DATE: November 17, 2006

In re:

SSN:---------

Applicant for Security Clearance

ISCR Case No. 04-07187

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 August 31, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline J (Criminal Conduct), pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On March 13, 2006, after the hearing, Administrative Judge Martin H. ogul 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 contends that the Administrative Judge's decision that Applicant served less than one year of confinement was arbitrary, capricious or contrary to law because it was not supported by substantial evidence. The Judge's decision fails to discuss important evidence that contradicts his opinion. For the reasons that follow, the Board remands the decision of the Administrative Judge.

A. Facts

On March 1, 1996, Applicant plead guilty at a court-martial at Holloman Air Force Base, New Mexico, to the wrongful use of methamphetamine, marijuana, and cocaine. His adjudged sentence included a bad-conduct discharge and confinement for two years. All parties agreed that Applicant was released from confinement on March 4, 1997. The disputed issue is whether Applicant's confinement began at Holloman Air Force Base on March 1, 1996, and continued until he was confined at a brig at another military installation. If Applicant was sentenced to and incarcerated for a period of time greater than one year as a result of criminal conduct and conviction, under 10 U.S.C. § 986(c)(1), the Administrative Judge is prohibited from granting or continuing a security clearance. *See* ISCR Case No. 01-20970 at 2 (App. Bd. Apr. 18, 2006); ISCR Case No. 03-05804 at 2-4 (App. Bd. Sep. 9, 2005).

Applicant's record of trial, and the convening authority's initial action approving his sentence are not part of the record evidence. However, Applicant's final General Court-Martial Order (GCMO) No. 122, dated May 7, 1997, which should replicate the convening authority's initial action is part of the record. GCMO No. 122 directs the execution of Applicant's bad-conduct discharge, and indicates Applicant's adjudged and approved sentence includes confinement for two years. GCMO No. 122 does not include any information about deferred or suspended confinement. The Judge's decision did not mention GCMO No. 122.

Applicant's Certificate of Release or Discharge from Active Duty (DD Form 214), dated May 20, 1997, states that Applicant had been tried by court-martial, and received a bad-conduct discharge. His DD Form 214 has "time lost" indicated for the period, March 1, 1996 through May 12, 1997.[(1)] Applicant's DD Form 214 was signed by an official in the Inmate Management Branch, however, the DD Form 214 indicates that Applicant was not available for signature. A Federal Bureau of Investigation (FBI) identification record, updated June 12, 2000, includes two relevant entries: "arrested or received 1996/03/14" and "1997/03/04 status-parole." The Judge's decision did not mention Applicant's DD Form 214, but it did indicate the FBI document was consistent with Applicant's testimony.

Applicant made three written statements that are relevant to determining the duration of his confinement. On July 18, 2000, Applicant made a statement to a Defense Security Service (DSS) investigator, "I received a sentence of 24 months in the military brig, Miramar Naval Air Station, San Diego, CA but was only required to spend 12 months." On August 24, 2000, Applicant made a statement to a DSS investigator, "[a]fter being taken into custody at HAFB, NM, I was transferred two weeks later to the U.S. Correctional Facility, Dyess, AFB, TX." The August 24, 2000, statement continues, "I was serving a 24 month sentence at the Miramar Naval Air Station (MNAS), San Diego, CA[,] but I was released after 12 months." The statement of reasons provided, "You served just over one year of confinement." In his response to the SOR, dated September 18, 2005, Applicant said, "I further admit that I was released (on March 4, 1997) after serving one year and 3 days in confinement at NAVCOMBRIG Miramar NAS, San Diego, CA." As to Applicant's statement of August 24, 2000, the Judge's decision noted that Applicant was transferred two weeks after his trial to a correctional custody facility, and that this was consistent with the date his confinement began as noted on the FBI document. The Judge's decision did not mention that both the July 18, 2000, and the August 24, 2000 statements indicated Applicant served 12 months of confinement. More importantly, his decision indicated that Applicant admitted in his response to the SOR that "he did serve for a period of one year and three days in confinement." (Decision at 3). His decision did not elaborate on why Applicant's response to the SOR was not credible, or was entitled to less weight than other evidence the Judge cited in support of his finding that Applicant served less than a year of confinement.

At his hearing, Applicant was the only witness. Applicant stated that immediately after his trial, he went into confinement for a few hours and then was released to his first sergeant. He did not ask for deferment of his confinement, and he has not seen any documentation suggesting he should be released for the initial portion of his sentence to confinement. Applicant explained that he used the time after his trial before he was confined to make additional arrangements for his household goods and his children because he was a single parent.[(2)] Applicant said his first sergeant directed Applicant to keep the first sergeant informed of where he was going at all times, but he was not restricted, and could leave the military installation. He slept at night at his off-installation residence. He did not have any military documentation establishing that he was not in confinement from March 1-13, 1996. The Judge reasoned that Applicant's statement at the hearing was credible and found that Applicant was confined for less than one year.

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 a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing 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 [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). Whether there is sufficient record evidence to support an Administrative Judge's findings of fact is a question of law, not a question of fact. *See* ISCR Case No. 02-02195 at 8 n. 24 (App. Bd. Apr. 9, 2004). The party challenging the Judge's "credibility determinations has a heavy burden of persuasion on appeal." ISCR Case No. 01-14740 at 7 (App. Bd. Jan. 15, 2003).

Military confinement resulting from a general court-martial (GCM) begins when adjudged, unless suspended or deferred by the GCM convening authority. *See* Article 57, UCMJ, 10 U.S.C. § 857. Applicant did not request, and there was no evidence that the GCM convening authority approved suspension or deferment of confinement. Rule for Courts-Martial 1107(f)(4)(E) provides that when the service of the sentence to confinement is deferred, the convening authority's action

"shall include the date on which the deferment became effective."

Title 10 U.S.C. § 972(a)(3) indicates one reason for "time lost" is when "an enlisted member of an armed force "is confined by military . . . authorities for more than one day in connection with a trial." 32 CFR § 45.3(d)(1) provides, a "DD Form 214 is an important record of service which must be prepared accurately and completely." It is used by the Department of Veterans Affairs and the Department of Labor as well as other agencies to determine eligibility for benefits. *Id*. at § 45.3(d)(3).[(3)]

In evaluating the Judge's finding, we are required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1. As the trier of fact, the Administrative Judge had to consider the evidence as a whole (including Applicant's explanations), assess the credibility of Applicant's testimony, and make a finding of fact about whether Applicant served more than one year of confinement. Although deference must be given to the Judge's credibility determination, it cannot be relied on by the Judge to the exclusion of documentary or other objective record evidence that is relevant and pertinent to the Judge's findings of fact. *See* ISCR Case No. 00-0620 at 3 (App. Bd. Oct. 19, 2001) (quoting from *Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985)). There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See* ISCR Case No. 99-9020 at 2 (App. Bd. Jun. 4, 2001). A party's disagreement with the Judge's weighing of the record evidence is not sufficient to rebut or overcome that presumption. "While a Judge need not discuss every piece of evidence, the Judge must confront evidence that does not support the Judge's conclusions and explain why it was rejected." *See Indoranto v. Barnhart*, 374 F.3d 470, 474 (7th Cir. 2004) (citations omitted).

The Judge used his favorable credibility determination to make findings of fact in the face of conflicting record evidence. A Judge "has broad latitude and discretion in writing a decision to decide an applicant's case" and the "Board does not have to agree with the Administrative Judge's findings" to affirm them. ISCR Case No. 03-07075 at 5 (App. Bd. Dec. 2, 2005). In this case, there is documentary evidence that undercuts the Judge's ability to simply accept Applicant's testimony about the duration of Applicant's confinement that was not discussed in his opinion: (1) the absence of information in GCMO No. 122 about deferment of confinement; and (2) "time lost" in his DD Form 214 beginning the date of his trial and continuing for over a year. Most importantly, his opinion did not explain why Applicant's response to the SOR that he served one year and three days of confinement was not credible, especially in light of the fact that he evidently made this statement before he had an interest in establishing that he did not serve over a year of confinement .

C. Remedy

There is a significant chance that the Judge could have reached a different result after considering all record evidence. *Compare* ISCR Case No. 02-27133 at 4 (App. Bd. Mar. 3, 2005) *with* ISCR Case No. 00-0250 at 6 (App. Bd. Jul. 11, 2001). Remand, rather than reversal, is appropriate for those legal errors that can be corrected on remand.

Conclusion

Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.2, the Board remands the case to the Administrative Judge with the following instructions: On remand, the Judge should consider all the documents and testimony concerning whether Applicant served over one year of confinement. The Judge should consider all the record evidence, including Applicant's conflicting statements about his drug involvement, as they pertain to his credibility. The Judge should then issue a new decision, consistent with the requirements of Directive, Additional Procedural Guidance, Items E3.1.35 and E3.1.25. The Judge has the discretion to document the actions taken on remand by correspondence, acceptance of a written stipulation by the parties, written rulings, or discussion in his new written decision.

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: Mark W. Harvey

Mark W. Harvey

Administrative Judge

Member, Appeal Board

1. The end date of Applicant's period of time lost is not relevant to this decision. Most likely it reflects time after release from confinement while Applicant was on excess leave. *See United States v. Hammond*, 61 M.J. 676, 677-679 (Army Ct. Crim. App. 2005) (discussing post-confinement excess leave pending execution of a punitive discharge).

2. Applicant's mother was present on the day of Applicant's trial to take care of his family, and he had previously made arrangements for a place for them to stay.

3. The July 1, 1995, version of 32 CFR §§ 45.3(d)(1) and 45.3(d)(3) which was in effect when Applicant's DD Form 214 was prepared is unchanged in the current version of the 32 CFR §§ 45.3(d)(1) and 45.3(d)(3).