

DATE: December 4, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0752

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Carol A. Marchant, Esq.,

FOR APPLICANT

Donald Koblitz, Esq.

Administrative Judge Elizabeth M. Matchinski issued a decision, dated August 14, 1998, in which she 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 in part and reverses it in part.

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 issue of whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated November 20, 1997 to Applicant. The SOR was based on Criterion E (Personal Conduct) and Criterion D (Sexual Behavior).

Applicant submitted an answer to the SOR and indicated that he did not want a hearing in his case. A File of Relevant Material (FORM) was prepared. A copy of the FORM was provided to Applicant, who submitted a response to the FORM. The case was then assigned to the Hearing Office for determination.

The Administrative Judge issued a written decision in which she concluded 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

Applicant makes several arguments in support of his challenge to the Administrative Judge's adverse decision: (1) Applicant was denied a fair and impartial proceeding; (2) the record evidence does not support the Judge's finding that Applicant deliberately concealed his extramarital affair; (3) the Government failed to meet its burden of proving that

Applicant's extramarital affair made him vulnerable to undue influence or coercion; and (4) the Judge failed to give sufficient weight to Applicant's military record and his work experience. The Board construes these arguments as raising the issue of whether the Judge's adverse decision is arbitrary, capricious, or contrary to law.

(1) The Board rejects Applicant's contention that he was denied a fair and impartial proceeding because (a) he was not told that he should supply an affidavit from his wife, or (b) because the government did not "mak[e] the effort to determine the facts itself" by interviewing Applicant's wife.

(a) The SOR placed Applicant squarely on notice that the government felt security concerns were raised because his wife was not aware of his extramarital affair. Furthermore, Applicant was placed on notice of his obligation to present evidence on his behalf (Directive, Additional Procedural Guidance, Item 15). In addition, the March 13, 1998 cover letter that accompanied the copy of the FORM sent to Applicant stated, in relevant part: "Before that file is sent to the Administrative Judge, you have the opportunity to review the attached copy of that complete file and to submit any material you wish the Administrative Judge to consider or any objection you have to the attached file material." If Applicant wanted to present evidence to support his claim that his wife was now aware of his extramarital affair, he had a reasonable opportunity to present that evidence in his behalf. Having decided to represent himself in the proceedings below, Applicant cannot now fairly complain about the quality of his representation. *See, e.g.*, ISCR Case No. 96-0544 (May 12, 1997) at p. 2.

(b) Applicant told a Special Agent that his wife did not know about his extramarital affair and he did not want to discuss it with her (FORM, Item 6). Accordingly, there was a good faith basis for the allegation in SOR ¶2.a. When answering the SOR, Applicant stated that his family did not know about that affair (FORM, Item 3). Once Applicant admitted his wife was not aware of his extramarital affair, the burden shifted to Applicant to "explain, extenuate, or mitigate" his situation. Directive, Additional Procedural Guidance, Item 15. If Applicant wanted to present evidence from his wife concerning her knowledge of his extramarital affair, he could have done so when responding to the FORM.

(2) On appeal, the Board must determine whether "[t]he Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might find as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge." Directive, Additional Procedural Guidance, Item 32.a.⁽¹⁾ Whether there is sufficient evidence to support a Judge's findings is a question of law, not one of fact. *See, e.g.*, ISCR Case No. 97-0727 (August 3, 1998) at p. 3.

Department Counsel has the burden of presenting evidence to prove controverted facts. Directive, Additional Procedural Guidance, Item 14. Absent record evidence supporting a controverted SOR allegation, mere disbelief of an applicant's statements is an insufficient basis for a Judge to find the applicant engaged in conduct alleged in that controverted allegation. *See, e.g.*, DISCR Case No. 87-1983 (August 29, 1989) at p. 3. *Accord* ISCR Case No. 96-0461 (December 31, 1997) at pp. 3-4. An applicant has the burden of presenting evidence to "rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel. . . ." Directive, Additional Procedural Guidance, Item 15. An applicant does not have the burden of disproving SOR allegations. If Department Counsel fails to present evidence to prove controverted facts, then an applicant has nothing to "rebut, explain, extenuate, or mitigate." *See, e.g.*, ISCR Case No. 97-0184 (June 16, 1998) at p. 5 n.4. For the reasons that follow, the Board concludes Department Counsel failed to meet its burden of presenting evidence sufficient to prove that Applicant falsified material facts during a January 7, 1997 interview with a Special Agent of the Defense Investigative Service (SOR ¶ 1.b.).

There is no admission by Applicant with respect to the SOR falsification allegation. Accordingly, Department Counsel had the burden of presenting evidence, direct or circumstantial, to prove that Applicant's failure to mention the extramarital affair during the January 7, 1997 interview was done with the intention to mislead or deceive the Special Agent. There is no dispute that Applicant had an extramarital affair during 1995. And, there is no dispute that Applicant did not mention that extramarital affair to the Special Agent during the January 7, 1997 interview. However, Applicant's failure to mention that extramarital affair to the Special Agent does not, standing alone, prove he deliberately omitted that fact with the intention of deceiving or misleading the Special Agent. The question is whether the record contains evidence that would permit the Judge to find that Applicant's omission was knowing and willful (*i.e.*, an attempt to deceive or mislead the Special Agent).

Applicant's omission of the extramarital affair during the January 7, 1997 interview would not be false or deceptive if no question had been asked that a reasonable person would know or should have known called for disclosure of the extramarital affair. *See, e.g.*, DISCR Case No. 91-0109 (July 1, 1993) at p. 4 (applying the reasonable person standard to falsification case). According to the limited record evidence in this case, Applicant was not asked whether he had ever engaged in an extramarital affair. Rather, Applicant was asked whether he had done anything that could leave him potentially vulnerable to coercion, exploitation, or pressure. *See* Applicant's response to FORM. That question does not ask for a simple factual answer,⁽²⁾ but rather calls for an applicant to make an inference or predictive judgment and express an opinion. An applicant's statement or omission, if based on an honestly held opinion, cannot be found to be a deliberate false statement or omission unless there is evidence that the applicant knew or should have known that the opinion was false. *Cf. United States v. Amrep Corp.*, 560 F.2d 539, 544 (2d Cir. 1977) ("The expression of an opinion not honestly entertained is a factual misrepresentation."), *cert. denied*, 434 U.S. 1015 (1978).

Considering the record as a whole, there is insufficient evidence⁽³⁾ to support a finding that Applicant knew or should have known that the investigator's open-ended question during the January 7, 1997 interview called for him to disclose the 1995 extramarital affair. The Judge's elaborate explanation for her finding of falsification, although plausible, lacks a sound basis in the record evidence. Accordingly, the Board reverses the Administrative Judge's adverse formal finding with respect to SOR ¶1.b.

(3) Applicant does not dispute that he had an extramarital affair in 1995. However, Applicant argues Department Counsel failed to prove that the extramarital affairs rendered him vulnerable to coercion or influence within the meaning of Criterion D. Applicant's argument is not persuasive.

In industrial security clearance cases, direct or objective evidence of nexus is not required. *See, e.g.*, ISCR Case No. 97-0191 (April 28, 1998) at p. 5. Furthermore, the federal government need not wait until an applicant fails to properly handle or safeguard classified information before it can deny or revoke an applicant's access to such information. All that is required is evidence that would allow an Administrative Judge to draw a reasonable inference that an applicant's conduct or circumstances pose a potential security risk. *See, e.g.*, ISCR Case No. 97-0176 (January 22, 1998) at p. 3. This does not require a showing that an applicant presents a "clear and present danger" to security. *See, e.g., Smith v. Schlesinger*, 513 F.2d 462, 476 n.48 (D.C. Cir. 1975). Evidence that a married applicant engaged in an extramarital affair and concealed that conduct from applicant's spouse provides a rational basis for a Judge to infer that the applicant could be vulnerable to coercion or influence, either through a threat to expose the affair to the applicant's spouse, or through possible exploitation by future sexual enticement.

As discussed earlier in this decision, Applicant's opinion about the significance of the extramarital affair is relevant to the specific falsification allegation in this case. However, Applicant's opinion about that matter is irrelevant to the Administrative Judge's analysis of its security significance under the other, nonfalsification allegations in the SOR. *See* ISCR Case No. 95-0176 (August 15, 1996) at p. 2 (applicant's belief that his conduct has no security significance is legally irrelevant to Judge's obligation to evaluate security significance of that conduct). Accordingly, the Board's conclusion that the Judge should have entered a favorable finding for Applicant with respect to the falsification allegation does not preclude the Board from upholding the Judge's adverse formal findings with respect to the other SOR allegations.

There is record evidence that supports the Administrative Judge's finding that Applicant concealed his extramarital affair from his wife. Given the record evidence that Applicant had concealed his extramarital affair from his wife even up to the time he answered the SOR (FORM, Item 3), it was not arbitrary, capricious, or contrary to law for the Administrative Judge to note the absence of corroborating evidence to support Applicant's belated claim that his wife is aware of his extramarital affair (Response to FORM). *See, e.g.*, DISCR Case No. 93-1234 (May 19, 1995) at p. 6 ("[T]he absence of corroborating evidence may, under some circumstances, be considered by the Judge in weighing a witness's testimony."). Furthermore, given the Judge's sustainable finding that Applicant's wife was not aware of Applicant's extramarital affair, the Judge gave a rational explanation why she had doubts about Applicant's belated claim that his wife was now aware of that affair.⁽⁴⁾

(4) The favorable evidence cited by Applicant concerning his military record and work experience does not render the

Administrative Judge's decision arbitrary, capricious, or contrary to law. The Judge must weigh the record evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. *See, e.g.*, ISCR Case No. 98-0111 (November 13, 1998) at p. 4. Accordingly, Applicant's ability to cite to favorable record evidence does not demonstrate the Judge erred. Considering the record as a whole, the favorable evidence cited by Applicant does not compel the Judge, as a matter of law, to issue a favorable security clearance decision. Furthermore, Applicant's brief fails to demonstrate the Judge weighed the record evidence in a manner that is arbitrary, capricious, or contrary to law.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error that warrants remand or reversal of the Administrative Judge's August 14, 1998 adverse security clearance decision.

For the reasons stated in this decision, the Board reverses the Administrative Judge's adverse formal finding concerning the falsification allegation (SOR ¶ 1.b.), but affirms the Judge's formal findings concerning the rest of the SOR paragraphs. The Board also affirms the Judge's overall adverse security clearance 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. This case involved a determination made on the basis of a FORM, not a hearing. Since the Administrative Judge did not have an opportunity to hear Applicant testify, her credibility determinations about Applicant are not entitled to the degree of deference that Department Counsel argues for in its reply brief. *See* ISCR Case No. 97-0625 (August 17, 1998) at pp. 2-3 (explaining why Judge's credibility determination based on a FORM is entitled to lesser deference than one based on Judge's opportunity to personally observe witnesses as they testify).

2. *Compare* other falsification cases where applicants have been asked questions about specific facts such as past criminal record, use of illicit drugs or abuse of prescription drugs, alcohol abuse, and financial matters (such as bankruptcies, wage garnishments, repossessions, or liens).

3. Whether there is sufficient record evidence to support an Administrative Judge's factual findings is a question of law, not one of fact. *See, e.g.*, ISCR Case No. 97-0727 (August 3, 1998) at p. 3.

4. The Administrative Judge relied, in part, on her finding that Applicant had engaged in falsification as alleged in SOR ¶1.b. As discussed earlier in this decision, that finding cannot be sustained. However, that error is harmless in this context because the Judge had other reasons, independent of her falsification finding, for having doubts about

Applicant's claim that his wife was now aware of his extramarital affair.