ¶1.c did not contain any further explanation. However, even if we assume, for purposes of this appeal, that Applicant did not admit to any of the allegations of falsification in his SOR Response, the Administrative Judge's decision indicates that he did not exclusively rely on Applicant's SOR Response admissions to reach his findings on the SOR paragraphs (other than ¶1.b), but considered the record evidence as a whole. In considering the record evidence, the Judge specifically considered Applicant's claims that he did not realize that the alcohol-related traffic offenses were not crimes and that he had predicated his responses to SOR paragraph 1.e as indicated earlier. Decision at 6-7. In such circumstances, the Judge's conclusion that Applicant admitted to all SOR paragraphs, except ¶1.b, is not error.

Applicant also claims that the following findings of fact are erroneous: (a) Applicant denied serving confinement; (b) Applicant did not report his DUI convictions when he completed the Registered Employee Information Form in January 2001; and (c) Applicant's "lead technician and supervisor informed him that his dismissal was due to poor performance (Ex. 4 at 2), specifically being unproductive." The Appeal Board's review of the Administrative Judge's findings of fact 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 (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 Board finds that the Judge reasonably could have found that Applicant served confinement on his last alcohol-related traffic conviction and did not report his DUI convictions when he completed the Registered Employee Information Form. (It was not necessary for the Judge's decision to distinguish between pretrial and post-trial confinement.) The Board agrees that there is no evidence that Applicant's "lead technician and supervisor" informed him that his dismissal was due to poor performance, but Applicant was so informed by his company. The Judge's confusion as to the identity of the person who informed Applicant of the basis for his dismissal, in the context of this case, is harmless error because the material issue is that a company official advised Applicant of the adverse reason for his dismissal.

For several reasons, Applicant contends that the Administrative Judge could not have concluded that he intentionally falsified his Security Clearance Application or any of the job-related applications, the unemployment compensation form, or any other form described earlier in this decision. Applicant acknowledges that he omitted information, but

asserts that these omissions were not deliberate. Applicant claims that the Judge erroneously construed Applicant's ignorance of the law, *i.e*., his erroneous distinction between criminal and traffic offenses/convictions, into an impermissible inference of deliberate deception, and the Department Counsel did not introduce sufficient evidence to prove falsification. Applicant argues that the Judge cannot substitute a credibility determination for evidence.

The Board agrees that an Administrative Judge's credibility determinations are no substitute for evidence, and that an omission is not necessarily evidence of falsification. Applicant's statements about his intent and state of mind when he executed his security clearance application and other documentation in issue were relevant evidence, but they were not binding on the Administrative Judge. *See* ISCR Case No. 01-19278 at 6-7 (App. Bd. Apr. 22, 2003). As the trier of fact, the Judge had to consider Applicant's statements in light of the record evidence as a whole, and Applicant's denial of any intent to falsify a statement did not preclude the Judge from weighing the record evidence and making findings that contradicted Applicant's denials. *See* ISCR Case

No. 03-22281 at 2 (App. Bd. Jul. 13, 2006). In this case, the Judge specifically considered, among other things, several letters from his manager and coworkers attesting to Applicant's professional skill, honesty, trustworthiness and superior duty performance, but the presence of some mitigating evidence did not alone compel the Judge to make a favorable security clearance decision. *See* ISCR Case No. 03-23573 at 3 (App. Bd. Aug. 24, 2006). The Judge specifically considered the evidence of falsification under each subparagraph of the SOR, and found in Applicant's favor with respect to SOR paragraph 1.b. However, considering the record evidence as a whole, the Judge had a sufficient basis to find that Applicant's omissions under the other SOR subparagraphs were deliberate and intentional.

Applicant notes that the only disqualifying conditions cited by the Administrative Judge were Personal Conduct Disqualifying Conditions 1[(2)] and 2[(3)], and argues that his "lack of work" response in the application for unemployment benefits should not be sufficient to deny him a security clearance in light of his explanations, mitigation, and extenuation. Applicant contends that even if the alleged falsifications were sustainable, the Judge was required to mitigate them. Applicant provides specific arguments for favorably applying each of the Personal Conduct Mitigating Conditions (except one) and argues that the Judge failed to properly mitigate his conduct under the "whole person" concept.

The application of disqualifying and mitigating conditions does not turn simply on a finding that one or more of them applies to the particular facts of the case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole. *See* ISCR Case No. 01-14740 at 7 (App. Bd. Jan. 15, 2003). As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. An applicant's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. The burden is on an applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. The Judge's conclusion that none of the Personal Conduct Mitigating Conditions applies is sustainable.

Applicant contends that the Administrative Judge summarily asserted that he applied the whole person concept, but that the record makes it "abundantly clear" that he did not apply the factors enumerated in Directive ¶ E2.2.1. For example, Applicant cites the language in the Judge's synopsis in which he states, "Applicant has a long history of providing false information to employers and government agencies in order to conceal his three convictions for [DUI] and his poor employment record." Applicant asserts that the record really shows that the relevant conduct occurred from January through July 2001, and therefore, was neither a long history nor recent. Applicant reasons that Adjudicative Process factor E2.2.1.3 should apply in his favor.[(4)] Applicant also argues that the Judge did not address or consider evidence that Applicant had rehabilitated himself;[(5)] that he is no longer subject to the potential for pressure, coercion, etc.;[(6)] that he was open and honest in the security clearance application process and that it is unlikely that Applicant would repeat such conduct considering the "several year history" of trustworthiness, reliability and candor that Applicant has demonstrated through his submitted exhibits.[(7)]

The Board reviews an Administrative Judge's decision as a whole rather than focusing on isolated sentences or passages in it, to discern what the Judge meant. *See* ISCR Case No. 02-29608 at 3-4 (App. Bd. Dec. 17, 2003). Absent unusual

circumstances, any flaw or failing with a synopsis is not likely to demonstrate harmful error. *See* ISCR Case No. 02-23336 at 3-4 (App. Bd. May 10, 2004). The body of the Administrative Judge's decision is more critical, and the Judge's discussion indicates his concern about multiple instances of Applicant deliberately concealing adverse material information. Decision at 6-7. Applicant's falsifications starting in January 2001 and continuing through the security clearance application process in October 2001, which is still in issue here, could reasonably be viewed as frequent and recent. Moreover, while the Judge found no evidence that Applicant altered Government Exhibit 8 (as alleged in SOR ¶1.b), the Judge reasonably could conclude that Applicant's conduct surrounding that exhibit, along with testimony he gave concerning his handling of it, continue to raise security concerns. The Judge specifically considered this in his whole person analysis. Decision at 7. As stated earlier in this decision, the Judge was aware of and considered several letters from Applicant's managers and coworkers attesting to his professional skill, honesty, trustworthiness, and superior duty performance, but given the record evidence in this case, the Judge's conclusion that Applicant had failed to mitigate the security concerns under the whole person concept was sustainable.

Order

The decision of the Administrative Judge denying Applicant a clearance is AFFIRMED.

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

Signed: Mark W. Harvey

Mark W. Harvey

Administrative Judge

Member, Appeal Board

1. The Applicant denied SOR paragraph 1.b and the Administrative Judge made a formal finding in Applicant's favor with respect to this allegation of the SOR. This formal finding is not an issue in this appeal.

2. "Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances," Directive ¶ E2.A5.1.2.1.

3. "The deliberate omission, concealment, or falsification of relevant and material facts from any personal security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities," Directive ¶ E2.A5.1.2.2.

4. "The frequency and recency of the conduct," Directive ¶ E2.2.1.3.

5. "The presence or absence of rehabilitation and other pertinent behavioral changes," Directive ¶ E2.2.1.6.

6. "The potential for pressure, coercion, exploitation, or duress," Directive ¶ E2.2.1.8.

7. "The likelihood of continuation or recurrence," Directive ¶ E2.2.1.9.