

DATE: April 19, 1999

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 98-0470

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Matthew E. Malone, Esq., Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Claude R. Heiny issued a decision, dated December 8, 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 issue of whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated June 20, 1998 to Applicant. The SOR was based on Criterion E (Personal Conduct) and Criterion J (Criminal Conduct). A hearing was held on October 22, 1998. The Administrative Judge subsequently issued a written decision in which he concluded it is 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 favorable decision.

Appeal Issue⁽¹⁾

The Administrative Judge found that Applicant deliberately failed to disclose all of his marijuana use when he completed a security questionnaire in December 1997, in a written statement he gave to an investigator in April 1998, and initially during a June 1998 interview. The Judge concluded Applicant's falsifications were extenuated and mitigated by his youth and immaturity and his subsequent disclosures. The Judge entered formal findings for Applicant with respect to those falsifications under SOR 1.c., 1.d., 1.e., and 2.b.

Department Counsel contends the Administrative Judge's decision is arbitrary, capricious, or contrary to law because: (1) the Judge gave undue weight to his finding about Applicant's youth and immaturity; and (2) in the alternative, it was inconsistent for the Judge to find that Applicant made his falsifications due to youth and immaturity, yet conclude that

Applicant demonstrates the judgment and trustworthiness required of a person granted access to classified information. Department Counsel's second contention has merit.

The Administrative Judge has the primary responsibility for weighing the evidence and making findings of fact. Directive, Additional Procedural Guidance, Item 25. The Judge's findings are subject to review. Directive, Additional Procedural Guidance, Item 32.a. Absent a showing that the Judge acted in a manner that is arbitrary, capricious, or contrary to law, the Board will not disturb the Judge's weighing of the record evidence. *See, e.g.*, ISCR Case No. 98-0445 (April 2, 1999) at p. 2. The Board need not agree with the Administrative Judge's finding about Applicant's youth and immaturity in connection with his multiple falsifications to conclude that the Administrative Judge's finding was not arbitrary, capricious, or contrary to law.

Department Counsel's alternative argument is more persuasive. The Administrative Judge's decision is not a model of clarity as to his reasoning concerning mitigation of Applicant's falsifications. Given the Judge's finding that Applicant engaged in separate acts of falsification in December 1997, April 1998, and June 1998 due to his youth and immaturity, the Judge could not rationally conclude it was clearly consistent with the national interest to grant Applicant a security clearance unless there was a rational basis for the Judge to conclude either (a) Applicant's falsifications were not of security significance because of Applicant's youth and immaturity, or (b) Applicant had demonstrated subsequent maturity sufficient to overcome the security significance of his multiple falsifications.

Even if Applicant was so "young and immature" as to not fully appreciate the seriousness of his multiple acts of deliberate falsification (made when he was 26 years old), it would not comport with common sense (Directive, Section F.3.) to conclude that Applicant's falsifications are not security significant. Given the clearly consistent with national interest standard, an applicant's conduct must be evaluated against the reasonable person standard. *See, e.g.*, ISCR Case No. 98-0355 (March 12, 1999) at p. 4. An applicant who is unwilling or unable to act in a reasonable manner does not demonstrate the high degree of judgment, reliability, and trustworthiness required of persons granted access to classified information. An applicant who engages in deliberate falsifications out of immaturity is not more reliable or trustworthy than a mature applicant who engages in deliberate falsifications.

Reading the decision in a light most favorable to the nonappealing party (*i.e.*, Applicant), the Administrative Judge seems to be making an implicit finding that, by the hearing, Applicant demonstrated maturity sufficient to overcome the negative implications of his earlier falsifications (the last of which occurred about four months before the hearing). Considering the record evidence, the Board finds no evidence that rationally would support such a finding. *See* Directive, Additional Procedural Guidance, Item 32.a. Accordingly, the Judge's favorable conclusion about Applicant's security eligibility lacks a rational basis in the record evidence.

Conclusion

Department Counsel has met its burden of demonstrating harmful error below. Pursuant to Item 33.c. of the Directive's Additional Procedural Guidance, the Board hereby reverses the Administrative Judge's December 8, 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. Department Counsel does not challenge the Administrative Judge's findings and conclusions concerning SOR paragraphs 1.a., 1.b., 2.a., 2.c., and 2.d. Accordingly, the Board need not address those findings and conclusions.