

DATE: November 23, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0440

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Jerome H. Silber issued a decision, dated June 12, 1998, 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, as amended.

Applicant's appeal presents the following issues: (1) whether the Statement of Reasons contained various errors; (2) whether the Administrative Judge's findings of fact are erroneous; and (3) 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 a Statement of Reasons (SOR) dated September 18, 1997 to Applicant. The SOR was based on Criterion E (Personal Conduct) and Criterion J (Criminal Conduct).

A hearing was held on April 14, 1998. 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⁾

1. Whether the Statement of Reasons contained various errors. Applicant addresses the SOR allegations, contending they contain or reflect various errors. The Board does not review the completeness or accuracy of an SOR. Rather, the Board reviews the Administrative Judge's decision to determine whether it contains harmful factual or legal error. *See* Directive, Additional Procedural Guidance, Item 32. Accordingly, the Board need not address Applicant's contentions about the SOR allegations.

Applicant also notes the Administrative Judge characterized some of the SOR allegations as duplicative and adding

nothing substantive to the SOR. This observation by Applicant adds nothing useful to his appeal. The Judge entered formal findings for Applicant with respect to the SOR allegations the Judge felt were duplicative (SOR 1.m. and 2.g.).⁽²⁾ Because the Judge ruled in favor of Applicant with respect to those SOR allegations, Applicant suffered no prejudice from them. Therefore, the Board need not address the issue of whether those SOR allegations were duplicative.

2. Whether the Administrative Judge's findings of fact are erroneous. Applicant makes a number of arguments that the Board construes as raising the issue of whether the Administrative Judge's erred with respect to some of his factual findings: (a) the Judge erred by relying on Applicant's March 1997 written statement because it was coerced and contains false admissions of wrongdoing; (b) the Judge erred by finding Applicant made false or misleading statements about the ages of his brothers in a security questionnaire, and about his job position in an interview with a deputy sheriff; (c) the Judge erred by finding Applicant falsified material facts on security questionnaires in March 1982, December 1989, and January 1997, and falsified material facts in written statements he gave to government investigators in October 1982, August 1990, and February 1992; (d) the Judge erred by finding Applicant's falsifications were in violation of 18 U.S.C. Section 1001; and (e) the Judge erred by finding Applicant made threats of physical harm when using his amateur radio equipment. For the reasons that follow, the Board concludes Applicant has failed to demonstrate the Judge erred.

(a) The Board rejects Department Counsel's argument that there is *no* record evidence to support Applicant's claim that his arch 1997 written statement was coerced and contains false admissions of wrongdoing. At the hearing, Applicant gave testimony to support his claim that he felt pressured during the March 1997 interview and told the investigators things she wanted to hear. Such testimony constitutes record evidence, regardless of whether the Administrative Judge found it credible or not.

The Administrative Judge must consider all the record evidence, both favorable and unfavorable (Directive, Section F.3). A Judge is not required to accept a witness's testimony at face value merely because it is unrebutted. *See, e.g.*, ISCR Case No. 98-0123 (October 28, 1998) at p. 3. Instead, the Judge must assess a witness's credibility and weigh the witness's testimony in light of the record evidence as a whole. In this case, the Judge did not find credible Applicant's testimony about being pressured to tell the investigator things that were not true. Considering the record evidence as a whole, and giving due deference to the Judge's credibility determination (Directive, Additional Procedural Guidance, Item 32.a.), the Board concludes it was not arbitrary, capricious, or contrary to law for the Judge to find the March 1997 written statement was voluntarily given, and to rely on Applicant's admissions in that written statement. *See, e.g.*, ISCR Case No. 97-0184 (June 16, 1998) at p. 3 (discussing factors to be considered when evaluating claim that a confession was coerced or involuntary).

(b) In assessing Applicant's credibility, the Administrative Judge noted evidence of some incidents that reflected adversely on Applicant's honesty and truthfulness. Applicant's arguments on appeal concerning those incidents are based on factual assertions that go beyond the record evidence. As noted earlier, such assertions constitute new evidence that the Board cannot consider. And, in any event, the Judge did not rely solely on those incidents to reach a conclusion about Applicant's credibility. Considering the record as a whole, the Judge's negative conclusions about Applicant's credibility are not arbitrary, capricious, or contrary to law.

(c) During the proceedings below, Applicant vacillated between admitting and denying the alleged falsifications. Considering the record evidence as a whole, there is ample record evidence to support the Administrative Judge's findings that Applicant deliberately falsified material facts in connection with various personnel security questionnaires and written statements.⁽³⁾ Applicant's appeal arguments on this issue reflect a similar vacillation on his part and fail to demonstrate the Judge erred.

(d) Given the Administrative Judge's sustainable findings about Applicant's various falsifications, it was entirely proper for the Judge to conclude those falsifications constituted violations of 18 U.S.C. Section 1001. The fact that Applicant eventually made disclosures to the government does not retroactively negate the criminality of his multiple falsifications under Section 1001.

(e) Applicant challenges the Administrative Judge's finding that he made threats of physical harm using a "ham radio." There is substantial record evidence to support the Judge's challenged finding. Applicant's arguments to the contrary are

not persuasive.

3. Whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. Applicant also contends: (a) the Administrative Judge erred by not allowing Applicant to cross-examine the investigator who interviewed him in March 1997; (b) the Judge erred by relying on a report of investigation (ROI) to reach conclusions unfavorable to him; (c) the Judge erred by not considering various factors that mitigated Applicant's conduct; and (d) Applicant's 1978 drug-related offense is too old to have any current security significance. The Board construes these contentions as raising the issue of whether the Judge's adverse decision is arbitrary, capricious, or contrary to law. For the reasons that follow, the Board concludes Applicant has failed to demonstrate the Judge erred.

(a) The investigator who interviewed Applicant in March 1997 did not testify at the hearing. Furthermore, Applicant did not object to the admission of the March 1997 written statement which he gave to the investigator. Therefore, Applicant's right to cross-examine any witness against him (Directive, Additional Procedural Guidance, Item 16) never arose. Furthermore, Applicant did not ask the Administrative Judge for an opportunity to question the investigator. If Applicant had wanted to question the investigator, he had the responsibility to ask the Judge for such an opportunity in a timely manner during the proceedings below. Under the circumstances, it is not reasonable for Applicant to claim now that the Judge should have required the investigator to appear as a witness to allow Applicant the opportunity to question her.

(b) Applicant contends that information in a report of investigation (ROI) was relied upon by the Administrative Judge to reach conclusions unfavorable to Applicant, in violation of Additional Procedural Guidance Item 20. This contention lacks merit. Department Counsel offered no ROI as evidence against Applicant. The only ROI in the record is one that Applicant offered as evidence. Furthermore, when Applicant offered the ROI as an exhibit, the Judge specifically admonished Applicant that if the ROI was admitted into evidence that it would be considered in its entirety, not just those portions that might be favorable to Applicant. Despite that admonishment, Applicant indicated he wanted the ROI considered by the Judge. Under the circumstances, it is frivolous for Applicant to contend the Judge erred by admitting and considering the ROI.

(c) Applicant contends the Administrative Judge should have found his conduct mitigated because: (1) he made good faith disclosures to the government before he was confronted with the facts about his falsifications; (2) he has shown clear evidence of rehabilitation; (3) his conduct was the result of disorders that are in full remission; (4) his work record is positive and there is no evidence that he has ever had a problem with handling classified information; and (5) he has demonstrated genuine remorse for his past misconduct and demonstrated a determination to not repeat it.

(c1) Applicant's reliance on Personal Conduct Mitigating Guideline 3⁽⁴⁾ is misplaced. As discussed earlier, the record evidence supports the Administrative Judge's findings that Applicant engaged in multiple acts of falsification over a period of several years. Under the circumstances, it is not tenable for Applicant to contend his belated admissions were "prompt, good-faith efforts" within the meaning of Mitigating Guideline 3.

(c2 and c3) The Administrative Judge considered the evidence presented by Applicant and concluded that evidence was insufficient to demonstrate that his disorders were in full remission and that there were "considerable doubts" that Applicant had demonstrated rehabilitation. The Judge's approach was appropriate because he must consider the record evidence as a whole (Directive, Section F.3.) and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. See, e.g., ISCR Case No. 97-0783 (August 7, 1998) at p. 5. Furthermore, the Judge's conclusions on the issue of Applicant's rehabilitation and the remission of his disorders reflect a reasonable, plausible interpretation of the record evidence. Applicant's appeal arguments to the contrary fail to demonstrate the Judge erred.

(c4) The Administrative Judge was not precluded from making an adverse decision because of Applicant's positive work record. Security clearance decisions are not limited to consideration of an applicant's conduct during duty hours. Any off-duty conduct that has security implications can be considered in deciding an applicant's security suitability. See, e.g., ISCR Case No. 97-0618 (June 11, 1998) at p. 3.

The Administrative Judge's adverse decision is not arbitrary, capricious, or contrary to law merely because there is no evidence that Applicant has engaged in any security violations. The federal government need not wait until an applicant

mishandles classified information before it can deny or revoke the applicant's access to such information. *Adams v. Laird*, 420 F.2d 230, 238-39 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. *See, e.g.*, ISCR Case No. 97-0435 (July 14, 1998) at p. 3.

The Administrative Judge's findings and conclusions about Applicant's misconduct over a period of several years provide a rational basis for the Judge's adverse conclusions about Applicant's suitability for access to classified information. Applicant's work record and his security record did not compel the Judge, as a matter of law, to make a favorable security clearance decision.

(c5) The Administrative Judge considered the evidence Applicant presented in support of his claim of remorse and rehabilitation. The Judge concluded that evidence was not sufficient to overcome the negative implications of Applicant's overall history of misconduct, or to satisfactorily demonstrate such misconduct was not likely to recur. Considering the record as a whole, the Judge's conclusion reflects a reasonable interpretation of the evidence as a whole.

(d) Standing alone, Applicant's 1978 drug-related offense might be deemed too dated to support an adverse security clearance decision. However, this case does not involve just a single isolated, dated incident of misconduct by Applicant. Given Applicant's overall history of misconduct over a period of years, it was entirely reasonable for the Judge to take into account Applicant's 1978 drug-related offense. The Judge's analysis was consistent with the "whole person" concept and the requirement to consider the record evidence as a whole. The Judge properly did not conduct a piecemeal evaluation of Applicant's various acts of misconduct. *See, e.g.*, ISCR Case No. 96-0776 (June 5, 1997) at p. 2 ("[T]he security eligibility of an applicant cannot be meaningfully assessed by looking only at the applicant's present situation and ignoring the applicant's past conduct.").

The federal government 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). Applicant's multiple acts of falsification and his history of criminal conduct provide a rational basis for the Administrative Judge's conclusion that it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Although the Board sustains the Administrative Judge's ultimate disposition of this case and is unpersuaded by Applicant's arguments on appeal, one item is worthy of note. The Judge uses language which suggests that a diagnosis of ADHD may be sufficient to deny an applicant a security clearance. Any such theory should be considered with extreme caution. It is doubtful that a diagnosis of a mental disorder alone without facts or circumstances that have a security dimension will be sufficient to justify denial of a security clearance.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's June 12, 1998 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's appeal brief contains various factual assertions that go beyond the record evidence. Such assertions constitute new evidence, which the Board cannot consider. Directive, Additional Procedural Guidance, Item 29.
2. The Administrative Judge also entered formal findings for Applicant with respect to SOR 1.k., 1.n., and 2.h. for other reasons. Those formal findings are not at issue on appeal and need not be addressed by the Board.
3. As noted earlier, the Administrative Judge's favorable findings with respect to three of the SOR falsification allegations (SOR 1.k., 1.m. and 1.n.) are not at issue on appeal.
4. "[T]he individual made prompt, good-fath efforts to correct the falsification before being confronted with the facts."