

DATE: March 6, 1997

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 96-0376

APPEAL BOARD DETERMINATION

Appearances

FOR GOVERNMENT

Teresa A. Kolb

Department Counsel

FOR APPLICANT

James E. Campion, Jr., Esq.

Administrative Judge John G. Metz, Jr. issued a determination, dated November 5, 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 that adverse determination. For the reasons set forth below, the Board affirms the Administrative Judge's Determination.

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

Applicant's appeal presents the following issues: (1) whether the Administrative Judge erred in his findings of fact and (2) whether the Administrative Judge should have applied mitigating factors to the falsifications in this case.

Procedural History

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated May 17, 1996. The SOR was predicated upon Criteria H (Drug Involvement), E (Personal Conduct), and J (Criminal Conduct). A hearing was held on August 28, 1996. On November 5, 1996 the Administrative Judge issued a written opinion in which he concluded that it was not clearly consistent with the national interest to grant or continue a clearance for Applicant. The case is before the Board on Applicant's appeal from that unfavorable decision.

Appeal Issues

1. Whether the Administrative Judge erred in his findings of fact. Applicant does not challenge the Administrative Judge's findings that Applicant on several occasions gave the government false or inconsistent answers to questions regarding his drug history (in writing on official forms and verbally to investigators). Applicant, however, does challenge Judge's decision to not accept Applicant's explanations for those events as part of his findings of fact. Applicant's explanations include, for example, misunderstanding the question in one case and being pressured to lie by a company official in another. Applicant's explanations might have plausible bases for findings of fact by the

Administrative Judge. However, the findings of fact that the Administrative Judge did make were supported by the record evidence and it was not error for the Judge to find an alternative explanation that was supported by the record evidence. *Cf. American Textile Mfrs Inst. v. Donovan*, 452 U.S. 490, 523 (1981) (possibility of drawing two inconsistent conclusions from evidence does not mean agency's findings and conclusions are not supported by substantial evidence).

Applicant also challenges the Administrative Judge's finding that Applicant lied when he answered "no" to a question on a National Agency Questionnaire regarding his mental health history. Again Applicant's argument is founded on Applicant's alleged motivations for the event rather than the event itself. The Administrative Judge's findings concerning this matter were supported by the record evidence.

On appeal, the Board must determine whether an Administrative Judge's factual findings "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." Directive, Additional Procedural Guidance, Item 32.a. Considering the record as a whole, we find no error in the Judge's findings of fact concerning Applicant's falsifications.

2. Whether the Administrative Judge should have applied mitigating factors to the falsifications in this case. Applicant argues, in the alternative, that if the Board upholds the Administrative Judge's findings of fact, then we should find that the Judge erred by not applying mitigating factors to Applicant's case. Applicant's argument is not persuasive.

Applicant contends that the record supports the application of several mitigating factors, including (1) the fact that the information about his drug use acquired by federal agents was provided voluntarily by Applicant, (2) Applicant on his own initiative contacted investigators and provided them with information about the change in answers between his PSQ and the later NAQ and (3) any arguable falsification was isolated in time and not recent. The Judge specifically addressed one of these mitigating factors when he concluded that Applicant's disclosure of one falsification two years after the fact did not provide enough mitigation to overcome the adverse inferences of earlier falsifications. The evidence of record supports the Judge's resolution of this issue. Regarding the other mitigating factors cited by Applicant, the Board concludes that the Judge's decision not to apply these factors was not error. The state of the evidence neither mandated a conclusion that Applicant's falsifications were isolated and dated nor a conclusion that Applicant was forthright in disclosing his past drug history.

Applicant's argument here is also based on an assumption that Applicant's explanations for the falsifications were correct. In essence Applicant says, if one accepts his explanations then mitigation is appropriate. However, his explanations were not persuasive to the Administrative Judge. As the trier of fact, the Judge had the discretion to weigh the evidence and reach conclusions as to the credibility of Applicant's explanations for his falsifications. As discussed earlier, the Judge's rejection of Applicant's explanations was not arbitrary, capricious, or contrary to law. The Administrative Judge was not obliged to apply mitigating factors on the basis of Applicant's explanations for the events when he did not find those explanations credible. Moreover, the Judge correctly noted that even if Applicant had falsified a National Agency Questionnaire at the direction of company personnel, such an explanation did not excuse or mitigate his falsification.

Conclusions

Applicant has failed to meet his burden on appeal of demonstrating error below. Accordingly the Administrative Judge's November 5, 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: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board