

DATE: February 28, 2007

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-01964

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Richard A. Stevens, Esq., Department Counsel

FOR APPLICANT

Stanley E. Sacks, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 21, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline E (Personal Conduct), pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 30, 2006, after the hearing, Administrative Judge Juan J. Rivera 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: whether the Judge's findings of fact are supported by substantial evidence and whether the Judge's decision is arbitrary, capricious, or contrary to law. We affirm the Judge's decision to deny the clearance.

Whether the Record Supports the Administrative Judge's Factual Findings

A. Facts

The Judge found that in January 2002, Applicant proposed to another worker from a different federal contractor who shared his worksite that the worker enter into a lease to rent Applicant's house. The other worker was in "temporary duty" status while performing a project for the Navy. The other worker had a company credit card which he used for living expenses, which was reimbursed by the government.

The agreement would be between the other worker and Applicant's mother, with a rent payment higher than the actual rental amount. The worker would live in the house and would submit his inflated rent payment to the government for reimbursement. A portion of the excess rent would go to Applicant and a portion to the worker, as a "kickback." The other worker advised his employer and government representatives of Applicant's proposal. Applicant's employer confronted Applicant with the allegation and after Applicant confirmed the basic facts, fired him. In the portion of the opinion marked "Conclusions," the Judge stated that the other worker's testimony during the hearing was credible, that he had no motive to lie, and that the testimony was to some extent corroborated by other government evidence. The Judge stated, "Applicant knew or should have known his proposal to submit a false rental fee claim was illegal, and his actions were committed with the intent to defraud the government and for his own personal benefit."

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 finding, we are required to give deference to the Administrative Judge's credibility determinations. Directive ¶ E3.1.32.1.

Applicant contends that his conduct did not rise to the level of fraud, that it was merely a casual conversation, and he was misinterpreted by the fellow worker. He contends that his own testimony was credible and that his credibility was bolstered by the testimony of other witnesses, while that of his fellow worker was not credible. Applicant ultimately contends that Department Counsel did not prove the government's case.

The essence of Guideline E is not the criminality of the conduct as such, but the extent to which Applicant has engaged in conduct "involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty." Directive ¶ E2.A5.1.1. Moreover, Department Counsel is only required to prove contested allegations by substantial evidence. Given the record in this case, the Board concludes that the Judge's adverse findings are reasonably supported by the evidence. Applicant's brief summarizes the testimony of numerous character witnesses and argues that they help establish his credibility. The Judge's decision makes explicit references to these witnesses, demonstrating that he took their opinions into account in making his final decision.

As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable, or *vice versa*. Applicant's disagreement with the Judge's weighing of the evidence, or an 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.

Whether the Record Supports the Administrative Judge's Ultimate Conclusions

The Administrative Judge's ultimate conclusions in the case are largely dependent on his finding that Applicant proposed a scheme to defraud the government. On appeal, Applicant does not challenge the Judge's conclusions that no mitigating factors applied. Therefore, the Board need not comment on the Judge's conclusions other than to say that they are consistent with his findings and are thus sustainable

Order

The judgment 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: James E. Moody

James E. Moody

Administrative Judge

Member, Appeal Board