

DATE: March 20, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-05612

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

Laura A. O'Reilly, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On November 5, 2004, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision--security concerns raised under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct), of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On September 30, 2005, after the hearing, Administrative Judge David S. Bruce denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: (a) whether the Administrative Judge erred in concluding that Applicant had falsified a statement to an authorized investigator by deliberately failing to disclose his December 2003 arrest; (b) whether the Administrative Judge erred by concluding that security concerns under Guidelines J and E are not mitigated; and (c) whether the Administrative Judge erred by failing to consider all relevant factors under the "whole person" concept.

The dispositive findings of fact are as follows:

Applicant is 50 years old and has been employed as an engineering technical analyst by a defense contractor since March 2003. He is highly regarded by his supervisors at work and is considered reliable and dependable. He has been married since 1987 and has no children with his current wife. Applicant served honorably in the United States Navy from 1982-2002, and he previously held a security clearance while serving in the Navy. He received various commendations and achievement awards during his time on active duty.

Applicant's wife has a history of medical and psychiatric difficulties. She has endured multiple miscarriages, two back surgeries, two brain surgeries and periods of clinical depression requiring multiple medications.

Applicants's wife attributes the numerous physical confrontations occurring between Applicant and her during their marriage to her addiction to prescription pain and other medications. She also maintains Applicant has consistently supported her throughout the marriage in spite of her significant personal problems. In March 2005, she entered a long term outpatient adult psychiatric treatment program to address her continuing condition.

In February 1993, Applicant was taken to court by his first wife concerning child support issues. The allegations involved in those proceedings were dismissed. Applicant was also arrested in March 1998 and July 1998, for allegedly violating a domestic relations protective order previously obtained against him by his present wife. The charges with respect to both incidents were later dismissed.

In December 2003, Applicant was arrested and charged with 2 counts of domestic assault and battery. The charges in the case were entered as *nolle prosequi* in April 2004. Applicant filed his Security Clearance Application (SF 86) on March 28, 2003. He was interviewed by the Defense Security Service Special Agent (investigator) assigned to his case on February 17, 2004, but Applicant did not disclose his arrest that occurred in December 2003 during the interview.

The Administrative Judge made formal findings favorable to Applicant with respect to all portions of the SOR except for the December 2003 arrest (SOR ¶2.d) and Applicant's deliberate omission of it during his February 17, 2004, interview with the investigator (SOR ¶¶ 1.a and 2.e).

When confronted with the December 2003 arrest, Applicant stated, as he does in his appeal brief, that he did not bring up this arrest during the February 2004 interview because he was concerned about the impact on his employment. However, during the hearing, Applicant testified that he forgot about the arrest.⁽¹⁾ Applicant contends that he did not intend to conceal his December 2003 arrest because the investigator did not ask him about subsequent arrests, and he claims that he did not know he had a duty to reveal it to the investigator or to continue to update his security clearance application. The omission of information does not necessarily prove that Applicant falsified a statement to the investigator, and Applicant's statement about his intent or state of mind at the time of the February 17, 2004, interview is relevant evidence that the Judge had to consider. But Applicant's denial of any intent to conceal the arrest from the investigator did not preclude the Judge from weighing the record evidence and making findings that contradicted Applicant's denials. *See, e.g.*, 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. Giving due deference to the Judge's credibility determination, and considering the record evidence, the Judge's conclusion that Applicant deliberately concealed his December 2003 arrest from the investigator is not arbitrary, capricious, or contrary to law.

The Applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the Applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision. Directive ¶ E3.1.15.

Applicant contends that the Judge erred by not applying Personal Conduct Mitigating Conditions 2⁽²⁾ and 4⁽³⁾ to the falsification. Personal Conduct Mitigating Condition 2 is inapplicable to an applicant seeking to correct a falsification, especially a more recent one in a current case. *See, e.g.*, ISCR Case No. 99-0557 at 4 (App. Bd. July 10, 2000) for an explanation of the differences between Personal Conduct Mitigating Condition 2 and Personal Conduct Mitigating Condition 3.⁽⁴⁾ Moreover, the Judge states that he considered all Personal Conduct Mitigating Conditions (and specifically considered Personal Conduct Mitigating Condition 3), but he concluded that none apply. Given the record evidence in this case, including Applicant's inconsistent explanations for not revealing the December 2003 arrest, it was not arbitrary or capricious for the Judge to conclude that the facts and circumstances did not warrant application of Personal Conduct Mitigating Condition 3. For the same reason, the Judge was not compelled to conclude that Applicant mitigated his conduct under Personal Conduct Mitigating Condition 4 because the Judge did not have to conclude that improper or inadequate advice caused or significantly contributed to Applicant's concealment of the December 2003 arrest.

Applicant contends that the Judge erred in not mitigating the security significance of Applicant's conduct under Guideline J (SOR paragraph 2). Applicant's appeal brief does not explain why the December 2003 arrest itself should be mitigated, but appears to focus on issues of credibility and candor as they relate to 18 U.S.C. § 1001. The Judge considered all Criminal Conduct Mitigating Conditions and specifically considered three of them, but ultimately concluded that no mitigating condition applies. 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 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. *See, e.g.*, ISCR Case No. 02-00578 at 3 (App. Bd. Apr. 6, 2004). Considering the record evidence in

this case and the Judge's credibility determination, the Judge was not compelled to mitigate Applicant's falsification in so far as it relates to Guideline J.

Applicant's claim that the Administrative Judge erred by failing to consider his situation under the "whole person" doctrine, likewise, is unpersuasive. The Judge described the "whole person" factors in detail and articulated a sustainable rationale for not applying them in Applicant's favor.

Accordingly, the Administrative Judge did not err in denying Applicant a clearance.

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

Concurring Opinion of Chairman Emilio Jaksetic:

I do not find persuasive Applicant's contention that the Administrative Judge failed to consider his case under all the relevant factors set forth in Directive, Section 6.3 and Directive, Adjudicative Guidelines, Item E2.2.1. (5) The Judge's listing of the general factors (Decision below at p. 5) is not dispositive of this appeal issue. A Judge is required to apply pertinent provisions of the Directive. *See, e.g.*, Directive, Section 6.3 and Additional Procedural Guidance, Item E3.1.25. If a Judge's statement that he or she applied pertinent provisions of the Directive -- standing alone -- were deemed to establish that the Judge applied pertinent provisions of the Directive, then the Judge's statement about complying with the Directive would, for all practical purposes, become unreviewable. Acceptance of such reasoning would be unwarranted because the Directive explicitly provides for appellate review of a Judge's rulings and conclusions for compliance with applicable law. *See* Directive, Additional Procedural Guidance, Items E3.1.32.2 and E3.1.32.3. Accordingly, when an appealing party claims the Judge failed to apply pertinent provisions of the Directive, the Board is not foreclosed from reviewing that claim merely because the decision being appealed states the Judge applied pertinent provisions of the Directive. Because the substance of the Judge's decision reflects an analysis of the facts and circumstances of Applicant's case in a manner consistent with consideration of the general factors set forth in Directive, Section 6.3 and Directive, Adjudicative Guidelines, Item E2.2.1, I concur with my colleagues' resolution of this appeal issue.

I fully concur with my colleagues' resolution of Applicant's claim concerning Personal Conduct Mitigating Condition 2.

Applicant contends the Administrative Judge erred by not applying Personal Conduct Mitigating Condition 4. (6) In support of that contention, Applicant argues: (a) it was not clear to Applicant during a February 2004 interview with a Special Agent that he was supposed to update the information contained in his security clearance application; (b) he was not asked to update the information in the security clearance application; and (c) the Special Agent failed to ask him about additional issues during the February 2004 interview. Applicant's argument concerning Personal Conduct Mitigating Condition 4 raises a serious legal question, but fails to demonstrate the Judge erred by not applying Personal

Conduct Mitigating Condition 4.

Given the record evidence in this case, the Administrative Judge was not required to find that Applicant's failure to disclose the December 2003 incident during a February 2004 interview was caused or significantly contributed to by improper or inadequate advice of the Special Agent interviewing Applicant. Absent such a finding, there would be no rational basis for the Judge to apply Personal Conduct Mitigating Condition 4. Although Applicant's argument is unsuccessful in bringing his case under the terms of Personal Conduct Mitigating Condition 4, the substance of his argument raises a serious legal question: How could the Judge find Applicant committed a falsification (through intentional omission of a material fact) if Applicant was not on adequate notice that the December 2003 incident was relevant to the questions asked during the February 2004 interview?⁽⁷⁾ Stated otherwise, was there direct or circumstantial record evidence that would permit the Judge to find that Applicant knew or should have known that the December 2003 incident was relevant to the questions asked of him during the February 2004 interview? Considering the record evidence as a whole, I conclude the Judge had sufficient record evidence to find that Applicant's failure to disclose the December 2003 incident to the Special Agent during the February 2004 interview was a falsification by deliberate omission.

Applicant's contention that the Administrative Judge should have concluded his conduct was mitigated under Guideline J (Criminal Conduct) is based on the following arguments: (a) his conduct "did not reach" the level of violating 18 U.S.C. 1001; (b) his "credibility is well-established through other evidence"; (c) he did not disclose the December 2003 incident because he was not aware of any obligation to disclose it during the February 2004 interview; and (d) his omission of the December 2003 "does not outweigh the substantial evidence establishing that [he] is extremely credible, trustworthy, and honest." As discussed in the preceding paragraph, there is sufficient record evidence to support the Judge's finding that Applicant's failure to disclose the December 2003 incident to the Special Agent during the February 2004 interview was a falsification by deliberate omission.⁽⁸⁾ Given that finding, the Judge had a legally sufficient basis to conclude Applicant's omission constituted a violation of 18 U.S.C. 1001. Furthermore, given that finding, the Judge had a rational basis for expressing doubts about Applicant's truthfulness and honesty.

For all these reasons, I agree with my colleagues that the Administrative Judge's decision should be affirmed.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

1. Hearing Transcript at 53.

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

3. "Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided" (Directive ¶ E2.A5.1.3.4).

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

5. With minor wording differences not worth discussing, the general factors listed in Directive, Section 6.3 are essentially the same as the general factors listed in Directive, Adjudicative Guidelines, Item E2.2.1.

6. "Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided."

7. Whether a falsification has occurred is not decided as an abstract proposition in a factual vacuum, but rather in light

of the evidence concerning the factual context under which an applicant's omissions or statements occur.

8. Record evidence showing that Applicant has been honest on *other* occasions did not preclude the Administrative Judge from finding that Applicant engaged in falsification during the February 2004 interview.