

DATE: October 15, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0821

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

William S. Fields, Department Counsel

FOR APPLICANT

Robert J. Hill Esq.

Administrative Judge Jerome H. Silber issued a decision dated May 22, 1998, in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Department Counsel appealed. For the reasons set forth below, the Board reverses 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.

Department Counsel's appeal presents the following issues: (1) Whether the Administrative Judge erred in his application of the Adjudicative Guidelines; and (2) Whether the Administrative Judge erred in concluding that Applicant had rebutted the Government's case.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR), dated December 8, 1997. The SOR was based on Criteria H (drug involvement), E (personal conduct), and J (criminal conduct).

A hearing was held on February 17, 1998. The Administrative Judge subsequently issued a decision in which he concluded that it is clearly consistent with national interest to grant or continue a security clearance for Applicant. The case is now before the Board on Department Counsel's appeal from that favorable decision.

Appeal Issues⁽¹⁾

1. Whether the Administrative Judge erred in his application of the Adjudicative Guidelines. Department Counsel argues that the Administrative Judge failed to explain his deviation from the express language of the Personal Conduct Adjudicative Guidelines by finding Applicant's falsifications were mitigated by a correction that was neither prompt nor voluntary.

Applicant's history of illegal drug use spans more than twenty years (1973-1996). In January 1997, Applicant signed a security clearance form in which he falsely denied illegal drug use in the past seven years and falsely denied drug use

while holding a clearance. In April 1997, Applicant provided a false version of his drug history to a Defense Investigative Service Agent during a follow-up interview. A month or two later, Applicant did provide the correct information to the government but only after he had been contacted by a member of another agency who had informed him that Applicant was to be polygraphed. Applicant then sought advice from his employer, who urged him to correct the record. Only after Applicant learned of the possibility that he might be polygraphed and he received the employer's strong recommendation to disclose his true drug history did he act to correct the record.

The Administrative Judge applied only one mitigating condition to Applicant's falsification conduct (Personal Conduct Mitigating Condition #3: "the individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts"). However, the facts of Applicant's case do not fit well under the mitigating condition. Specifically, Personal Conduct Mitigating Condition #3 refers to Applicant making prompt, good faith efforts to correct his falsification. The Administrative Judge noted correctly that the efforts were not prompt. The Administrative Judge incorrectly categorized Applicant's correction as good faith (even though the Administrative Judge had noted that Personal Conduct Mitigating Condition #2 did not apply because "There is some doubt as to the 'voluntariness' of his disclosure due to exogenous factors").⁽²⁾ Under the circumstances, Applicant's correction was neither prompt nor in good faith. Thus, Personal Conduct Mitigating Condition #3 did not apply to Applicant's conduct. The Administrative Judge's conclusion that Personal Conduct Mitigating Condition #3 operated to offset the disqualifying conduct of falsification was error.

The Administrative Judge concluded "there is clear evidence that the Applicant has successfully 'rehabilitated' his criminal conduct through confession to his superior and remorse (MC #5). Therefore, SOR ¶ 2 [Criterion E] and ¶ 3 [Criterion J] are concluded favorably to the Applicant" (Decision at p. 9). Department Counsel argues that the record is devoid of any evidence that Applicant underwent any rehabilitation with respect to the Criterion E and Criterion J aspects of the case. In contrast, Applicant argues the totality of the record evidence supports the Administrative Judge's finding of rehabilitation.

The mere presence or absence of Adjudicative Guidelines for or against clearance are not solely dispositive of a case. *See, e.g.*, ISCR Case No. 98-0066 (August 28, 1998) at p. 2. Accordingly, the fact that the Administrative Judge could not properly apply Personal Conduct Mitigating Condition # 3 under the particular facts of this case did not preclude the Judge from analyzing Applicant's case under Section F.3. of the Directive.

The Board rejects Department Counsel's assertion that there is no record evidence supporting the Administrative Judge's finding of rehabilitation. However, the question is not whether there is *some* evidence of rehabilitation, but rather whether there is evidence of rehabilitation sufficient to warrant the Judge's favorable conclusions under Criterion E and Criterion J, in light of the totality of the record evidence. *See* ISCR Case No. 97-0727 (August 3, 1998) at p. 6 (noting that mere presence of some evidence indicative of reform and rehabilitation may not be enough to warrant a favorable decision). Considering the record as a whole, the Board concludes there is insufficient record evidence to support the Administrative Judge's finding of "clear evidence" of rehabilitation. Since Applicant's falsifications were directed against the federal government, Applicant's confession to his superior does not logically support any finding of rehabilitation. Furthermore, Applicant's confession to his superior occurred only after Applicant was faced with the prospect of being polygraphed by another agency. Given the Judge's own finding that Applicant's disclosures were not really voluntary in nature, it was arbitrary and capricious for the Judge to characterize Applicant's disclosures to his superior as "clear evidence" of rehabilitation. Finally, the Judge's finding of rehabilitation is not saved by his reference to Applicant's reputation for integrity. Evidence of an applicant's reputation for honesty and integrity cannot be considered in isolation, but rather must be considered in light of evidence that the applicant engaged in deliberate acts of falsification. *See, e.g.*, ISCR Case No. 97-0727 (August 3, 1998) at p. 4 n.1; ISCR Case No. 97-0466 (February 3, 1998) at p. 2.

2. Whether the Administrative Judge erred in concluding that Applicant had rebutted the Government's case.

Department Counsel reiterates the issues addressed above, using a second line of reasoning that overlaps its earlier arguments. No useful purpose would be served by repeating the Board's analysis in a slightly different form.

Conclusion

Department Counsel has met its burden of demonstrating error that warrants reversal. Pursuant to Item 33.c. of the Directive's Additional Procedural Guidance, the Board reverses the Administrative Judge's May 22, 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. The Administrative Judge reached conclusions favorable to Applicant under Criterion H of the Directive. Those favorable conclusions were not appealed by Department Counsel.

2. The Administrative Judge's reference to Personal Conduct Mitigating Condition #2 is somewhat misplaced. Since this case involved Applicant's effort to correct his earlier falsifications, Personal Conduct Mitigating Condition #3 -- not itigating Condition #2 -- was the proper provision for the Judge to consider. *See* ISCR Case No. 97-0289 (January 22, 1998) at p. 3.