

DATE: December 8, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-11783

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Candace L. Le'i, Esq., Department Counsel

FOR APPLICANT

Mogeeb Weiss, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 28, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline B (Foreign Influence) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On April 26, 2006, after the hearing, Administrative Judge Darlene Lokey Anderson denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30. ⁽¹⁾

Applicant raised the following issues on appeal: whether the Administrative Judge's findings are supported by substantial evidence; whether the Administrative Judge erred in concluding Applicant's falsification of his security clearance application was deliberate; whether the Administrative Judge's unfavorable clearance decision under Guidelines E is arbitrary, capricious, or contrary to law.

(1) Applicant argues that the Administrative Judge's findings that Applicant had a foreign employment, business, or financial interest that was required to be disclosed in response to questions 6 and 12 on his security clearance application are not supported by substantial evidence. Applicant's argument has mixed merit.

Substantial evidence is 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. 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, (1966). In evaluating the Administrative Judge's finding, we are required to give deference to the Administrative Judge's credibility determinations. Directive ¶ E3.1.32.1.

In this case, there was record evidence that Applicant had a contract for the production of a film in Russia. According to the contract, Applicant was a second owner of the production company and was hired by the movie's financial investor to oversee the principal owner's activities in producing the film and to protect the investor's interests. This investor was to be repaid \$52,500 and receive 30% of the profits from the movie. ⁽²⁾ In furtherance of the contract, Applicant had traveled to Russia with the principal owner to be the investor's personal representative from approximately December 2001 through February 2002, and again from approximately October 2002 through December 2002. ⁽³⁾ Applicant

completed his security clearance application in March 2003, less than three months after his second return from Russia.

Given the record in this case, the findings with respect to SOR ¶ 2.a., which Applicant challenges, are permissible characterizations by the Administrative Judge.⁽⁴⁾ Applicant has not met his burden of demonstrating that the Judge's material findings with respect to Applicant's conduct of security concern do not reflect a reasonable or plausible interpretation of the record evidence. In that regard, the Board concludes that the Judge's material findings with respect to SOR ¶ 2.a. are based upon substantial evidence and are sustainable.⁽⁵⁾

However, with regard to SOR ¶ 2.b. (Question 12 on the Security Clearance Application), the Judge's finding that Applicant provided a false answer when he answered "no" to the question asking him about his foreign property, business connections or financial interests is not sustainable based on the evidence of record. That evidence establishes that Applicant had a business interest in the production of a Russian movie that lasted until December 2002, inasmuch as he had traveled to Russia to oversee its production until that time. Applicant testified that the movie project was cancelled. There is no additional record evidence to indicate precisely when the project was cancelled and there is no evidence to establish either a business/ownership or an employment connection between Applicant and the movie production after December 2002. Question 12 on Applicant's March 25, 2003 Security Clearance Application is couched purely in the present tense. It asks, "Do you have any foreign property, business connections, or financial interests?" Given Applicant's denial of the SOR allegation, the burden of proof was on Department Counsel to establish the falsification. A prerequisite to establishing the falsification was establishing that Applicant's "No" answer to Question 12 was incorrect, *i.e.*, he had a foreign business or financial interest of some kind on March 25, 2003. Department Counsel failed to do this. Thus, there is no basis in the record evidence for the Judge's finding of falsification relating to SOR ¶ 2.b.

Because the Administrative Judge's other two findings of falsification are reasonably supported by the record evidence and are sufficient to sustain her overall adverse security clearance decision, the Judge's error with regard to SOR ¶ 2.b. is harmless.

(2) Applicant argues that he did not deliberately falsify his Security Clearance Application by failing to disclose the 1998 bankruptcy filing and that his leaving the bankruptcy question blank was not evidence of an intent to falsify. The Board does not find this argument persuasive.

The Administrative Judge had the opportunity to consider Applicant's explanation for why he left the question blank and failed to disclose the information in question. The Judge was not bound, as a matter of law, to accept or reject Applicant's explanation. The Judge considered Applicant's explanation in light of the record evidence as a whole, and concluded there was a sufficient basis to find that Applicant's omissions were deliberate and intentional. Accordingly, we sustain the Judge's findings of deliberate, intentional falsification. *See* Directive ¶ E3.1.32.1.

(3) Applicant argues that the Administrative Judge's unfavorable decision under Guideline E is arbitrary, capricious and contrary to law because Applicant's fluency in two languages is important to the nation's defense effort. The Board does not find this argument persuasive.

The federal government has a compelling interest in protecting classified information and, pursuant to that interest, it has to decide whether persons to be entrusted with access to classified information are at risk of deliberately or inadvertently mishandling such information. *Department of Navy v. Egan*, 484 U.S. 518, 528-529 (1988). In making such decisions, the federal government must determine whether a given person possesses and exhibits the high degree of judgment, reliability, and trustworthiness required of persons granted access to classified information. *See, e.g.*, ISCR Case No. 02-22325 at 3 (App. Bd. July 30, 2004). Security decisions are not limited to consideration of an applicant's job performance or conduct during duty hours, and off-duty conduct can be relevant in assessing an applicant's security eligibility. *See, e.g.*, 01-20445 at 4 (Apr. 29, 2003). An applicant's technical expertise (or lack thereof) is not a measure of whether the applicant is at risk of deliberately or inadvertently mishandling classified information, nor is it a measure of whether the applicant demonstrates the high degree of judgment, reliability, or trustworthiness required of persons granted access to classified information. *See, e.g.*, ISCR Case No. 02-11570 at 8 (App. Bd. May 19, 2004). The security significance of Applicant's conduct and circumstances does not turn on whether Applicant possesses a technical ability that could be useful to a Department contract or project. *See, e.g.*, ISCR Case No. 03-04090 at 7 (App. Bd. Mar. 3,

2005). Moreover, the security concerns raised by Applicant's conduct under Guideline E are not extenuated or mitigated by whether Applicant possesses a technical ability that could be useful to a Department contract or project.

A review of the decision indicates that the Administrative Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct and considered the possible application of relevant mitigating conditions. The Judge found in favor of the Applicant under Guideline B. However, the Judge articulated a rational basis for not favorably applying any mitigating conditions or whole-person factors under Guideline E, and reasonably explained why the evidence Applicant had presented in mitigation was insufficient to overcome the government's security concerns. Given the record that was before her, the Judge's unfavorable clearance decision under Guideline E is not arbitrary, capricious or contrary to law.

Order

The decision of the Administrative Judge denying Applicant a clearance is AFFIRMED.

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

Signed: David M. White

David M. White

Administrative Judge

Member, Appeal Board

1. The Administrative Judge found in favor of Applicant under Guideline B. That favorable finding is not at issue on appeal.
2. Government Exhibit 4 at 6.
3. Transcript at 52-55.
4. ¶ 2.a. of the SOR involved Applicant's negative response to Question 6 of the security clearance application, which asked Applicant to list his prior employments.
5. The evidence was sufficient for the Judge to conclude that Applicant had a disclosable employment relationship in the form of an agreement for his personal services, as well as a partial ownership interest.