

DATE: January 31, 1997

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 95-0818

APPEAL BOARD DECISION

Appearances

FOR GOVERNMENT

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Department Counsel

FOR APPLICANT

Martin J. Ward, Esq.

Administrative Judge Darlene Lokey Anderson issued a decision, dated August 7, 1996, in which she concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed. For the reasons set forth below, the Board affirms 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.

Applicant's appeal presents the following issues: (1) whether the Board should remand the case for a hearing; (2) whether the Administrative Judge's adverse findings and conclusions with respect to Applicant's alleged falsifications are arbitrary, capricious, or contrary to law; (3) whether the Administrative Judge erred by finding Applicant engaged in criminal conduct; (4) whether the Administrative Judge erred by finding Applicant had demonstrated poor judgment and unreliability; (5) whether the Administrative Judge erred by finding Applicant has used controlled substances; and (6) whether the Administrative Judge failed to consider Applicant's performance while he held a security clearance.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated October 31, 1995 to Applicant. The SOR was based on Criterion N (drug abuse), Criterion O (knowing and willful falsification), Criterion H (criminal conduct), and Criterion I (poor judgment, unreliability, or untrustworthiness).

Applicant submitted an answer to the SOR, in which he stated "I wish to have a decision on this matter reached without a hearing." Department Counsel prepared a File of Relevant Material (FORM), a copy of which was provided to Applicant. Applicant did not submit a response to the FORM.

The case was assigned to an Administrative Judge for consideration. The Judge issued a written decision in which she concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

The case is before the Board on Applicant's appeal from that adverse decision.

Appeal Issues

1. Whether the Board should remand the case for a hearing. On appeal, Applicant requests that he be granted a hearing because: (a) he made a decision not to request a hearing without benefit of counsel; (b) he did not request a hearing due to a mistaken belief about the consequences if he made such a request; and (c) he declined to request a hearing because he was stationed at a remote site outside the United States. For the reasons that follow, the Board concludes Applicant's request is not well-founded.

The Directive (a copy of which is sent to applicants with the SOR) placed Applicant on notice that: he had the right to request a hearing in his case (Directive, Additional Procedural Guidance, Items 3 and 4); and hearings "generally shall be held at a location in the United States within a metropolitan area near the applicant's place of employment or residence" (Directive, Additional Procedural Guidance, Item 8). Moreover, the October 31, 1995 letter that accompanied the SOR also advised him of the right to request a hearing and indicated that a hearing would be "held in the United States near where you live or work." The record shows that Applicant is 39-year-old professional with college and graduate degrees in a scientific discipline (FORM Item 4) and an extensive list of scientific publications (FORM Item 3). Clearly, Applicant is literate, well-educated, and capable of reading and understanding the Directive and the October 31, 1995 letter sent to him with the SOR.

Applicant's answer to the SOR contains the following statement: "I wish to have a decision on this matter reached without a hearing." Nothing in Applicant's answer to the SOR or elsewhere in the record indicates the reasons why Applicant did not ask for a hearing. [\(U\)](#)

Applicant's *pro se* status does not relieve him of the consequences of his decision to forego a hearing. *See, e.g.*, ISCR Case No. 95-0810 (July 23, 1996) at p. 3 (*pro se* applicant can waive right to a hearing). A person with Applicant's educational and professional background is presumed to be capable of making a rational decision, without benefit of counsel, as to whether he wants to have a hearing in his case. The mere fact that Applicant believes, with the benefit of hindsight, that it is in his best interests to have a hearing does not relieve him of the consequences of his earlier decision to waive a hearing.

2. Whether the Administrative Judge's adverse findings and conclusions with respect to Applicant's alleged falsifications are arbitrary, capricious, or contrary to law. The Administrative Judge found that Applicant intentionally falsified material aspects of his background by giving false answers about his drug history when he executed a Personnel Security Questionnaire (PSQ) in June 1994 and gave a written statement to the Defense Investigative Service (DIS) in November 1994. Based on those findings, the Judge entered formal findings against Applicant under Criterion O. Applicant contends the Judge erred because: (a) the Judge's favorable formal findings under Criterion N (drug abuse) render Applicant's false statements immaterial; and (b) the Judge failed to give weight to Applicant's subsequent admissions about his drug history. Applicant's contentions fail to demonstrate the Judge's findings and conclusions under Criterion O are arbitrary, capricious, or contrary to law.

The Board has rejected the reasoning relied on by Applicant in this case. For example, in ISCR Case No. 95-0560 (August 16, 1996) the Board stated the following:

"Clearly, information is material if it would result in an adverse security [clearance] decision. However, for purposes of Criterion O, materiality is not limited to falsifications about matters that would support an adverse security clearance decision. Falsifications can be material even if the conduct an applicant sought to conceal is determined to be extenuated or mitigated for purposes of Criteria other than Criterion O. [Citations omitted] Here, the drug abuse Applicant sought to conceal was material and relevant to the background investigation concerning her security eligibility. As such, it was material for purposes of Criterion O. . . .

". . . Information need not be dispositive of a final security clearance decision to be 'relevant or material to reaching a security clearance or access determination.' [Citation omitted] Even drug abuse that is ultimately determined to have been extenuated or mitigated under Criterion N is relevant and material to deciding an applicant's security eligibility.

[Footnote omitted]. . . [F]or purposes of falsification, materiality also covers information that is relevant to a security clearance investigation."

"The fact that a falsification does not succeed in ultimately impairing or impeding a security clearance investigation or adjudication does not make that falsification immaterial. [Citations omitted] The gravamen of Criterion O is not that an applicant committed a falsification that ultimately influenced or impaired a security clearance investigation of adjudication. Rather, the gravamen of Criterion O is that an applicant has demonstrated poor judgment, unreliability, and untrustworthiness by trying to mislead the Government in connection with a security clearance application."

The same reasoning applies to Applicant's case.

The fact that Applicant subsequently made admissions to the Government about his drug abuse does not preclude the Administrative Judge from concluding Applicant's earlier falsifications warrant an adverse security clearance decision. Applicant made false statements to the Government about his drug history in the June 1994 PSQ and his November 1994 written statement, and did not correct those false statements until he gave a written statement in August 1995. Under those circumstances, the Judge was not required to find Applicant's August 1995 admissions mitigated his earlier falsifications.

3. Whether the Administrative Judge erred by finding Applicant engaged in criminal conduct. The Administrative Judge found that Applicant's falsifications constituted a violation of 18 U.S.C. §1001, a federal felony, and warranted an adverse formal finding under Criterion H (criminal conduct). Applicant contends the Judge erred because: (a) he cannot be found guilty of criminal conduct without due process of law, including a criminal trial; and (b) the Judge found that Applicant's falsifications were not material. This contention lacks merit.

The mere fact that an applicant has not been criminally charged or convicted does not preclude an Administrative Judge from finding that the applicant had engaged in criminal conduct. *See, e.g.*, ISCR Case No. 94-1213 (June 7, 1996) at pp. 4-5. Moreover, an applicant's constitutional rights under the Fifth and Sixth Amendments of the U.S. Constitution are not violated when an Administrative Judge finds, in the process of adjudicating a security clearance case, that an applicant has engaged in criminal conduct. *Chesna v. U.S. Department of Defense*, 850 F.Supp. 110, 119-20 (D. Conn. 1994). Here, the Judge's findings of falsification provide a rational and legally permissible basis for her conclusion that Applicant engaged in criminal conduct.

Applicant's second argument is groundless. The Administrative Judge specifically found Applicant's false statements about his drug history were material. Furthermore, as discussed earlier in this decision, the Judge's finding of materiality is legally sound and sustainable.

4. Whether the Administrative Judge erred by finding Applicant had demonstrated poor judgment and unreliability. The Administrative Judge concluded Applicant's falsifications supported an adverse finding under Criterion I. Applicant contends the Judge's conclusion is in error because: (a) the Judge found Applicant's drug use to be immaterial; and (b) it is unfair to rely just on Applicant's false statements to judge whether he uses poor judgment and is unreliable. Applicant's arguments fail to demonstrate the Judge erred.

Applicant's first argument is merely a variation of his arguments under Criterion O and H that the Board finds to be without merit.

Applicant's second argument is flawed, in part, because it seeks to rely on new information submitted on appeal. As noted earlier, the Board cannot consider new evidence on appeal. Moreover, the Judge did not commit error by not taking into account information that was not offered for her consideration during the proceedings below. The Judge could only consider that evidence which was before her. Applicant had an opportunity to present information for the Judge's consideration in response to the FORM. He did not do so. Under the circumstances, Applicant has no legitimate grounds for complaint on this score.

The favorable record evidence cited by Applicant on appeal does not demonstrate the Administrative Judge erred. There is a rebuttable presumption that a Judge considered all the record evidence unless the Judge expressly states otherwise. Apart from that presumption, the Judge specifically considered Applicant's evidence and concluded he extenuated and

mitigated his drug history sufficiently to warrant favorable formal findings under Criterion N. The Judge's decision is not rendered arbitrary or capricious merely because she did not find Applicant's favorable evidence sufficient to extenuate or mitigate his falsifications. *See, e.g.*, DOHA Case No. 96-0031 (December 30, 1996) at p. 3 (Administrative Judge has discretion to weigh favorable evidence in light of the record evidence as a whole). Nothing in Applicant's brief persuades the Board the Judge abused her discretion or otherwise acted in an arbitrary or capricious manner in weighing the evidence in this case.

Applicant's falsifications provide a rational basis for the Administrative Judge's adverse formal finding under Criterion I. The United States must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). Security requirements include consideration of a person's honesty. *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961). *See also Harrison v. McNamara*, 228 F.Supp. 406, 408 (D. Conn. 1964)(lying on application for government position requiring a security clearance raises questions as to person's reliability and justifies dismissal), *aff'd per curiam*, 380 U.S. 261 (1965). Making false statements in connection with a security clearance application and to a government investigator raises serious questions about an applicant's judgment, reliability, and trustworthiness. Accordingly, the Judge's findings about Applicant's falsifications provide a rational basis for her adverse formal finding under Criterion I.

5. Whether the Administrative Judge erred by finding Applicant has used controlled substances. Applicant concedes he admitted using controlled substances in the past, but contends on appeal that "there is no evidence that conclusively establishes that the substances that he believed to be controlled substances were such substances. There is no evidence that these substances were ever tested as to their content." This contention fails to demonstrate the Administrative Judge erred by finding Applicant had used drugs.

These proceedings are civil, administrative proceedings that do not need to meet the stringent procedural or evidentiary requirements of criminal trials. *See, e.g.*, ISCR Case No. 94-0729 (May 31, 1995) at p. 3 ("DOHA proceedings are civil in nature, and therefore, the procedural protections of criminal proceedings are not applicable."); DISCR Case No. 93-0386 (April 21, 1994) at p. 4 ("[DOHA] proceedings are administrative in nature and the burden of proof in such proceedings is lower than that of criminal cases. All that is required in [DOHA] proceedings is proof based on substantial evidence."). Moreover, Department Counsel is not required to prove its case against an applicant through "conclusive evidence." *See, e.g.*, DISCR Case No. 91-0362 (October 9, 1992) at p. 5 (evidence need not be "conclusive" or "compelling" to establish a fact). Applicant's "conclusive evidence" argument goes far beyond the ordinary standard of proof required in routine civil trials or administrative proceedings.⁽²⁾

In addition, Applicant's argument seeks to avoid the significance of the fact that his answer to the SOR admitted his involvement with various illegal drugs, including cocaine, marijuana, mescaline, and psilocybin. Having admitted those SOR allegations, Applicant cannot now reverse course and controvert them for the first time on appeal. Given Applicant's admissions in his answer to the SOR (as well as his admissions in his written statements to DIS), the Judge's findings about Applicant's drug history are easily sustainable.

6. Whether the Administrative Judge failed to consider Applicant's performance while he held a security clearance. Applicant contends the Administrative Judge failed to properly consider his performance while he held a security clearance. In support of this contention, Applicant cites: (a) his employment record, his stable lifestyle, and his completion of substance abuse programs; (b) his record of holding a security clearance without a security violation; and (c) the favorable evidence submitted with his appeal brief. For the reasons that follow, the Board concludes Applicant has failed to demonstrate the Judge erred.

Applicant cannot rely on the new information submitted on appeal to attack the Administrative Judge's decision. As discussed earlier, the Board cannot consider new evidence. Furthermore, an Administrative Judge's decision cannot be deemed to be arbitrary and capricious based on information that was not submitted for the Judge's consideration during the proceedings below. Moreover, Applicant had an opportunity to submit such information in response to the FORM, but did not do so. Under the circumstances, Applicant cannot complain about that information not being considered in his case.

The favorable record evidence cited by Applicant does not mandate a favorable security clearance decision. Security clearance decisions are not limited to consideration of an applicant's job performance. *See, e.g.*, ISCR Case No. 94-1055 (May 8, 1996) at p. 4. Furthermore, the Government need not wait until an applicant actually commits a security violation before it can deny or revoke that applicant's access to classified information. *Adams v. Laird*, 420 F.2d 230, 238-39 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1037 (1970). Even in the face of a favorable employment record and an absence of security violations, an applicant's access to classified information can be denied or revoked based on conduct that demonstrates poor judgment, unreliability, or untrustworthiness. Here, Applicant's falsifications provide a nexus or rational basis for the Judge's adverse security clearance decision.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error below. Accordingly, the Administrative Judge's August 7, 1996 decision is affirmed.

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: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. Attached to Applicant's appeal brief is a September 7, 1996 declaration that seek to explain why Applicant did not ask for a hearing. That declaration constitutes new evidence that the Board cannot consider. Directive, Additional Procedural Guidance, Item 29.

2. Indeed, Applicant's argument fails to recognize that even in criminal cases the identity of illegal drugs can be established without chemical analysis. *See* DISCR Case No. 89-0574 (March 13, 1991) at p. 3 (citing federal cases).