DATE: June 28, 2006

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 04-00789

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Nichole Noel, Esq., Department Counsel

FOR APPLICANT

Alan D. Putnam, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On March 31, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision-security concerns raised under Guideline E (Personal Conduct), Guideline F (Financial Considerations), and Guideline J (Criminal Conduct) pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended)(Directive). Applicant requested a hearing. On October 31, 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 conclusion that Applicant did not intentionally falsify his security clearance application, Form SF 86 (hereinafter SF86) was arbitrary, capricious, contrary to law and not supported by the record evidence, whether the Administrative Judge's application of Personal Conduct Mitigating Condition 2[(1)] was arbitrary, capricious, and contrary to law, and whether the Administrative Judge's application of Financial Considerations Mitigating Condition 6[(2)] was arbitrary, capricious, or contrary to law. We reverse the Administrative Judge's decision to grant the clearance.

Whether the Record Supports the Judge's Factual Findings

A. Facts

The following findings of fact made by the Administrative Judge are pertinent to the issues raised on appeal: (a) Applicant completed a SF86 on September 18, 2003; (b) at that time Applicant failed to disclose information regarding his felony arrest in December 1986 stemming from an altercation wherein he injured another individual; (c) Applicant also failed to list this arrest on a 2003 job application; (d) Question 21 of the SF86 required that Applicant disclose his police record regarding felony offenses;[(3)] (e) Applicant pled guilty to a misdemeanor to avoid going to prison, but understood from the court that after he completed two years probation, his record would reflect a misdemeanor arrest; (f) he did not know the felony arrest, in fact, remained on his record; (g) in subsequent years, he obtained gun permits and had a responsible position in the private sector where a felony record would have presented a barrier; (h) Applicant subsequently learned that the 1986 incident was still listed as a felony on the state arrest report when he was investigated by the Defense Security Service (DSS); (i) he never obtained a printout of his state arrest record as he believed the court's promise that the charge would be lowered to a misdemeanor after he completed probation; (j) in a

statement given to the DSS, Applicant made the damaging admission that he did not list his 1986 arrest on his SF86 or his job application because he was afraid it might hurt his chances of getting the job and the clearance; (k) Applicant signed the statement and did not amend the words of the DSS agent as he wanted to cooperate with the security process; (l) Applicant credibly maintained that he did not know the felony arrest was still on his record and thought his record had been "wiped clean;" (m) the job application form filled out by Applicant asked for misdemeanor or felony arrests in the last seven years; (n) Applicant had no intent to falsify his criminal record on his SF86 or his job application form; (o) Applicant filed for Chapter 7 bankruptcy in August 1996 to clear up the debts that arose from getting custody of his two sons; (p) the bankruptcy was discharged in December 1996; (q) Applicant has an outstanding debt with the U.S. Department of Education in the amount of $18,900 that went into default in May 2003 when he was having problems with his sons; (r) Applicant took some classes in May 2003 with his credit union and his previous employer to try to resolve his financial issues; and (s) in June 2005 he entered into a repayment agreement of $190 monthly and has made three payments.

There is other record evidence not made the basis of a finding of fact by the Administrative Judge that nevertheless is pertinent to the issues raised on appeal. That evidence is: (a) when discussing his answer to Question 21 during his hearing testimony, at one point Applicant indicated that he did not fully understand the question; (b) during his hearing testimony, Applicant acknowledged that he did not list the arrest on his SF86 because he was afraid it would hurt his chances of getting a security clearance; and (c) at the time the arrest occurred, Applicant was aware that the had been charged with a felony.

B. Discussion

The Administrative Judge's finding of fact regarding Applicant's intent to falsify is challenged on appeal. No other findings of fact are challenged on appeal. Because the finding of no intent to falsify differs somewhat from the Judge's other findings in that it is an ultimate fact, and since it is repeated by the Judge in her conclusions, for the sake of simplicity, the appeal issues in this case can be resolved with reference to the Judge's conclusions, (including the conclusion that Applicant did not intend to falsify) which are described in succeeding paragraphs.

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*.

The Administrative Judge reached the following conclusions in the case: (a) Applicant concluded that he had no felony record stemming from the 1986 arrest and did not need to disclose it on his security form; (b) this belief was reasonable given his understanding on his guilty plea as a teenager; (c) his explanations at the hearing were credible, especially in light of his understanding; (d) Applicant did not deliberately, with an intent to deceive, answer Question 11 incorrectly; (e) even if one were to conclude it was a falsification, the omission was an isolated incident, was not recent, and Applicant subsequently provided correct information voluntarily when questioned by the DSS agent, and thus was mitigated under Personal Conduct Mitigating Condition 2 (Directive ¶ E2.A5.1.3.2); (f) Applicant did not intend to falsify the company job application, as that application asked only for arrests within the past seven years; (g) the security concerns raised by Applicant's 1996 bankruptcy are mitigated under Financial Considerations Mitigating Condition 3 (Directive ¶ E2.A6.1.3.3)[(4)] owing to the special circumstances and financial pressures involved in gaining custody of his sons; (h) Applicant has mitigated the overall financial concerns under Financial Considerations Mitigating Conditions 4 (Directive ¶ E2.A6.1.3.4)[(5)] and 6 (Directive ¶ E2.A6.1.3.6); and (i) the government's security concerns under criminal conduct were linked to the concerns of his personal conduct and since he had no intent to falsify, there is insufficient evidence to support security concerns under criminal conduct.

On appeal, Department Counsel argues: (i) the Administrative Judge's finding that Applicant did not engage in falsification is arbitrary and capricious because it does not consider an important aspect of the case; (ii) the Judge's decision does not articulate a satisfactory explanation for its conclusions that Applicant did not falsify his SF86; (iii) the Judge's finding that Applicant did not falsify his SF86 is based, in part, on a favorable credibility determination that is not sustainable; (iv) the Judge's application of Personal Conduct Mitigating Condition 2 was arbitrary, capricious, and contrary to law; and (v) the Judge's application of Financial Conditions Mitigating Condition 6 was arbitrary, capricious and contrary to law. Department Counsel's arguments have mixed merit.

Department Counsel argues that the Administrative Judge failed to consider an important aspect of the case by dismissing Applicant's admission that he answered the SF86 the way he did because he was afraid of losing his clearance and his job "[i]n order to demonstrate he was fully cooperating with the DSS agent."[(6)] While a reading of the Judge's decision does not support the notion that she completely failed to consider Applicant's damaging admission, the Judge seriously discounts it in a manner that is not supported by the record evidence.

The Board reviews an Administrative Judge's findings according to the standard requiring them to be "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." Directive ¶ E3.1.32.1. Here, the language in the statement made by Applicant, which was signed and initialed by him was a statement against interest, a type of statement with a quantum of intrinsic credibility. Such a statement, if reliable, is strong evidence of Applicant's state of mind at the time he answered Question 21 on his SF86. The Administrative Judge acknowledges that Applicant made this damaging admission but goes on to say that he did not "amend the words of the DSS agent" on the statement "as he wanted to cooperate with the security process." Although the Judge's finding about Applicant not amending the words of the DSS agent suggests that she believes (or suspects) that the words may not truly be Applicant's, she stops short of making a finding that this evidence of Applicant's intent is inaccurate or unreliable. Given this, the Judge fails to offer a rational explanation as to why Applicant's statement was a mere attempt to cooperate with the security process as opposed to an accurate description of his state of mind. Moreover, there is no record evidence of a recantation of the statement by Applicant (indeed, he revives the admission during the course of his hearing testimony) and no evidence whatsoever of the DSS agent forcing Applicant to unwillingly sign a statement containing inaccuracies or untruths. Therefore, there is no record evidence that the statement is unreliable or otherwise unworthy of belief. For these reasons, the Judge's dismissal of Applicant's admission as a mere attempt to cooperate was arbitrary and capricious and not supported by the record evidence.

In her conclusions, the Administrative Judge again acknowledges the Applicant's admission that he answered "no" to question 21 because he was afraid of losing his clearance and job. She then states, "However, looking at all of the evidence I conclude that at the time he completed his security clearance form, he had no intent to deceive."[(7)] The Judge failed to discuss how other evidence of record worked to overcome this significant evidence of Applicant's state of mind--an admission against interest that seriously detracts from the Judge's conclusion that Applicant had no intent to deceive when he filled out the SF86. Given the inconsistent and conflicting nature of the other evidence of record, the nature of which will be discussed in succeeding paragraphs, the Judge failed to articulate a satisfactory explanation for why she weighed the evidence in a manner that minimized the importance of Applicant's admission against interest. The Judge's weighing of the evidence on the issue of Applicant's state of mind is not reasonably supported by the record.

Department Counsel asserts on appeal that the Administrative Judge's conclusion that Applicant's understanding of his arrest record and his receiving a gun permit from the state where he was arrested are not satisfactory explanations for the conclusion that Applicant did not have the intent to falsify his SF86. Department Counsel's assertion has merit.

Question 21 of the SF86 seeks to discover whether or not an applicant has ever been charged with or convicted of a felony offense. As pointed out by Department Counsel, the record evidence clearly reflects that Applicant understood that he was originally arrested and charged with a felony. Even though it may have been Applicant's understanding subsequently that he had no felony record and that by pleading guilty to a misdemeanor, the felony had "gone away," for Applicant's assertion that he did not intend to falsify to be viable, the record would still have to include a clear, logical explanation as to why Applicant thought he could answer "no" to question 21 knowing full well that he had once been arrested for a felony. The record contains no such evidence. By focusing on Applicant's understanding as to whether he had ever been convicted of a felony at the time he completed the SF86, the Judge failed to adequately explain why

Applicant had no intent to falsify a question that clearly contemplated the recording of felony arrests, regardless of future disposition. The Judge failed to provide a rational explanation as to why Applicant's understanding that he had no felony record at the time he completed the SF86 negated an intent to falsify when he failed to disclose his original felony arrest.

Applicant's denial that he intended to falsify the SF86 was relevant and material evidence that the Administrative Judge had to consider. However, Applicant's denial of an intent to falsify the security questionnaire was not binding on the Judge; rather the Judge had to consider Applicant's denial in light of the record evidence as a whole. A review of the decision below shows the Judge relied heavily on her conclusions that (a) Applicant credibly established that he had no intent to falsify; and (b) Applicant's explanations at the hearing as to why he answered Question 21 on the SF86 the way he did were credible.

Although the Board must give deference to the credibility determinations made by an Administrative Judge (Directive ¶ E3.1.32.1), that deference does not immunize credibility determinations from review. *See*, *e.g.*, ISCR Case No. 99-0710 at 4 (App. Bd. Mar. 19, 2001). As the Supreme Court noted in *Anderson v. City of Bessemer*, 470 U.S.. 564, 575 (1985): "[T]he trial judge may [not] insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable fact finder would not credit it. Where such factors are present, the courts of appeals may well find clear error even in a finding purportedly based on a credibility determination."

Accordingly, whether to accept an applicant's explanation about a matter cannot simply turn on a Judge's assessment of the applicant's demeanor when the applicant testifies. Thus, the Board must consider whether a Judge's acceptance of an applicant's explanation for his or her conduct is consistent with a reasonable interpretation of the record evidence as a whole. *See*, *e.g.*, ISCR Case No. 00-0620 at 3 (App. Bd. Oct. 19, 2001).

Department Counsel is correct in asserting the Judge did not consider the conflicting nature of the explanations the Applicant offered for not disclosing his 1986 arrest. A review of the record evidence shows Applicant provided several different explanations for his failure to disclose the 1986 arrest In his signed sworn statement of December 9, 2003, Applicant told the DSS agent he did not list the arrest on his SF86 because he was afraid it might hurt his chances of getting the job and the clearance. Applicant reaffirmed this motivation at one point during the hearing. In the course of his hearing testimony, Applicant also stated (a) he believed that the felony arrest no longer appeared on his arrest record, because his subsequent conviction of a misdemeanor converted the arrest to a misdemeanor arrest and he was therefore not obligated to report it, (b) he believed that his record had been "wiped clean," and (c) he did not understand the question.

Applicant's inconsistent explanations for his failure to disclose the 1986 arrest when he completed the SF86 seriously undercut the Administrative Judge's favorable credibility determination. Given Applicant's inconsistent explanations for his failure to disclose the 1986 arrest, the Judge failed to articulate a rational basis for why she found his explanations to be credible. *See*, *e.g.*, ISCR Case No. 86-2256 at 2-4, 6 (App. Bd. Jan 6, 1988)(where there are nontrivial inconsistencies or discrepancies in an applicant's statements and testimony, the Examiner must specifically address them). Considering the record evidence as a whole, the Board concludes the Judge's favorable credibility determination is not sustainable.

The Administrative Judge concluded that, even if one were to conclude that a falsification occurred, the falsification was mitigated by Personal Conduct itigating Condition 2. Department Counsel contends the Administrative Judge erred by applying Personal Conduct Mitigating Condition 2. This assertion has merit. Personal Conduct mitigating Condition 3, [(8)] not Personal Conduct Mitigating Condition 2 was the pertinent Adjudicative Guideline under the facts of this case. *See*, *e.g.*, ISCR Case No. 98-0582 at 7 (App. Bd. Nov. 12, 1999). Personal Conduct Mitigating Condition 3, not Personal Conduct Mitigating Condition 2, must be considered when a case involves the issue of whether an applicant has made disclosures that are corrections of an earlier falsification. *See* ISCR Case No. 97-0595 at 4 (App. Bd. May 22, 1998). A Judge does not have the authority or discretion to ignore the plain language of a pertinent Adjudicative Guideline that, on its face, does not apply to the particular facts of the case.

In his reply brief Applicant argues that the record supports mitigation of any falsification on the alternate ground of the application of Personal Conduct itigating Condition 3. However, the record evidence indicates Applicant's disclosures were not made in a prompt, good-faith manner or before being confronted with the facts as required by the language of the mitigating condition. Applicant concealed his 1986 felony arrest when he completed his SF86 in September 2003. Applicant made no effort to correct the SF86 after it was submitted. Applicant passively waited until the DSS agent contacted him and set up an interview and at that point he made no effort to correct his earlier falsification. Not until the DSS agent confronted Applicant with the record of his felony arrest did he disclose any information about the arrest. Considering all the circumstances, there is no basis to apply Personal Conduct Mitigating Condition 3 in this case.

Department Counsel asserts that, under the Financial Considerations Guideline, it was arbitrary and capricious for the Administrative Judge to apply Financial Considerations Mitigating Condition 6. The record evidence indicates that Applicant's student loan debt became delinquent in 2003 owing to some financial problems he was having at the time. Subsequently, Applicant took financial management classes offered by his employer, set up a repayment plan, and made three payments on the plan by the time of the hearing. The Board does not have to agree with the Judge's application of Financial Considerations Mitigating Condition 6 to conclude that it is reasonably supported by substantial record evidence and is therefore neither arbitrary nor capricious. Moreover, Department Counsel's attempt to use exclusively its argument regarding Financial Considerations Mitigating Condition 6 to undermine the Judge's ultimate conclusions under the Financial Considerations Guideline overlooks the fact that the Judge also applied Financial Considerations Mitigating Conditions 3[(9)] and 4[(10)] to Applicant's overall history of financial problems. The Judge's application of these mitigating conditions was not challenged on appeal.

Department Counsel has demonstrated several errors below that, taken cumulatively, warrant 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

Separate Opinion of Member William S. Fields

I would affirm the Administrative Judge's decision under Guideline E. Given the age and circumstances[(11)] of Applicant's single felony arrest, it was no longer of sufficient security concern to serve as an independent basis for denying Applicant a clearance under Guideline J.[(12)] The omission of the charge from Applicant's security clearance application did not adversely impact the course of the background investigation because the charge was disclosed as part of the routine criminal record check that is an integral part of such investigations. Therefore, the Judge could reasonably conclude that the government's case had not been harmed by the omission and that the omission was not overly serious.[(13)] Moreover, the Judge's unchallenged findings indicate that Applicant's omission was an isolated incident, not likely to continue or recur in the future. Those findings constituted a sufficient basis for the Judge's favorable application of the Directive's "whole person" factors.[(14)]

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. "The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily," (Directive ¶ E2.A5.1.3.2).

2. "The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts," (Directive ¶E2.A6.1.3.6).

3. The full text of Question 21 as it appeared on Applicant's SF86 reads as follows: "Have you ever been charged with or convicted of any felony offense? (Include those under the Uniform Code of Military Justice.) 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."

4. "The conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation)."

5. "The person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control."

6. Decision at 5.

7. Decision at 5.

8. "The individual made prompt, good faith efforts to correct the falsification before being confronted with the facts" (Directive ¶ E2.A5.1.3.3).

9. "The conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation)" (Directive ¶ E2.A6.1.3.3).

10. "The person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control" (Directive ¶ E2.A6.1.3.4).

11. The arrest was 20 years old, having occurred back in 1986. The charge was amended to a misdemeanor, Applicant pleaded guilty, and received a two year suspended imposition of sentence.

12. Given its ultimate disposition, the arrest could reasonably be characterized as a single lesser offense. *See* Directive ¶ E2.A10.1.2.2. There was no pattern of criminal activity. *See* Directive ¶ E2.A10.1.1. And, the offense was an isolated incident that was not recent. *See* Directive ¶¶ E2.A10.1.3.1 and E2.A10.1.3.2.

13. *Compare* ISCR Case No. 02-26685 at 5 (App. Bd. Dec. 22, 2004); ISCR Case No. 02-24578 at 5 (App. Bd. May 25, 2004; ISCR Case No. 02-12528 at 5 (App. Bd. Apr. 22, 2004) (Cases involving the omission of information of obvious security significance in response to two or more questions on the security clearance application). *Compare also* ISCR Case No. 03-02097 at 5-6 (App. Bd. Mar. 17, 2005) (Case involving the omission of information of obvious security significance in two different contexts--on a security clearance application and in an interview with a government agent).

14. Decision at 5. *See* Directive ¶¶ E2.2.1.1 through E2.2.1.9.