

DATE: August 19, 1999

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 98-0621

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Administrative Judge Robert R. Gales issued a decision, dated April 27, 1999, 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 the Administrative Judge erred by finding Applicant engaged in knowing and willful falsification of material facts; and (2) whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR), dated September 29, 1998, to Applicant. The SOR was based on Criterion E (Personal Conduct) and Criterion J (Criminal Conduct).

A hearing was held on March 2, 1999. The Administrative Judge subsequently issued a written decision, in which he 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

Attached to Applicant's appeal brief are various documents. Several of those documents are copies of documents that were made part of the record during the proceedings below. The remainder of those documents are new evidence. Applicant's brief also contains some statements about himself that go beyond the record below and, therefore, constitute new evidence. The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item 29. In this regard, the Board notes Applicant had ample opportunity to submit documentary and testimonial evidence on his behalf during the proceedings below. The Board will consider Applicant's appeal arguments only to the extent they

are not based on new evidence.

1. Whether the Administrative Judge erred by finding Applicant engaged in knowing and willful falsification of material facts. The Administrative Judge found that Applicant falsified material facts about his court-martial and dismissal from the military when he executed a security questionnaire in April 1998, and during an April 1998 interview with a special agent of the Defense Security Service (DSS).⁽¹⁾ On appeal, Applicant contends he did not engage in deliberate falsification on those occasions. In support of that contention, Applicant argues: (a) he provided information about his court-martial and dismissal from the military from memory to the best of his ability; (b) his incorrect answers were the result of "an honest mistake" about his understanding and recollection of his military record; (c) he regrets not trying to review documentation about his military history before responding to questions about it; and (d) he would never deliberately and knowingly withhold information during a security investigation.

During the proceedings below, Applicant presented evidence about his intentions and state of mind when he executed the security questionnaire in April 1998 and during his April 1998 interview with a DSS special agent. That evidence was relevant and material to the issue of whether Applicant falsified material facts about his court-martial and dismissal from the military, as alleged in the SOR. However, that evidence was not conclusive. The Judge had to consider Applicant's statements about his intentions and state of mind in light of the Judge's assessment of Applicant's credibility and the record evidence as a whole. *See, e.g.*, ISCR Case No. 98-0620 (June 22, 1999) at pp. 2-3. Considering the record as a whole, the Judge had ample basis for finding that Applicant acted in a knowing and willful manner when he failed to disclose his court-martial and dismissal from the military. The Judge's findings on this point reflect a reasonable interpretation of the record evidence. Applicant's appeal arguments fail to demonstrate the Judge's findings about Applicant's falsifications are erroneous.

2. Whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. Applicant also argues: (a) the criminal conduct for which he was court-martialed and dismissed from the military occurred 12 years ago, was the result of isolated poor judgment during a difficult time in his life, and it will never be repeated; (b) he is deeply remorseful about his past criminal conduct; (c) apart from the criminal conduct that resulted in his court-martial, he has a record that is clean and outstanding; (d) he has always performed his security duties in a proper manner; and (e) he will not make the same mistake when answering questions about his military record during a security audit. The Board construes these arguments as raising the issue whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

The Administrative Judge made a formal finding in favor of Applicant with respect to the SOR allegation concerning the criminal conduct that resulted in Applicant's court-martial and dismissal from the military. Given those favorable findings, Applicant's arguments about his 12-year-old criminal conduct are moot and need not be addressed by the Board.

The Administrative Judge has the primary responsibility for weighing the record evidence and making findings of fact. Of course, the Judge has the obligation to consider the record evidence as a whole and weigh it in a reasonable manner. *See, e.g.*, ISCR Case No. 98-0395 (June 24, 1999) at p. 3. The favorable evidence cited by Applicant does not demonstrate the Judge acted in an arbitrary or capricious manner when he weighed the evidence in this case. The Judge had to consider the evidence as a whole (Directive, Section F.3.) and decide whether the favorable evidence outweighed the unfavorable evidence or *vice versa*. *See, e.g.*, ISCR Case No. 98-0394 (June 10, 1999) at p. 6. Because Applicant's appeal arguments fail to demonstrate the Judge weighed the record evidence in a manner that was 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. 98-0394 (June 10, 1999) at p. 6.

The absence of any evidence that Applicant failed to properly perform his security duties does not mean that the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. The federal government need not wait until an applicant fails to properly handle or safeguard classified information before it can deny or revoke that applicant's access to such information. *Adams v. Laird*, 420 F.2d 230, 238-39 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). All that is necessary is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons given access to classified information. *See, e.g.*, ISCR Case No. 98-0648 (July 12,

1999) at p. 3.

The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). Security requirements include consideration of a person's judgment, reliability, and trustworthiness. *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961). Persons who engage in deliberate acts of falsification in connection with a security clearance application or investigation raise serious questions about their suitability for a security clearance. *See Harrison v. McNamara*, 228 F. Supp. 406, 408 (D. Conn. 1964)(lying on application for government position requiring a security clearance raises questions as to person's reliability and justifies dismissal), *aff'd per curiam*, 380 U.S. 261 (1965). The Administrative Judge's findings about Applicant's falsifications provide a rational basis for the Judge's adverse security clearance decision.

Conclusion

Applicant has failed to meet his burden of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's April 27, 1999 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 found Applicant did not falsify material facts about the suspension of his security clearances in 1989 and 1990 when he executed security questionnaires in October 1990 and April 1998. Those favorable findings are not at issue on appeal.