

DATE: November 15, 1996

In Re:

SSN: -----

Applicant for Security Clearance

DOHA Case No. 95-0904

APPEAL BOARD DECISION AND REVERSAL ORDER

Appearances

FOR GOVERNMENT

Teresa A. Kolb, Esq.

Department Counsel

FOR APPLICANT

Pro se

Administrative Judge Kathryn Moen Braeman issued a decision, dated July 9, 1996, in which she concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Department Counsel appealed. For the reasons set forth below, the Board reverses the Administrative Judge's Decision.

This Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992.

Department Counsel's appeal presents the following issues: (1) Whether the Administrative Judge's failure to apply the Felony Policy properly was arbitrary, capricious and contrary to law; (2) Whether the Administrative Judge's findings as to falsification are contrary to the record evidence and arbitrary, capricious and contrary to law; and (3) Whether the Administrative Judge's finding that Applicant was rehabilitated was supported by adequate record evidence.

Procedural History

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated December 14, 1995. The SOR was predicated upon Criterion H (criminal conduct), Criterion O (falsification), and Criterion I (poor judgment, untrustworthiness and unreliability).

A hearing was held on June 6, 1996. The Administrative Judge issued a decision dated July 9, 1996, in which she concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Department Counsel appealed that favorable decision and the case is ready for disposition by the Board.

Appeal Issues

1. Whether the Administrative Judge's failure to apply the Felony Policy properly was arbitrary, capricious and contrary to law. Department Counsel argues that the Administrative Judge misapplied the Felony Policy in light of the record

evidence in this case. For the reasons that follow, we agree.

Applicant had two felony convictions while in the military. Those convictions, which involved violations of the Uniform Code of Military Justice, should be analyzed under the portion of the Criminal Conduct Adjudication Policy applying to felonies under the laws of the United States. Although parts of the appropriate section of the Adjudication Policy were cited in the Administrative Judge's decision, she never analyzed the case using the Felony Policy. The Administrative Judge instead applied the portion of the Adjudication Policy covering conduct which is not a felony under the laws of the United States. [\(1\)](#)

As a result of the Administrative Judge's application of only the Adjudication Policy factors for conduct which is not a felony under the laws of the United States, the Judge applied three mitigating factors which should not have been applicable to Applicant's criminal conduct when he was in the military. The Judge, in her analysis, failed to apply the Felony Policy's compelling reasons standard to this Applicant. Had she applied that standard to this record there would have been no room to find Applicant satisfied any of the exceptions to the Felony Policy. Department Counsel's other argument in this area is based on the assumption that the Judge could have applied the mitigating factors to Applicant's criminal conduct under the laws of the United States. Since we find otherwise, there is no need to analyze this argument.

The Board has held that an Administrative Judge can evaluate an applicant's felonious conduct under Section F.3 even if the applicant does not fall under any of the exceptions to the Felony Policy. In this case, the Judge ostensibly analyzed Applicant's criminal conduct under Section F.3 and concluded that Applicant was rehabilitated and would not repeat the criminal conduct in the future. Department Counsel challenges that analysis on appeal.

The Administrative Judge's Section F.3 analysis has the practical effect of making Applicant's serious criminal conduct in 1994 (theft of firearms with intent to sell them) disappear, so that his earlier criminal conduct (drug offenses) can be viewed as occurring in the distant past and being conduct that is not really indicative of Applicant's more recent behavior and character. Thus, the Judge's analysis of Applicant's criminal conduct is contrary to the record evidence, involves conclusions that do not rationally follow from the Judge's own factual findings, and does not reflect a "whole person" analysis required by the Directive (i.e., a "common sense determination based upon consideration of all the relevant and material information..."). Accordingly, the Judge's analysis of Applicant's criminal conduct is not sustainable under the common sense standard required by Section F.3.

2. Whether the Administrative Judge's findings as to falsification are contrary to the record evidence and arbitrary, capricious and contrary to law.

(a) Department Counsel argues that the Administrative Judge erred by accepting as credible Applicant's explanation that he had omitted his first arrest (March 1989) because he believed it was part of the same investigation as his second arrest (October 1989). Department Counsel notes that Applicant had already served most of his sentence in the brig prior to the Naval Investigative Service's issuance of the first Report of Investigation and did not commit the acts that led to the second arrest, conviction and Report of Investigation until after he had already been released from the brig for the first arrest.

It is well established in industrial security clearance cases that the question of whether there is sufficient evidence to support a Judge's factual findings is a matter of law, not one of fact. *See, e.g.*, ISCR Case No. 94-0964 (July 3, 1996) at p.3. Department Counsel correctly notes that the deference normally afforded a trier of fact is not absolute, for example in a matter where the factual findings are clearly erroneous. *See, e.g.* ISCR Case No. 95-0178 (March 29, 1996) at pp. 2-4 (Board finding Administrative Judge's credibility determination and findings not sustainable on appeal). The matter before the Board is such a case. It is not a reasonable finding of fact that a person could serve a jail term, be released, commit a new crime, be arrested, tried and convicted again and then not remember that his two confinements were founded on two separate crimes. The Administrative Judge clearly erred on this finding.

(b) Department Counsel also argues that the Administrative Judge misapplied Falsification Mitigating Factor 5 ("The individual made prompt, good faith efforts to correct the falsification before being confronted with the facts of falsification.") in support of her finding for Applicant on Falsification. Department Counsel asserts that the Administrative Judge's finding that Applicant prepared an accurate first draft of his statement prior to signing a false

statement prepared by Special Agent 1 is not credible. Relying, in part, on that lack of credibility, Department Counsel then argues that the Judge misapplied Falsification Mitigating Factor 5. The argument is also based, in part, on Special Agent 2's testimony that Applicant at first repeated the content of the false statement. Thus, Department Counsel argues there was no prompt, good faith effort to correct the false information.

The Board finds that on this matter the transcript of the hearing is not as clear as Department Counsel asserts. We note that Special Agent 1, although initially quite certain of his perspective, hedged in his testimony more than once on this subject and left the door open with use of phrases such as "It was my misunderstanding then if" We also note that Special Agent 1 did acknowledge that there was a handwritten first draft prepared by Applicant. Special Agent 2 testified that Applicant initially gave him the same story as in the false statement. Applicant, without benefit of counsel, did not cross-examine Special Agent 2 on that point although he did argue the matter in his closing arguments. We conclude that the Administrative Judge had sufficient room to make the finding that she reached and to apply Falsification Mitigating Factor 5.

3. Whether the Administrative Judge's finding that Applicant was rehabilitated was supported by adequate record evidence. Department Counsel argues that the Administrative Judge gave undue weight to four letters of reference in support of a finding that Applicant is rehabilitated. Department Counsel points to the inherent unreliability of the letters and also to the gravity of Applicant's criminal conduct (which the Judge found mitigated by those letters) in arguing that the Judge's reliance on the letters was excessive. Three of the letters were from persons who are very close to Applicant (including his fiancée). Those letters need to be viewed with balance. When weighed against the seriousness and recency of Applicant's criminal conduct (his most recent felony conduct was in 1994), it is not possible to justify rationally the Administrative Judge's excessive reliance on the letters of reference as a significant basis for her conclusion that Applicant is now rehabilitated.

Conclusions

Department Counsel has demonstrated error in three areas of the Administrative Judge's analysis of the instant case. The Administrative Judge's analysis of Applicant's criminal conduct requires reversal. Pursuant to Item 33.c. of the Additional Procedural Guidance, the Board reverses the Administrative Judge's July 9, 1996 decision.

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. Applicant also engaged in felonious conduct in 1994 but the Administrative Judge was apparently not analyzing just that conduct. In fact, she gave relative short shrift to that felonious conduct in her analysis of Applicant's criminal

conduct because it resulted only in probation, which is now terminated.