

DATE: May 22, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0595

APPEAL BOARD DECISION AND ORDER FOR REMAND

APPEARANCES

FOR GOVERNMENT

Carol A. Marchant, Esq., Department Counsel

FOR APPLICANT

Richard C. Flanigan, Esq.

Administrative Judge John R. Erck issued a decision, dated January 29, 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. The Board remands the case to the Administrative Judge for further processing consistent with the rulings and instructions set forth in this Decision and Order for Remand.

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

Applicant's appeal presents the following issues: (1) whether the Administrative Judge erred by indicating that any doubts about Applicant's security eligibility must be resolved against Applicant; (2) whether the Administrative Judge erred by finding that none of the Criterion E mitigating conditions was applicable; and (3) whether the Administrative Judge erred by considering uncharged conduct to conclude Applicant's omission of marijuana use was not mitigated.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR), dated September 2, 1997. The SOR was based on Criterion H (Drug Involvement) and Criterion E (Personal Conduct).

A hearing was held on December 17, 1997. The Administrative Judge subsequently issued a written decision in which he entered formal findings for Applicant under Criterion H, but against Applicant under Criterion E, and 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.⁽¹⁾

Appeal Issues⁽²⁾

1. Whether the Administrative Judge erred by indicating that any doubts about Applicant's security eligibility must be resolved against Applicant. Relying on *Department of the Navy v. Egan*, 484 U.S. 518 (1988), the Administrative Judge indicated that doubts about an applicant's security suitability must be resolved against the applicant. Applicant contends: (a) the Judge misinterpreted the Supreme Court decision in the *Egan* case; (b) the standard articulated by the Judge

would make it impossible for an applicant to mitigate misconduct sufficiently to result in a favorable security clearance decision; and (c) the standard articulated by the Judge is not consistent with fairness or due process. For the reasons that follow, the Board does not find Applicant's contentions to be persuasive.

The Administrative Judge's reading of the *Egan* decision is consistent with the Board's interpretation of that decision. *See, e.g.*, ISCR Case No. 96-0461 (December 31, 1997) at p. 5. The federal government has a compelling interest in protecting and safeguarding classified information. *Department of the Navy v. Egan*, 484 U.S. at 527. Furthermore, there is no right to a security clearance. *Department of the Navy v. Egan*, 484 U.S. at 528. In addition, a security clearance should not be granted or continued unless the decision-maker can make an affirmative finding that it would be "clearly consistent with the national interest" to do so. Executive Order 10865, Section 2; Directive, Section C.2. Given the importance of the government's interest in protecting the national security, the government is entitled to resolve doubts about an individual's suitability for access to classified information in favor of protecting the national security. *See Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991)(interpreting *Egan* decision). Of course, such doubts must have a rational basis in the record evidence that raises legitimate concerns about an applicant's suitability for access to classified information. *See, e.g.*, ISCR Case No. 96-0457 (December 8, 1997) at p. 4.

The Board rejects Applicant's contention that, if doubts are to be resolved in favor of the national security, then it would be impossible for an applicant to successfully mitigate misconduct. It may be difficult for an applicant to demonstrate evidence of extenuation, mitigation or changed circumstances sufficient to overcome the negative security implications of past misconduct. However, it is not an impossible task. DOHA Administrative Judges have issued decisions in which they found an applicant engaged in misconduct, but concluded that the applicant presented credible evidence of extenuation, mitigation, or changed circumstances sufficient to warrant a favorable security clearance decision. Indeed, in this case, the Judge concluded that Applicant had presented credible evidence that warranted the conclusion that Applicant's past drug abuse should not result in an adverse security clearance decision. The Judge's favorable formal findings under Criterion H undercut Applicant's impossibility argument.

The Board also rejects Applicant's contention that the principle of resolving doubts against an applicant is not consistent with notions of fairness and due process. The purpose of due process is not to guarantee any particular result in a security clearance case; it is intended to guarantee that there is a fair and impartial adjudication of each security clearance case within the requirements of applicable law. An applicant has the burden of persuasion to demonstrate his or her security suitability in the face of admitted or proven past misconduct. *See* Directive, Additional Procedural Guidance, Item 15. Given the "clearly consistent with the national interest" standard, an applicant's burden of persuasion can be a heavy one. However, an applicant still has the rights traditionally associated with due process: right to receive written notice of the reasons why the government wants to deny or revoke access to classified information; an opportunity to respond to those allegations; the right to a hearing; a reasonable time to prepare for the hearing; opportunity to cross-examine persons providing information adverse to the applicant; opportunity to present evidence on his behalf; written notice of the clearance decision; and appeal rights. There is nothing inherently incompatible between Applicant's right to a fair and impartial adjudication and the principle that the federal government is entitled to resolve doubts in favor of the national security when making security clearance decisions. *See, e.g.*, ISCR Case No. 96-0277 (July 11, 1997) at p. 5.

2. Whether the Administrative Judge erred by finding that none of the Criterion E mitigating conditions was applicable. The Administrative Judge found that none of the Criterion E mitigating conditions applied. Applicant contends the Judge erred because: (a) Personal Conduct Mitigating Guidelines 2, ⁽³⁾ 3, ⁽⁴⁾ and 5⁽⁵⁾ should have been applied by the Judge; and (b) in the alternative, the Judge should have discussed those Mitigating Guidelines and explained why he found them to be insufficiently mitigating in Applicant's case rather than not refer to or discuss them. Applicant's contentions have mixed merit.

When a case involves disclosures by an applicant that are corrections of an earlier falsification, then Personal Conduct Mitigating Guideline 3 is the proper guideline to consider, not Personal Conduct Mitigating Guideline 2. *See* ISCR Case No. 97-0289 (January 22, 1998) at p. 3. Since Applicant's disclosures to an investigator in June 1997 were, for all practical purposes, a correction of his January 1997 falsification of the Questionnaire for National Security Positions (SF 86) with respect to his marijuana use, those disclosures did not fall within the scope of Personal Conduct Mitigating Guideline 2. Accordingly, the Administrative Judge did not err by not applying Personal Conduct Mitigating Guideline

2.

The Administrative Judge gave two reasons for not applying Personal Conduct Mitigating Guideline 3: Applicant's disclosures to the investigator were not a "prompt good-faith effort" to correct the SF 86 falsification because they occurred almost five months after Applicant executed the SF 86; and the mitigating benefits of Applicant's disclosures were diminished because Applicant admitted additional drug involvement that had not been disclosed in the SF 86. Although the Judge's first reason is sustainable, his second reason is problematic.

The fact that Applicant made the disclosures to an investigator the first time he was interviewed did not preclude the Administrative Judge from considering the passage of time between the falsification in January 1997 and the subsequent disclosures in June 1997, and concluding Applicant's disclosures were not prompt within the meaning of Personal Conduct Mitigating Guideline 3. Considering the record as a whole, the Judge's first reason reflects a plausible interpretation of the record evidence, and it is not arbitrary, capricious, or contrary to law. The ability of a party to argue for an alternate interpretation of the record evidence is insufficient, standing alone, to demonstrate error. *See, e.g.*, ISCR Case No. 97-0202 (January 20, 1998) at p. 4.

The Administrative Judge's second reason for not applying Personal Conduct Mitigating Guideline 3 is problematic because it relies, in part, on: (a) a finding of additional falsification that is not sustainable; and (b) arbitrary and capricious reasoning.⁽⁶⁾ The specific language of the drug question in the SF 86 that Applicant executed (Government Exhibit 1) indicates that it is seeking information about drug use that occurred "[s]ince age 16 or in the last 7 years, whichever is shorter" As Applicant points out on appeal, since the record evidence does not support a finding that Applicant's cocaine use occurred within the time period covered by the drug question, his omission of that cocaine use from the SF 86 could not constitute a falsification. Furthermore, it is arbitrary and capricious for the Judge to conclude that Applicant's disclosures to the investigator about his past drug involvement (including marijuana purchase and cocaine use) "diminished" the mitigating benefit of Applicant's admissions. The Judge's conclusion is based on reasoning that has the practical effect of rendering Personal Conduct Mitigating Guideline 3 meaningless because, under that reasoning, the more an applicant discloses to an investigator, the less mitigating the act of disclosure becomes. A logical consequence of the Judge's reasoning would be to discourage applicants from correcting any earlier falsification. The Board declines to sustain reasoning that would render Personal Conduct Mitigating Guideline 3 meaningless. *See* ISCR Case No. 97-0289 (January 22, 1998) at p. 3 (Adjudicative Guidelines should not be interpreted or construed in manner that would render them meaningless or superfluous).

The Board is left with the following situation: part of the Administrative Judge's reasoning concerning Personal Conduct Mitigating Guideline 3 is sustainable, and part of it is not sustainable. The Board need not decide whether the Judge's erroneous second reason, standing alone, constitutes harmful or harmless error. As will be discussed later, there is sufficient reason for the Board to remand the case to the Judge.

Applicant's argument concerning Personal Conduct Mitigating Guideline 5 fails to demonstrate the Administrative Judge erred. As a preliminary matter, the Board rejects Department Counsel's contention that Mitigating Guideline 5 cannot be applied in a falsification case. Even if the Board were to assume solely for purposes of deciding this appeal that Mitigating Guideline 5 can be considered potentially applicable only when a Judge has found Disqualifying Guideline 4⁽⁷⁾ to be applicable, then Department Counsel's contention fails. Because Disqualifying Guideline 4 can cover situations involving concealment of information, it would be unreasonable to construe Mitigating Guideline 5 as not covering actions that significantly reduce or eliminate any vulnerability that arises from acts of falsification. However, since the Judge did not apply Personal Conduct Disqualifying Guideline 4 to Applicant's case, then the Judge was not required to consider or apply Mitigating Guideline 5. If an Administrative Judge has not made a threshold finding that there exist facts or circumstances that "increase[] an individual's vulnerability to coercion, exploitation or pressure," then it would not make sense for the Judge to consider whether an applicant "has taken positive steps to significantly reduce or eliminate" such vulnerability. Accordingly, the Board concludes Applicant has failed to demonstrate the Judge erred by not applying Mitigating Guideline 5.

3. Whether the Administrative Judge erred by considering uncharged conduct to conclude Applicant's omission of marijuana use was not mitigated. Applicant contends the Administrative Judge erred by finding Applicant's SF 86 falsification about marijuana was not mitigated because Applicant had failed to disclose his cocaine use when he

executed the SF 86. Applicant argues this was error because the SOR did not allege Applicant falsified the SF 86 by omitting his past cocaine use. Applicant also argues that the Judge should not have found he engaged in such a falsification because there is no evidence he used cocaine within 7 years of the time he executed the SF 86, and therefore, his failure to disclose his past cocaine use was not a falsification because the wording of the SF 86 drug question allows a person to exclude drug use that occurred 7 years or more in the past. Applicant's contention has mixed merit.

The Board has held that an Administrative Judge cannot base an adverse security clearance decision on uncharged conduct. *See, e.g.*, ISCR Case No. 97-0356 (April 21, 1998) at pp. 3-4.⁽⁸⁾ However, the Board also has indicated that an Administrative Judge may consider evidence of uncharged conduct under some circumstances: (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, and changed circumstances; (c) to decide whether a particular Adjudicative Guideline is applicable; and (d) to evaluate whether an applicant has demonstrated success in his rehabilitation efforts. *See* ISCR Case No. 96-0608 (August 28, 1997) at p. 3; ISCR Case No. 94-1159 (December 4, 1995) at p. 5; DISCR Case No. 89-1529 (February 7, 1991) at pp. 7-8.

In this case, if the record evidence supported a finding that Applicant engaged in a falsification not alleged in the SOR, then the Administrative Judge could consider that evidence for any of the purposes listed in the preceding paragraph. However, as discussed earlier, the record evidence in this case does not support the Judge's finding that Applicant falsified the SF 86 by failing to disclose his past cocaine use. Therefore, it was arbitrary and capricious for the Judge to rely on such a finding to conclude Applicant's disclosures to an investigator in June 1997 did not mitigate his falsification of the SF 86.

The Board cannot conclude that this error is harmless because of the particular wording of the Administrative Judge's decision. Specifically, the Judge indicated that "information of additional falsification warrants a conclusion that the alleged and proven falsification can not be mitigated." The Judge's use of such categorical language cannot be sustained. Whether an applicant's falsification has been mitigated by subsequent disclosures sufficiently to warrant a favorable security clearance decision turns on a reasoned evaluation of the record evidence as a whole, both favorable and unfavorable (Directive, Section F.3), and a reasonable application of pertinent Adjudicative Guidelines. The Judge's use of an apparent *per se* rule has no basis in the Directive nor any other discernable legal justification. Furthermore, the Board is unable to discern from the decision below what weight the Judge might give to Applicant's June 1997 disclosures if the Judge had not relied on his impermissible *per se* rule.

The Board need not decide whether this error, standing alone, constitutes harmful or harmless error. Taken together, the Administrative Judge's errors raise sufficient question as to the sustainability of the decision below to warrant a remand.

Conclusion

Applicant has met his burden of demonstrating error below that warrants remand. Accordingly, pursuant to Item 33.b of the Additional Procedural Guidance, the Board remands the case to the Administrative Judge. After correction of the errors identified in this decision, the Judge must issue a new decision consistent with the requirements of Items 35 and 25 of the Additional Procedural Guidance.

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. The Administrative Judge's findings and conclusions under Criterion H are not at issue on appeal.
2. Attached to Applicant's appeal brief are several letters that were not part of the record below. The Board cannot consider new evidence on appeal. Directive, Additional Procedural Guidance, Item 29.
3. "[T]he falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily."
4. "[T]he individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts."
5. "[T]he individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or pressure."
6. Later in this decision, the Board will address Applicant's arguments about whether the Administrative Judge erred by relying on uncharged conduct.
7. "[P]ersonal conduct *or concealment of information* that increase an individual's vulnerability to coercion, exploitation or pressure" (italics added)
8. In the cited case, the Board noted that the SOR could be amended at the request of the parties or by the Administrative Judge pursuant to the requirements of Item 17 of the Additional Procedural Guidance.