

DATE: January 4, 2001

In Re:

SSN: -----

Applicant for ADP Position

ADP Case No. 30-1130

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Arthur A. Elkins, Esq., Department Counsel

FOR APPLICANT

Philip B. Zipin, Esq.

Administrative Judge Jerome H. Silber issued a decision, dated June 27, 2000, in which he concluded it is not clearly consistent with the national interest to grant or continue a designation of trustworthiness, suitability, and eligibility for Applicant to hold a sensitive Information Systems Position. Applicant appealed. For the reasons set forth below, the Board affirms the Administrative Judge's decision.

The Composite Health Care System Program Office, the Directorate for Industrial Security Clearance Review (now Defense Office of Hearings and Appeals), and the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence entered into a memorandum of agreement (MOA), effective April 9, 1993, under which the Defense Office of Hearings and Appeals (DOHA) is authorized to adjudicate trustworthiness cases involving contractor personnel working on unclassified automated systems in ADP-I and ADP-II sensitivity positions as defined in DoD Regulation 5200.2-R. This Board has jurisdiction on appeal by virtue of the MOA, Department of Defense Directive 5220.6, dated January 2, 1992 (as amended), and DoD Regulation 5200.2-R, dated January 1987 (as amended). Under the MOA, the procedural provisions of the DoD Directive 5220.6 are applied by DOHA in processing trustworthiness cases. *See* ADP Case No. 30-0385 (August 8, 1995) at p. 3 n.2.

Applicant's appeal presents the issue of whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. Department Counsel's cross-appeal presents the issue of whether the Administrative Judge's favorable findings and conclusions about paragraph 1.a. of the Statement of Reasons are arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated November 4, 1999 to Applicant. The SOR was based on Guideline E (Personal Conduct) and Guideline J (Criminal Conduct). A hearing was held on June 2, 2000.

The Administrative Judge issued a written decision, dated June 27, 2000. The Judge found that Applicant falsified a National Agency Questionnaire (NAQ) in January 1996 by concealing and minimizing his substance abuse history and criminal arrest record. The Judge concluded Applicant had mitigated falsification of his criminal arrest record by disclosing the full extent of his criminal arrest record to an investigator in October 1996. However, the Judge concluded

that Applicant had not mitigated falsification of his substance abuse history because Applicant disclosed his substance abuse history to the government in a gradual, piecemeal manner over the course of interviews in October 1996, July 1997, October 1997, and February 1998. The Judge entered a formal finding in favor of Applicant with respect to SOR 1.a., but entered formal findings against Applicant with respect to the rest of the SOR paragraphs. The Judge then concluded it is not clearly consistent with the national interest to make or continue a trustworthiness determination for Applicant, or to make a determination that Applicant is eligible to occupy a noncritical-sensitive position.

Applicant appealed the Administrative Judge's adverse decision. Department Counsel cross-appealed the Judge's favorable findings and conclusions about SOR paragraph 1.a.

Applicant asks that he "be permitted to make an oral presentation in support of his appeal." The Board cannot receive or consider new evidence on appeal. Directive, Additional Procedural Guidance, Item E3.1.29. Furthermore, the Board does not have the authority to entertain personal appearances before the Board or hear oral argument on appeal. *See, e.g.*, DISCR Case No. 93-1043 (August 1, 1994) at p. 2 ("The Directive does not provide for personal appearances before the Board on appeal."); DISCR Case No. 88-2577 (February 22, 1991) at pp. 5-6 (explaining why Board lacks authority to hear oral argument).⁽¹⁾

Appeal Issue

Applicant does not challenge the Administrative Judge's findings that he made false statements about his substance abuse history. However, Applicant contends the Judge's adverse decision is arbitrary, capricious, or contrary to law because: (1) the Judge erred by not concluding Applicant had successfully demonstrated mitigation of his false statements; and (2) the Judge erred by not relying on Applicant's mitigation of his false statements to conclude Applicant had mitigated the Guideline J allegation (SOR 2), which was predicated on Applicant's false statements. For the reasons that follow, the Board concludes Applicant has failed to demonstrate the Judge erred.

Under Sections 2-101 and 6-100 of DoD Regulation 5200.2-R, an Administrative Judge must decide whether, based on all available information, it "is clearly consistent with the interests of national security" to assign the applicant to sensitive duties. Furthermore, "[i]n all adjudications the protection of the national security shall be the paramount determinant." DoD Regulation 5200.2-R, Section 6-100.d. *Cf.* DoD Regulation 5200.2-R, Section 3-100 ("Designation of Sensitive Positions")(noting "[i]t is vital to the national security that great care be exercised in the selection of individuals to fill such positions."). Persons in sensitive ADP positions must be held to high standards because their positions give them access to important, sensitive information on government computers. *Cf. Swann v. Walters*, 620 F. Supp. 741, 745 (D.D.C. 1984)(in case involving computer operator in a Veterans Administration medical center, court noted computer operator had access to large amounts of sensitive information on government computers and could "cause substantial harm by destruction, alteration, or disclosure of the data"). Accordingly, there is no presumption in favor of making a determination that an applicant is eligible to be assigned to sensitive duties.

Making false oral or written statements to the federal government provides a rational basis for deciding that an applicant is not eligible for assignment to sensitive duties under DoD Regulation 5200.2-R. *See* ADP Case No. 30-0385 (August 8, 1995) at p. 3. Given the undisputed fact that Applicant made false statements to the Department of Defense, the burden shifted to Applicant to present evidence of extenuation, mitigation or changed circumstances sufficient to warrant a conclusion that it is clearly consistent with the interests of the national security to make a determination that he is eligible for a sensitive position. Applicant has a heavy burden of persuasion because "the protection of the national security shall be the paramount determinant." *See* DoD Regulation 5200.2-R, Section 6-100.d.

The Administrative Judge had to consider the record as a whole and decide whether the favorable evidence outweighed the unfavorable evidence or *vice versa*. In making that analysis, the Judge had to consider and apply pertinent provisions of the Adjudicative Guidelines. *See* DoD Regulation 5200.2-R, Section 6-102.b. Those Adjudicative Guidelines appear in Appendix I of DoD Regulation 5200.2-R.⁽²⁾ Absent a showing that the Judge acted in a manner that is arbitrary, capricious, or contrary to law, the Board will not disturb the Judge's weighing of the record evidence or the Judge's application of pertinent provisions of the Adjudicative Guidelines.

Applicant argues the Administrative Judge should have applied Personal Conduct Mitigating Condition 2⁽³⁾ because his

false statements were not recent and were an isolated incident, and he subsequently disclosed to the government the information about his substance abuse history and criminal arrest record. Applicant's argument is not persuasive. Personal Conduct Mitigating Condition 3 (discussed in the next paragraph), not Personal Conduct Mitigating Condition 2, is relevant when an applicant tries to correct a falsification. *See* ISCR Case No. 99-0557 (July 10, 2000) at p. 4 (and prior Board decisions cited in that decision). Even assuming merely for the sake of deciding this appeal argument that Personal Conduct Mitigating Condition 2 were potentially applicable in situations similar to Applicant's, the record evidence would not warrant its application in this case. Applicant did not engage in a single, isolated incident of falsification. In addition to Applicant's falsification of the NAQ in January 1996, Applicant made false and misleading statements to federal investigators over the course of interviews in October 1996, July 1997, and October 1997. Even if the Board were to deem Applicant's falsifications to be not recent, they clearly were not limited to a single, isolated incident. *See* ISCR Case No. 99-0500 (May 19, 2000) at p.4 (two separate instances of falsification are not an isolated incident); ISCR Case No. 99-0417 (February 24, 2000) at p. 3 (acts of dishonesty occurring on four separate occasions do not constitute an isolated incident).

Applicant argues the Administrative Judge should have applied Personal Conduct Mitigating Condition 3 ⁽⁴⁾ because he voluntarily provided correct information to the investigating agents without being confronted with evidence of falsification or incompleteness. For the reasons that follow, the Board concludes Applicant's gradual, piecemeal disclosures about his substance abuse history do not warrant application of Personal Conduct Mitigating Condition 3.

The words "prompt, good-faith" are not defined in the Adjudicative Guidelines. Undefined words in the DoD Regulation 5200.2-R, including the Adjudicative Guidelines Directive, must be applied in a reasonable, common sense way. *Cf.* ISCR Case No. 98-0803 (August 17, 1999) at p. 3. The Board specifically has declined to set forth a "bright line" definition of "prompt" in connection with Personal Conduct Mitigating Condition 3. *See* ISCR Case No. 98-0809 (August 19, 1999) at p. 5. Resolution of this appeal does not require the Board to provide a "bright line" definition of the word "prompt." In a variety of contexts, courts have indicated that the word "prompt" means to act within a reasonable time. *See, e.g., American Employers Insurance Co. v. etro Regional Transit Authority*, 12 F.3d 591, 592 (6th Cir. 1993); *K.M.L. Laboratories Ltd. v. Hopper*, 830 F. Supp. 159, 166 (E.D.N.Y. 1993); *Stonewall Insurance Co. v. Hamilton*, 727 F. Supp. 271, 273 (W.D. Va. 1989). *See also Black's Law Dictionary* (6th edition, West, 1990) at p. 1214 (definitions of "prompt" and "promptly"). What constitutes acting in a reasonable time will depend of the particular facts and circumstances of each case. ⁽⁵⁾

The Board also has not set forth a "bright line" definition of "good-faith" in connection with Personal Conduct Mitigating Condition 3. The phrase "good-faith" is particularly ill-suited for a precise definition. Courts have construed or interpreted the phrase "good-faith" in a variety of ways:

(i) action that is contrary to what a reasonable person would be expected to do is not action taken in good faith, *Barrett v. United States*, 51 F.3d 475, 479-80 (5th Cir. 1995); (ii) "[T]hat state of mind denoting honesty of purpose, freedom from intention to defraud, and generally speaking, means being faithful to one's duty or obligation," *Arnold M. Diamond, Inc. v. Dalton*, 25 F.3d 1006, 1010 (Fed. Cir. 1994); (iii) a buyer acts in good faith if a buyer has legitimate business reason for its action, as opposed to a desire to avoid its contract, *Brewster of Lynchburg, Inc. v. Dial Corp.*, 33 F.3d 355, 366 (4th Cir. 1994); (iv) "Good faith requires that the parties exercise honesty in fact, and prudence in the exercise of discretion conferred by contract," *Continental Bank N.A. v. odansky*, 997 F.2d 309, 312 (7th Cir. 1993); (v) good faith means a company must act reasonably and not arbitrarily or capriciously, *Olympic Chevrolet, Inc. v. General Motors Corp.*, 959 F. Supp. 918, 923 (N.D. Ill. 1997); (vi) "'Good faith' refers to a statement made in the honest belief that it is a correct statement and with reasonable grounds for believing it to be true," *Maggio v. Liztech Jewelry*, 912 F. Supp. 216, 220 (E.D. La. 1996). *See also Black's Law Dictionary* (6th edition, West, 1990) at p. 693 (definition of "good faith"). As these examples show, the concept of "good faith" requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation. Such standards are consistent with the level of conduct that must be expected of persons to be assigned to sensitive duties with the Department of Defense. It would not be clearly consistent with the interests of national security to assign an applicant to sensitive duties if the available information shows the applicant does not demonstrate reasonableness, prudence, honesty, and adherence to duty or obligation, especially when the applicant deals with the federal government.

In this case, the record evidence supports the Administrative Judge's finding that Applicant disclosed his substance

abuse history in a piecemeal manner over the course interviews that occurred in October 1996, July 1997, October 1997, and February 1998. Selective, partial disclosures that are parceled out to the federal government over an extended period of time do not constitute "prompt, good-faith efforts" to correct a falsification. It is untenable for Applicant to argue the Judge should have applied Personal Conduct Mitigating Condition 3 to his falsifications concerning his substance abuse history.

Applicant argues the Administrative Judge should have applied Personal Conduct Mitigating Condition 5 ⁽⁶⁾ because he no longer associates with persons involved in criminal behavior or drug or alcohol abuse, he successfully completed drug rehabilitation in 1995, and he has demonstrated a solid and prolonged recovery from his past substance abuse. By its plain meaning, Personal Conduct Mitigating Condition 5 addresses the concerns covered by Personal Conduct Disqualifying Condition 4 ("[P]ersonal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or pressure."). Because the Judge did not conclude that Personal Conduct Mitigating Disqualifying Condition 4 is applicable to Applicant's case, the Judge was not required to apply Personal Conduct Mitigating Condition 5. *See, e.g.*, ISCR Case No. 99-0417 (February 24, 2000) at p. 4. Applicant's argument to the contrary is not persuasive.

Applicant argues the Administrative Judge should have applied Personal Conduct Mitigating Condition 7 ⁽⁷⁾ because he no longer associates with persons who abuse alcohol or drugs or who are involved in criminal activity. By its plain meaning, Personal Conduct Mitigating Condition 7 addresses the concerns covered by Personal Conduct Disqualifying Condition 6 ("[A]ssociation with persons involved in criminal activity"). Because the Judge did not conclude that Personal Conduct Disqualifying Condition 6 is applicable to Applicant's case, the Judge was not required to apply Personal Conduct Mitigating Condition 7. Applicant's argument to the contrary is not persuasive.

Applicant also argues that the Administrative Judge should have concluded Applicant's reform and rehabilitation with respect to substance abuse and past criminal conduct, as well as the favorable evidence of his job performance, weigh in his favor sufficiently to warrant a determination that he is eligible to be assigned to sensitive duties. The record evidence submitted by Applicant to demonstrate his reform and rehabilitation with respect to substance abuse and criminal conduct and the evidence of his job performance did not, as a matter of law, compel the Judge to conclude that evidence demonstrated extenuation, mitigation or reform and rehabilitation with respect to Applicant's falsifications. Applicant's argument fails to demonstrate the Judge weighed the favorable evidence in a manner that is arbitrary, capricious, or contrary to law.

Applicant also contends the Administrative Judge should have concluded his conduct was mitigated under Guideline J (Criminal Conduct). In support of this contention, Applicant points out that his false statements provide the sole basis for the Guideline J allegation in the SOR and argues that because he has demonstrated mitigation of those false statements under Guideline E, they should be deemed to be mitigated under Guideline J as well. Applicant's argument about the Judge's adverse conclusions under Guideline J has no merit independent from his arguments about the Judge's adverse conclusions under Guideline E. Because Applicant has failed to demonstrate the Judge erred with respect to his adverse conclusions under Guideline E, his argument about the Judge's adverse conclusions under Guideline J lacks merit.

Cross-appeal Issue

The Administrative Judge concluded Applicant had mitigated falsification of his criminal arrest record by disclosing the full extent of his criminal arrest record to an investigator in October 1996. The Judge applied Personal Conduct Mitigating Condition 2 ⁽⁸⁾ to Applicant's disclosures about his criminal arrest record and entered a formal finding in favor of Applicant with respect to SOR paragraph 1.a. Department Counsel contends the Judge's favorable findings and conclusions under SOR paragraph 1.a. are arbitrary, capricious, or contrary to law. In support of this contention, Department Counsel argues: (1) the Judge's leading questions of the special agent about the general topic of when a confrontation occurs did not aid the inquiry; and (2) even if the Judge had a sufficient basis to find Applicant's disclosures were made before he was confronted by the special agent, the record evidence shows that Applicant's disclosures were not prompt, good-faith disclosures.

(1) Administrative Judge's questions. An Administrative Judge has discretion to question witnesses at a hearing,

provided the Judge does so in a fair and impartial manner. *See, e.g.*, ISCR Case No. 96-0869 (September 11, 1997) at p. 2; ISCR Case No. 94-1055 (May 8, 1996) at p. 2. Absent a showing that Judge questioned witnesses in an unfair or otherwise improper manner, it is irrelevant whether a party believes that the Judge's questions failed to elicit useful or helpful answers. In considering an appeal or a cross-appeal, the Board does not exercise general supervisory jurisdiction over the manner in a Judge conducts a hearing or questions witnesses. *Cf.* ISCR Case No. 99-0201 (October 12, 1999) at p. 2 (Board does not have general, supervisory jurisdiction or authority over Administrative Judges). Rather, the Board has the authority to review a Judge's findings, conclusions, and rulings under the terms of Item E3.1.32 of the Directive's Additional Procedural Guidance.⁽⁹⁾ Accordingly, the Board need not rule on Department Counsel's contention that the Judge's questions of the special agent failed to elicit useful or helpful answers about when a confrontation occurs.

(2) Personal Conduct Mitigating Condition 3. Department Counsel persuasively argues that the Administrative Judge erred by applying Personal Conduct Mitigating Condition 3 to Applicant's disclosure of his criminal arrest record during the October 1996 interview.

Applicant's disclosures about his criminal arrest record were not made promptly. Applicant concealed his criminal arrest record when he executed the NAQ in January 1996. Applicant made no effort to disclose his criminal arrest record until he was interviewed by a special agent in October 1996. It was not "prompt" action by Applicant to passively wait approximately nine months until a federal investigator came to interview him before he tried to correct his NAQ falsification. *See, e.g.*, ISCR Case No. 99-0201 (October 12, 1999) at p. 4 (there was no prompt good-faith disclosure where applicant falsified a security questionnaire in June 1998 and waited passively until October 1998 interview to correct the falsifications); ISCR Case No. 98-0809 (August 19, 1999) at pp. 5-6 (not arbitrary and capricious for Administrative Judge to conclude applicant's disclosures in November 1998 interview were not a prompt correction of the applicant's August 1998 falsification of a security questionnaire).

The Administrative Judge failed to articulate a rational basis for his conclusion that Applicant's disclosures about his criminal arrest record in the October 1996 interview were made as part of a good-faith effort to correct his NAQ falsifications. The Judge stated "there is no acceptable justification for deliberate deception on [Applicant's] part during a personnel security investigation with little evidence to show a prompt, good-faith correction of **all** of his deceptions . . ." Although Applicant disclosed his criminal arrest record during the October 1996 interview, he did not fully disclose his substance abuse history at that time. Having concluded that Applicant was not entitled to application of Personal Conduct Mitigating Condition 3 with respect to his false statements about his substance abuse history because they were not "a prompt, good-faith correction of **all** his deceptions," the Judge failed to explain why Applicant's disclosures about his criminal arrest record warranted application of Personal Conduct Mitigating Condition 3 despite the fact those disclosures were not made as part of a correction of all his false statements on the NAQ. The Judge's unexplained application of Personal Conduct Mitigating Condition 3 is indicative of arbitrary and capricious action. *See, e.g.*, ISCR Case No. 99-0144 (February 11, 2000) at p. 3 (it was arbitrary and capricious for Administrative Judge to rely on inconsistent reasons for making a particular finding); ISCR Case No. 97-0595 (February 19, 1999) at p. 4 (it was arbitrary and capricious for Administrative Judge to fail to articulate a satisfactory explanation for the Judge's conclusions).

Conclusion

Applicant has failed to meet his burden of demonstrating error below. Department Counsel has demonstrated the Administrative Judge's formal finding for Applicant with respect to SOR paragraph 1.a. was arbitrary and capricious. However, no useful purpose would be served by remanding the case to the Judge for correction of his error concerning SOR paragraph 1.a. Accordingly, the Board affirms the Judge's adverse sensitive position determination in this case.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

1. This case involves an adjudication (under DoD Regulation 5200.2-R) of Applicant's eligibility to occupy a sensitive position, not an adjudication (under DoD Directive 5220.6) of Applicant's eligibility for a security clearance. However, the Board will cite to some of its decisions in security clearance cases in support of legal propositions and principles that are pertinent to both security clearance cases and sensitive position cases.

2. The Adjudicative Guidelines in DoD Regulation 5200.2-R are the same as the Adjudicative Guidelines in DoD Directive 5220.6. Accordingly, Board decisions construing the Adjudicative Guidelines in security clearance cases will be relied on in construing the Adjudicative Guidelines in sensitive position cases.

3. "[T]he falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily."

4. "[T]he individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts."

5. Deciding what is reasonable is based on the reasonable person standard, not the personal beliefs of an applicant. *See, e.g.,* ISCR Case No. 98-0470 (April 19, 1999) at p.3.

6. "[T]he individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or pressure."

7. "[A]ssociation with persons involved in criminal activities has ceased."

8. The text of Personal Conduct Mitigating Condition 2 is quoted in footnote 3 of this decision.

9. Nothing in the MOA gives the Board authority in appeals of sensitive position cases that is broader than its authority under DoD Directive 5220.6, Additional Procedural Guidance, Item E3.1.32.