

DATE: November 14, 1997

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 96-0685

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

William S. Fields, Esq., Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Jerome H. Silber issued a decision, dated July 10, 1997, 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 (DoD) Directive 5220.6 (Directive), dated January 2, 1992.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated September 23, 1996 to Applicant. The SOR was based on Criterion H (Drug Involvement), Criterion E (Personal Conduct) and Criterion J (Criminal Conduct).

On October 16, 1996 in his response to the Statement of Reasons, Applicant indicated his desire to have his case decided on the written record without a hearing. Subsequently Department Counsel prepared a File of Relevant Material (FORM). The Administrative Judge subsequently issued a written decision in which he concluded that it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is now before the Board on Applicant's appeal from that adverse decision.

Appeal Issue⁽¹⁾

Applicant does not challenge the Administrative Judge's factual findings but he does take issue with some of the Judge's specific conclusions and the Judge's ultimate conclusion that it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant makes the following arguments in support of his appeal: (1) he is basically an honest employee for whom falsifying is not an every day occurrence, but his fear of losing his job and his desire to support his family caused him to falsify and from there the situation "seemed to snowball"; and (2) there is no pattern or history of criminal activity since the Judge found in favor of Applicant under all of the subparagraphs under Criterion H upon which the misrepresentations (Criterion E) were based and Applicant's first instance of misrepresentation took place a little over a year ago. The Board construes Applicant's arguments as raising the issue of

whether the Administrative Judge's adverse security clearance 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). Falsification of information during investigations to determine security clearance eligibility conflicts fundamentally with this requirement. The Administrative Judge noted Applicant's motivations in withholding information from the government about his drug involvement but concluded that there was little evidence of mitigation or extenuation for such lying. The fact that the Judge did not consider Applicant's motives a mitigating factor is not error. On the contrary, self-interest is not a valid justification for falsifying. *See, e.g.*, DISCR Case No. 89-1586 (October 26, 1990) at p. 4. An applicant who lies to the government in the belief that doing so will save his job demonstrates a willingness to place his personal self-interest over his responsibility to be frank and candid with the government at all times. The Judge reasonably concluded that there was an unacceptable risk that Applicant might lie to the government in future instances where the truth might have adverse personal consequences for him.

The undisputed facts in this case show that Applicant falsified his National Agency Questionnaire then later lied about drug use during his first interview with a DIS agent. Several weeks after the interview he lied to the government again in a signed, sworn statement. This series of falsehoods provided more than enough evidence to support the Judge's conclusion that Applicant engaged in repeated criminal conduct.⁽²⁾ The Judge's favorable findings under Criterion H (drug abuse) in no way undercut or detract from his conclusion that Applicant's falsifications concerning his drug abuse mandate an adverse security clearance decision. Applicant's drug history was material to the government's evaluation of his security clearance eligibility and the ultimate disposition of that drug abuse history by the government does not affect the severity of the conduct. Applicant also points out that the first instance of falsification took place less than two years ago. While this fact negates any suggestion that Applicant has a long history of criminal conduct, there was still a basis for the Judge to conclude that Applicant's recent criminal conduct was disqualifying.

Conclusion⁽³⁾

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

See concurring opinion

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

Concurring Opinion of Administrative Judge Emilio Jaksetic

With one exception, I fully concur with the majority opinion and its resolution of this appeal. I respectfully disagree

with my colleagues' decision to not address Department Counsel's argument concerning the Administrative Judge's ruling with respect to SOR subparagraph 2.c. As a matter of judicial economy, I would have preferred the Board address and resolve that argument now rather than wait for it to arise in another appeal.

The majority correctly notes that Department Counsel did not file a cross-appeal in this case. However, that procedural fact is not dispositive. Even in the absence of a cross-appeal, the non-appealing party is entitled to urge affirmance of the decision below on the basis of any matter in the record, even if the argument relies on matters overlooked or ignored by the lower tribunal. *Massachusetts Mutual Life Insurance Co. v. Ludwig*, 426 U.S. 479, 480-81 (1976). *See also Banque Franco-Hellenique de Commerce International et Maritime v. Christophides*, 106 F.3d 22, 25 (2d Cir. 1997); *Kickapoo Tribe of Indians in Kansas v. Babbitt*, 43 F.3d 1491, 1495 n.3 (D.C. Cir. 1995). This principle is applicable even when the non-appealing party urges affirmance of the decision below based on arguments attacking the lower tribunal's reasoning or arguments expressly rejected by the lower tribunal. *See, e.g., International Ore & Fertilizer Corp. v. SGS Control Services, Inc.*, 38 F.3d 1279, 1285 (2d Cir. 1994), *cert. denied*, 115 S.Ct. 2276 (1995); *Engleson v. Burlington Northern Railroad Co.*, 972 F.2d 1038, 1041 (9th Cir. 1992). Accordingly, the failure of Department Counsel to file a cross-appeal in this case does not preclude it from arguing that even though the Administrative Judge's adverse decision should be affirmed, the Judge erred with respect to his ruling concerning SOR subparagraph 2.c.

The Administrative Judge found in Applicant's favor with respect to SOR subparagraph 2.c. because Department Counsel did not present evidence to support that allegation. The Judge noted that Item 14 of the Directive's Additional Procedural Guidance requires Department Counsel to present evidence to support controverted facts. However, the Judge reasoned that, although Applicant had admitted that allegation in his answer to the SOR, Item 7 of the Directive's Additional Procedural Guidance required Department Counsel to present evidence in support of that allegation and Department Counsel's failure to do so "compels the conclusion that no such evidence is in the possession of Department Counsel." The Judge's reasoning is legally flawed and not sustainable.

Implicit in the requirement that Department Counsel must present evidence to prove controverted facts is the logical conclusion that Department Counsel is *not* required to present evidence to support admitted or uncontroverted facts. Indeed, the Board has specifically held that admissions to SOR allegations relieve Department Counsel of the obligation to prove the admitted allegations. ISCR Case No. 94-1159 (December 4, 1995) at p. 4. *Cf. also* ISCR Case No. 96-0575 (July 22, 1997) at p. 2 ("The right to confrontation and cross-examination pertains solely to controverted issues.").

The Administrative Judge's reasoning is also flawed because it has the practical effect of ignoring Applicant's admission to subparagraph 2.c of the SOR. The Board has noted that a Judge cannot simply ignore an applicant's admissions. *See, e.g.,* ISCR Case No. 94-1109 (January 31, 1996) at p. 5. Furthermore, an admission in an SOR is a form of judicial admission that has more binding effect on the applicant than nonjudicial admissions made by the applicant. *See* ISCR Case No. 95-0622 (April 18, 1997) at p. 4 ("Unlike an evidentiary admission, such a judicial admission is conclusive and binding on Applicant."). Accordingly, it was arbitrary, capricious, and contrary to law for the Judge to find in Applicant's favor with respect to SOR subparagraph 2.c. despite Applicant's admission to that allegation.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

1. The Administrative Judge entered formal findings for Applicant with respect to the SOR allegations under Criterion H (Drug Involvement). Those favorable formal findings are not at issue on appeal.

2. The precise language that Applicant objects to in his appeal is "[A] history or pattern of criminal activity...." This language is contained in the general "basis" narrative under Criterion J (Criminal Conduct) which is recited by the Judge in the "Policies" portion of his decision. The Judge does not use the terms "history" or "pattern" in the "Conclusions" section of the decision, and he does not suggest that Applicant has historically engaged in criminal acts. However, the Judge does reasonably conclude that Applicant engaged in repeated, serious conduct recently (*i.e.*, falsifications), and

this makes Criterion J applicable to the case.

3. In its reply brief, Department Counsel discusses an error that it perceives the Judge made regarding the resolution of subparagraph 2.c. of the Statement of Reasons. Inasmuch as Department Counsel did not file a notice of cross-appeal in this case and the Judge's decision regarding subparagraph 2.c. did not affect his ultimate conclusion, the Board need not address Department Counsel's argument.