

DATE: November 25, 1996

In Re:

SSN: -----

Applicant for Security Clearance

DOHA Case No. 96-0049

APPEAL BOARD DECISION

Appearances

FOR GOVERNMENT

Barry M. Sax, Esq.

Department Counsel

FOR APPLICANT

Owen T. Kinney, Esq.

Administrative Judge John G. Metz, Jr., issued a decision, dated July 24, 1996, in which he 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 Administrative Judge erred by finding Applicant engaged in knowing and willful falsification; and (2) whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated January 25, 1996. The SOR was based on Criterion E (personal conduct) and Criterion J (criminal conduct). A hearing was held on June 6, 1996.

The Administrative Judge subsequently issued a written decision in which he 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 Administrative Judge erred by finding that Applicant engaged in knowing and willful falsification. The Administrative Judge found that Applicant falsified a National Agency Questionnaire (NAQ) in September 1994 by answering "NO" to the NAQ drug questions. The Judge also found Applicant falsified a written statement he gave to the

Defense Investigative Service (DIS) in April 1995 by failing to fully disclose the nature and extent of his drug abuse. On appeal, Applicant does not challenge the Judge's finding that he falsified the NAQ, but contends the Judge's other finding of falsification is erroneous because Applicant was trying to be truthful and honest throughout the DIS investigation.

On appeal, the Board reviews the Administrative Judge's challenged factual findings to determine whether they "are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge." Directive, Additional Procedural Guidance, Item 32.a. Under that standard, the Judge's findings of falsification in this case are sustainable.

The Administrative Judge considered the record evidence pertinent to Applicant's April 1995 written statement and found Applicant's testimony to be less persuasive than the rest of the evidence concerning that statement and the circumstances under which it was given. The Judge had the opportunity to personally observe Applicant's demeanor and assess his credibility as a witness, as well as that of the DIS Special Agent. Nothing in the record indicates the Judge's negative assessment of Applicant's credibility, or his favorable assessment of the DIS Special Agent's credibility, was arbitrary, capricious, or contrary to law. Accordingly, the Judge's challenged finding concerning Applicant's April 1995 falsification is sustained.

2. Whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. Applicant challenges the Administrative Judge's adverse decision on several grounds: (a) there is no nexus between the record evidence and the Judge's adverse decision; (b) Applicant has been conscientious about complying with security procedures; (c) Applicant is a committed family man who would do nothing to jeopardize the best interests of his family; (d) Applicant is considered to be trustworthy and not a security risk by various people who know him; (e) Applicant is a person who admits his mistakes and learns from them; (f) Applicant sought advice and guidance from his supervisor and a company security official before he appeared for a DIS polygraph examination; (g) the Judge's decision is not sustainable under the Section F.3. factors or the "whole person" concept; and (h) the Judge erred by finding Applicant's conduct was not mitigated. The Board construes these arguments as asserting that the Judge's decision below was arbitrary, capricious, or contrary to law. However, for the reasons that follow, the Board concludes Applicant has failed to demonstrate the Judge's adverse decision is arbitrary, capricious, or contrary to law.

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). Accordingly, the Administrative Judge reasonably could conclude that Applicant's knowing and willful falsifications in September 1994 and April 1995 provide a rational and legally permissible basis for an adverse security clearance decision.

The favorable evidence cited by Applicant on appeal was before the Administrative Judge, who is presumed to have considered it unless he expressly stated otherwise. *See, e.g.*, ISCR Case No. 94-0544 (June 24, 1996) at p. 2. The Judge has the discretion to weigh and balance any favorable evidence in light of the record as a whole (Directive, Section F.3.) and the seriousness of Applicant's conduct. *Cf. Carosella v. U.S. Postal Service*, 816 F.2d 638, 643 (Fed. Cir. 1987) (agency has discretion to balance the seriousness of employee's misconduct against any applicable mitigating factors). Absent a showing that the Judge acted in a manner that is arbitrary, capricious, or contrary to law, the Board will not disturb his weighing of the evidence, both favorable and unfavorable. Applicant's favorable security record weighs in his favor, but it does not preclude an adverse security clearance decision based on his knowing and willful falsifications. *See, e.g.*, ISCR Case No. 95-0793 (September 30, 1996) at p. 4. The same reasoning applies to the favorable character evidence submitted on Applicant's behalf, as well as the evidence of Applicant's devotion to his family.

The fact that Applicant sought advice and guidance from his supervisor and a company security official before he appeared for the polygraph test does not, legally or logically, preclude the Administrative Judge from finding that Applicant falsified the September 1994 NAQ and his April 1995 written statement, which falsifications occurred

months before the November 1995 polygraph session. Stated otherwise, neither Applicant's seeking advice before the polygraph session nor his candor with the DIS Special Agent in November 1995 make his earlier falsifications any less false or render the Judge's findings about those falsifications erroneous.

Nothing in Applicant's appeal brief persuades the Board that the Administrative Judge's decision is not sustainable under Section F.3. of the Directive. The Judge's analysis of Applicant's falsification conduct reflects a plausible, reasonable interpretation of the record evidence and is not arbitrary, capricious, or contrary to law. Applicant's ability to argue for an alternate interpretation of the record evidence is not enough to demonstrate the Judge failed to fairly consider the record evidence or made findings and reached conclusions that are erroneous and contrary to the requirements of Section F.3. *See, e.g.*, ISCR Case No. 95-0731 (September 13, 1996) at pp. 2-3. Furthermore, the Judge's analysis and adverse decision are consistent with the "whole person" concept required in industrial security clearance cases.

Finally, the Administrative Judge's finding that no Adjudicative Guidelines mitigating factors applied to Applicant's case is not arbitrary, capricious, or contrary to law. The Judge had a rational basis for finding Applicant did not engage in prompt, good-faith disclosures of his drug abuse within the meaning of Personal Conduct Mitigating Factor 3. As discussed earlier, the Board sustains the Judge's finding that Applicant falsified material facts about his drug abuse when he gave the DIS a written statement in April 1995. Given Applicant's November 1994 falsification of the NAQ and his falsification of a written statement in April 1995, the Judge had a rational basis to conclude that Applicant's subsequent disclosures to the DIS Special Agent did not fall within the scope of Personal Conduct Mitigating Factor 3. Similarly, the Judge's findings that Applicant engaged in falsifications in September 1994 and April 1995 provide a rational basis for the Judge to not apply Personal Conduct Mitigating Factor 2 ("[T]he falsification was an isolated incident [and] was not recent . . .").

We note that Applicant asks, in the alternative, that he be allowed to retain a Secret-level security clearance if he cannot be granted a Top Secret clearance. Applicant asks for relief for which there is no authority. Section C.2. of the Directive provides that "[a]n unfavorable clearance decision denies any application for a security clearance and revokes any existing security clearance, thereby preventing access to classified information at any level and the retention of any existing security clearance." *See also* ISCR Case No. 95-0523 (May 15, 1996) at p. 2 (no authority to deny clearance at one level but grant it at a lower level).

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's July 24, 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