

DATE: March 8, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-22563

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy. Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On May 7, 2004, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct), pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 8, 2005, after the hearing, Administrative Judge Kathryn Moen Braeman granted Applicant's request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Administrative Judge's favorable security clearance decision was arbitrary, capricious, contrary to law and unsupported by the weight of the record evidence in its ultimate conclusion that the Guideline E concerns were mitigated; whether the Judge's decision was arbitrary, capricious, contrary to law, and unsupported by the weight of the record evidence in its conclusion that the Guideline J concerns were mitigated by Criminal Conduct Mitigating Conditions 1, 4, and 6; and whether the Judge committed reversible error when she allowed Applicant to avoid giving full, frank, and truthful answers to relevant and material questions posed by Department Counsel during the hearing and when she ignored Paragraph 6.2 implications in her "whole person" analysis.

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

A. Facts

The Administrative Judge found the following:

While in the military in 1980, Applicant was convicted by Special Court Martial of Wrongful Possession, Use, and Sale of Cocaine/Wrongful Possession and Use of Marijuana. He requested an administrative discharge and was discharged under Other than Honorable Conditions in 1981.

Applicant was hospitalized for cocaine and alcohol addictions in July 1989.

On his 2002 security clearance application, Applicant disclosed a DUI arrest and his court martial, but failed to disclose other information.

In response to Question 21, Applicant failed to disclose a 1992 felony arrest for Endangering Children. The charge arose after his stepson's leg was broken. Child protective services substantiated physical and emotional abuse, and the child was removed to his grandmother's care. Applicant pled guilty to a misdemeanor. He explained that due to the passage of time he did not remember that the original charge was a felony and no longer had any documentation.

In response to question 24, Applicant neither admitted nor denied a misdemeanor drug arrest in 2000, relying on a state statute which provided that a person arrested for a first-time drug offense under that statute need not disclose the arrest.

In response to question 26, Applicant failed to disclose an arrest in 2000 under a Fugitive from Justice warrant. Applicant explained the circumstances and indicated that he had forgotten the arrest because the warrant was dismissed.

In a 2002 interview, Applicant signed a sworn statement that he had not used any illegal drugs since he left the military in 1981. At the hearing, Applicant admitted that statement was false. He explained that he made the statement "in anger" at the agent, who was pressing him regarding the drug arrest referred to under question 24 above.

Applicant's mother-in-law, who has had custody of Applicant's step-children, testified that Applicant has made positive changes in his life and in his relationship with his step-children.

B. Discussion

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 ¶ 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.

The Judge's findings of fact will be discussed below in conjunction with her ultimate conclusions.

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

When the rulings or conclusions of an Administrative Judge are challenged, the Board must consider whether they are arbitrary, capricious, or contrary to law. Directive ¶ 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, for example, whether it: does not examine relevant evidence; fails to articulate a satisfactory explanation for its conclusions; does not consider relevant factors; fails to consider an important aspect of the case; offers an explanation for the decision that runs contrary to the record evidence; or is so implausible that it cannot be ascribed to a mere difference of opinion. 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.

Department Counsel argues that the Administrative Judge's favorable security clearance decision is arbitrary, capricious, contrary to law, and unsupported by the weight of the record evidence in its ultimate conclusion that the Guideline E concerns were mitigated. Department Counsel contends that the Judge erred in accepting at face value Applicant's explanations for his failure to include required information on his security clearance application and in engaging in a piecemeal analysis of the Guideline E concerns. The argument has merit. There were three allegations of falsification against Applicant. In each instance the government proved the omission, and in each instance the Judge accepted at face value Applicant's explanation for his omission of the relevant information from his security clearance application. The Judge's piecemeal analysis of those three episodes, along with at least one other instance of failure to tell the truth⁽¹⁾, failed to reflect a reasonable interpretation of the full evidentiary record, which showed a pattern of intentional falsifications, dishonest conduct, and failure to cooperate. By analyzing each incident, one at a time, the Judge failed to

consider the significance of Applicant's pattern of conduct. *See, e.g., Raffone v. Adams*, 468 F. 2d 860, 866 (2d Cir. 1972)(taken together, separate events may have a significance that is missing when each event is viewed in isolation). The Judge's conclusions as to Guideline E are contrary to the weight of the evidence. *See, e.g., ISCR Case No. 99-0122 at 3 (App. Bd. Apr. 7, 2000)*.

Department Counsel argues that the Judge's favorable security clearance decision is arbitrary, capricious, contrary to law, and unsupported by the weight of the record evidence in its conclusion that the Guideline J concerns were mitigated by Criminal Conduct Mitigating Conditions 1, 4, and 6. As with the Guideline E concerns, Department Counsel contends the Judge considered each allegation separately and concluded that each was an isolated incident in the past, and that Applicant was rehabilitated. Department Counsel argues that the Judge again engaged in a piecemeal analysis instead of looking at Applicant's overall behavior as a pattern of criminal behavior involving poor choices and a lack of reliability. Department Counsel's argument has merit. *See, e.g., ISCR Case No. 96-0316 at 2 (App. Bd. Feb. 24, 1997)*; and *ISCR Case No. 99-0122 at 3-4 (App. Bd. Apr. 7, 2000)*. The Judge's favorable conclusions regarding Applicant's Guideline J concerns are contrary to the total weight of the record evidence.

Department Counsel argues that the Judge erred when she allowed Applicant to avoid giving full, frank, and truthful answers to relevant and material questions posed by Department Counsel during the hearing and when she ignored Paragraph 6.2 implications in her "whole person" analysis. Department Counsel's argument has mixed merit. The government proved that Applicant was convicted of a drug offense in 2002. Relying on a state statute, Applicant refused to answer relevant and material questions about the drug conviction, and the Judge refused to instruct him to answer. ⁽²⁾ It is well-settled that officers of the federal government are not bound by state law when carrying out their official duties unless there is a specific act of Congress that expressly indicates otherwise, and the federal government is not bound by state law concerning the expungement of state criminal convictions. *See, e.g., ISCR Case No. 00-0423 at 3 (App. Bd. June 8, 2001)*. The federal government has a compelling interest in protecting classified information. *Department of Navy v. Egan*, 484 U.S. 518, 527 (1988). Therefore, the federal government can require a person applying for a position that requires a security clearance to disclose information about his criminal record even if it has been expunged. *See, e.g., ISCR Case No. 00-0423 at 3 (App. Bd. 2001)*. After being instructed to answer, Applicant could still refuse to comply. Paragraph 6.2 of the Directive provides that such an action may impact negatively on Applicant's security clearance application. Although the Judge refused to instruct Applicant to answer questions about the 2002 drug conviction, she referred to it in her findings and conclusions.

When an appealing party demonstrates factual or legal error, the Board must consider whether: (a) the error is harmful or harmless; (b) the nonappealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds; and (c) if the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded. In this case, the Judge's favorable clearance decision is not sustainable, and the identified errors are unlikely to be remedied by remand. Therefore, that decision must be reversed.

Order

The Administrative Judge's decision is REVERSED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, 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. Applicant testified that he purposely swore to and signed a false statement in a DSS interview in order to make the agent cease questioning him about one of the falsification allegations. That behavior was not alleged in the SOR, but was significant evidence of a pattern of falsehoods.
2. The Judge stated that because Applicant had a legal basis for his refusal to answer the questions she could not force him to answer.