

DATE: September 1, 1998

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 97-0707

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Paul J. Mason issued a decision, dated May 14, 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 some of the Administrative Judge's findings about Applicant's drug abuse are erroneous; (2) whether the Administrative Judge erred by finding Applicant provided false information about his drug abuse history during a July 1997 interview; and (3) whether the Administrative Judge's unfavorable decision is arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated December 9, 1997 to Applicant. The SOR was based on Criterion H (Drug Involvement), Criterion E (Personal Conduct), and Criterion J (Criminal Conduct).

A hearing was held on March 5, 1998. The Administrative Judge subsequently issued a written decision, dated May 14, 1998. The Judge found Applicant had a history of marijuana and methamphetamine use, but concluded Applicant had demonstrated sufficient evidence of reform to warrant formal findings for Applicant under Criterion H. The Judge found Applicant engaged in deliberate falsification of material facts about his drug abuse in connection with: (1) a Questionnaire for National Security Positions (October 1996); (2) a written statement given to a Special Agent of the Defense Investigative Service (DIS) (May 1997); and (3) an interview with a DIS Special Agent (July 1997). The Judge also found Applicant stole U.S. Government property, valued at approximately \$4,570, during the period December 1993-June 1994. The Judge concluded Applicant's falsifications and theft of government property were not mitigated and warranted formal findings against Applicant under Criteria E and J. The Judge finally 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 the Administrative Judge's adverse security clearance decision.

Appeal Issues⁽¹⁾

1. Whether some of the Administrative Judge's findings about Applicant's drug abuse are erroneous. Applicant takes issue with some, but not all, of the Administrative Judge's findings about his history of drug abuse. Applicant argues: (a) he did not intend to present equivocal hearing testimony about his marijuana use; (b) he did not begin using methamphetamine as early as 1989; and (c) he is sorry for not truthfully disclosing the actual extent of his drug use in connection with the October 1996 questionnaire or his May 1997 written statement, but his hearing testimony was honest and accurate.

The Administrative Judge must weigh the evidence and make factual findings. Directive, Additional Procedural Guidance, Item 25. When doing so, the Judge must assess the credibility of witnesses and decide what weight to give to their testimony. The Judge's credibility determinations are entitled to deference on appeal because the Judge has the opportunity to personally observe and assess the demeanor of witnesses during their testimony. Directive, Additional Procedural Guidance, Item 32.a.

Here, there is ample record evidence to support the Administrative Judge's challenged findings about Applicant's drug abuse. Apart from the Judge's negative assessment of Applicant's credibility during the hearing, the record evidence clearly shows Applicant engaged in a pattern of dishonesty and deception directed against the federal government. Considering the record as a whole, the Judge had a rational basis for his weighing of the conflicting evidence about Applicant's history of drug abuse and making the findings that he did.

2. Whether the Administrative Judge erred by finding Applicant provided false information about his drug abuse history during a July 1997 interview. The Administrative Judge found that Applicant provided false information about his drug abuse during a July 1997 interview with a DIS Special Agent. On appeal, Applicant: (a) concedes he made a statement in July 1997, but states he cannot locate the statement in the documentation; and (b) contends he was truthful about his drug abuse in that statement.

At the hearing, Department Counsel offered two written statements by Applicant, one dated July 15, 1997 (Government Exhibit 3) and the other dated July 17, 1997 (Government Exhibit 4). Applicant was provided a copy of all the government's exhibits prior to the hearing and he was given the opportunity to object to each government exhibit prior to the Administrative Judge ruling on its admissibility (Hearing Transcript at pp. 8, 13-18).

The SOR alleged in paragraph 2.e.: "During a July 15, 1997 interview with a Special Agent of the Defense Investigative Service, you falsified material facts in that you stated you had not used any illegal drugs since June 16, 1994, when in fact, you had used illegal drugs as set forth in subparagraphs 1.a. and 1.e., above." The Administrative Judge found (Decision at p. 4): "During an interview on July 15, 1997 (subparagraph 2e), Applicant provided false information when he said he used no drugs since June 16, 1994." There is no record evidence supporting the SOR allegation or the Judge's finding as to the July 15, 1997 interview. There is a statement from May 19, 1997 (Government Exhibit 5) which contains information that is at least similar to if not the same as the false information alleged in the SOR paragraph 2.e. and the Judge's finding. However, the SOR was never amended and the Applicant was never given an opportunity to respond to the matter of the May 19, 1997 statement. *See* Directive, Additional Procedural Guidance, Item 17. Accordingly, the Judge's finding on this point cannot be sustained.

Considering the Administrative Judge's decision as a whole, the Board concludes this factual error is harmless. Given the Judge's adverse findings and conclusions about Applicant's other falsifications and his theft of U.S. Government property, it is not likely that the Judge would change his decision to a favorable one based on correction of this one factual error. Accordingly, no remand is warranted. *See N.L.R.B v. American Geri-Care, Inc.*, 697 F.2d 56, 64 (2d Cir. 1982)(remand required only where there is a significant chance that, but for the error, a different result might have been reached), *cert. denied*, 461 U.S. 906 (1983).

3. Whether the Administrative Judge's unfavorable decision is arbitrary, capricious, or contrary to law. On appeal, Applicant: (a) asserts that he did not intend to steal some of the U.S. Government property that was found in his

possession; (b) expresses regret that he stole U.S. Government property; (c) expresses regret that he was unable to admit earlier that he intended to steal U.S. Government property; (d) states that his conduct before and after his methamphetamine use "is respectable"; (e) indicates that his falsifications were the result of "[s]hame, embarrassment, and human forces compelling me not to admit (to myself) that I engaged in such behavior" and "my fear of not being granted a security clearance (as a result of that behavior)"; and (f) says the investigation and the security clearance application process have "helped to further rehabilitate me." The Board construes these arguments are raising the issue of whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

The record evidence supports the Administrative Judge's finding that Applicant intended to steal the U.S. Government property found in his unauthorized possession in June 1994. The record evidence also supports the Judge's finding that Applicant engaged in deliberate falsifications in October 1996 and May 1997. Applicant's theft of U.S. Government property and his deliberate falsifications demonstrate poor judgment, unreliability, and untrustworthiness and provide a rational basis for the Judge to enter formal findings against Applicant under Criteria E and J and conclude that it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Finally, the presence of favorable record evidence does not demonstrate the Administrative Judge's decision is arbitrary, capricious, or contrary to law. The Judge considered the favorable evidence presented by Applicant, but concluded it did not overcome the negative implications of Applicant's falsifications and his theft of U.S. Government property. The Judge's approach was legally sound. The Judge must consider all available information, both favorable and unfavorable. Directive, Section F.3. Furthermore, the Judge must consider 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. Applicant's reference to favorable evidence about his conduct fails to demonstrate the Judge erred in this case.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error that warrants remand or reversal. Accordingly, the Board affirms the Administrative Judge's May 14, 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 some statements that go beyond the record evidence. Such statements constitute new evidence, which the Board cannot consider. Directive. Additional Procedural Guidance, Item 29.