

DATE: March 20, 2006

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 03-22819

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Edward W. Loughran, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On November 29, 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 August 31, 2005, after the hearing, Administrative Judge Michael J. Breslin 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 issue on appeal: whether the Administrative Judge's conclusion that Applicant had mitigated an act of falsification was arbitrary, capricious and contrary to law. We reverse the Administrative Judge's decision to grant the clearance.

### **I. Administrative Judge's Findings of Fact and Record Evidence Pertinent to Appeal Issue**

#### **A. Facts and Record Evidence**

The following findings of fact made by the Administrative Judge are pertinent to the issue raised on appeal: (a) between about 1997 and 1999, Applicant experimented with marijuana on a few occasions at small, private gatherings; (b) Applicant and her husband separated in 1998 and a custody battle over the couple's son ensued; (c) during the course of the custody proceedings, Applicant's husband alleged that she unlawfully used marijuana and abused alcohol; (d) Applicant voluntarily submitted to weekly drug testing to prove she did not use drugs, and was awarded custody of her son; (e) In July 2002, when Applicant was 24 years old, two minors approached her outside a convenience store and asked her to buy two beers for them; (f) Applicant bought the beer and gave it to the minors, who were part of a police undercover operation; (g) when confronted by police, Applicant admitted purchasing the alcohol for the individuals, but claimed she did not know they were minors; (h) Applicant was subsequently arrested and convicted of contributing to the delinquency of minors; (i) Applicant submitted an SF 86, Security Clearance Application, on September 9, 2002; (j) Applicant was a young, single parent facing many pressures at the time she filled out the application; (k) the application asked about pending charges, and Applicant properly reported the citation for contributing to the delinquency of a minor; (l) Question 27 on the SF 86 asked whether Applicant had illegally used drugs, including marijuana, since she was 16 years old or within the last seven years, whichever was shorter; (m) Applicant answered, "No" to Question 27;

(n) In March 2003, a security investigator questioned Applicant about her drug use; (o) in that statement, Applicant admitted that she experimented with marijuana on a few occasions in social settings; (p) she also wrote, "I falsified my ESPQ by not listing my use of marijuana on that form because I did not want to look like a druggie when I felt that my use of marijuana was insignificant;" (q) at the hearing, Applicant asserted that she understood Question 27 on the SF 86 to ask whether she was a drug user; (r) Applicant is subject to random drug testing at any time at her place of work and she has test results that were negative; and (s) since her 2002 offenses, Applicant has assumed greater responsibilities and held steady employment.

The following additional record evidence was not mentioned by the Administrative Judge in his decision but is pertinent to the issue raised by Department Counsel on appeal: (i) in a statement given to a security investigator on December 13, 2002, Applicant admitted that she knew the couple at the convenience store were not of legal drinking age when she purchased two beers for them; (ii) at the hearing, Applicant testified that when she purchased alcohol for the couple, she did not know they were under age; (iii) at the hearing, upon inquiry from the Administrative Judge, Applicant indicated that she denied the SOR allegation relating to falsification of her SF 86 answer regarding marijuana use; and (iv) in further testimony at the hearing, Applicant stated that it was not her intent to lie to the government or falsify information.

## 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 Administrative Judge's findings of fact are not challenged on appeal. Therefore, the appeal issue in this case will be resolved with reference to the Judge's conclusions, which are described in succeeding paragraphs.

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

The Administrative Judge reached the following conclusions in the case: (a) Applicant's assertion that she understood Question 27 of the SF 86 to ask whether she was a drug user is unpersuasive; (b) Applicant deliberately falsified her answer to Question 27 of the security clearance application; (c) none of the Guideline E mitigating conditions apply to Applicant's act of falsification; (d) with regard to the falsification of the security clearance application, Applicant has not met her burden of demonstrating that it was an isolated event because, when stopped for buying beer for minors, she was not completely candid with police officers about whether she knew the individuals were under age; (e) Applicant recognizes how important it is to be completely candid in matters relating to her security clearance; (f) considering all the evidence, including her demeanor at the hearing, Applicant has changed her behavior so that there is little likelihood of recurrence; and (g) Applicant has mitigated the security concerns arising from her falsification of her security clearance application.

On appeal, Department Counsel challenges the Administrative Judge's conclusions as being arbitrary, capricious and contrary to the law and the record evidence. Specifically, Department Counsel argues: (a) having concluded that Applicant deliberately falsified a security clearance application in September 2002, the Judge failed to articulate a rational basis for his conclusion that Applicant has mitigated the security concerns arising from that falsification; (b) the Judge's conclusion that the falsification was mitigated runs contrary to his rejection of Applicant's explanation (which was, in essence, a denial) of the falsification; (c) given the Judge's rejection of Applicant's explanation as not being credible, it follows that the Judge could not have logically concluded that Applicant now recognizes the importance of being candid in matters relating to her security clearance; and (d) once the Judge rejected Applicant's assertion at the hearing that she did not know the individuals she purchased beer for were minors, it was illogical for the Judge to then find that Applicant has matured, recognizes the importance of being completely candid in matters regarding security

clearances, and is unlikely to commit further misconduct.

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*.

Department Counsel's appeal arguments concerning the Administrative Judge's conclusion that Applicant had mitigated the falsification of her security clearance application have merit.

In deciding whether the Administrative 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 at 3 (App. Bd. July 14, 1998) (citing Supreme Court decision).

Once the Administrative Judge found that Applicant deliberately falsified a security clearance application in September 2002, the Judge could not render a favorable security clearance decision without articulating a rational basis for why it would be clearly consistent with the national interest to grant or continue a security clearance for Applicant despite the falsification. Here, the Judge gives reasons as to why he considers the falsification mitigated under a "whole person" analysis, namely that Applicant has matured, has held a position of responsibility, recognizes how important it is to be candid in relation to matters relating to her security clearance, and has changed her behavior so that there is little likelihood of recurrence. However, the Judge's conclusion runs contrary to the Judge's rejection of Applicant's explanations for the security clearance application falsification. At the hearing (after earlier admitting the falsification in her March 2003 written statement to a security investigator), Applicant testified that she had not intentionally falsified her application. Given the Judge's rejection of this explanation as not being credible, it follows that the Judge could not have concluded Applicant now recognizes the importance of candor and has changed her behavior. As pointed out by Department Counsel on appeal, the problem with the Judge's conclusion regarding mitigation of the falsification is compounded by his rejection of Applicant's assertions that she was unaware that she was buying alcohol for underage minors in 2002. Applicant made this assertion to the police at the time of the incident, and resurrected it during her hearing testimony (after specifically admitting that she had such knowledge in her December 2002 statement to a security investigator). Given these facts, the Judge could not logically conclude that Applicant now demonstrates an increased capacity for truthfulness and honesty.

Given the errors described in the preceding paragraph, the references of the Administrative Judge in his decision to Applicant's maturity and her holding of a position of responsibility do not provide a rational basis for his conclusion that Applicant's falsification of her security clearance application was mitigated.

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) the Administrative Judge's decision should be reversed or remanded if it cannot be affirmed. In this case, the Judge's favorable security clearance decision is not sustainable, and Department Counsel has demonstrated harmful error requiring reversal.

### Order

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

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, 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