

DATE: August 18, 1999

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 98-0767

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Administrative Judge Claude R. Heiny issued a decision, dated May 5, 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's erred by finding that Applicant engaged in knowing and willful falsification of his criminal record; 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 December 2, 1998 to Applicant. The SOR was based on Criterion E (Personal Conduct) and Criterion J (Criminal Conduct).

Applicant submitted an answer to the SOR in which he indicated "I do not request a hearing." A File of Relevant Material (FORM) was prepared. A copy of the FORM was given to Applicant, who submitted a response to the FORM. The case was then assigned to the Administrative Judge for determination.

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 that adverse decision.

Appeal Issues

1. Whether the Administrative Judge's erred by finding that Applicant engaged in knowing and willful falsification of his criminal record. Applicant contends he did not try to conceal any information from the Defense Security Service special agent who interviewed him in September 1998. For the reasons that follow, the Board concludes the

Administrative Judge erred by finding Applicant engaged in knowing and willful falsification of his criminal record.

The Administrative Judge's decision does not spell out clearly a finding of falsification. The first full paragraph on page 3 of the decision does not set forth a finding of fact concerning falsification, but is largely a recitation of the evidence. *See, e.g.*, ISCR Case No. 97-0551 (May 28, 1998) at p. 3 n.2 ("Summarizing record evidence is not a substitute for fact finding."). The last sentence of that paragraph (with footnote 4) is not a factual finding *per se*, but it goes beyond reciting the evidence and sets forth the Judge's evaluation of the relative believability of two pieces of evidence.⁽¹⁾ The Judge's only finding of falsification occurs in the first paragraph of the Conclusion section of the decision (at page 5). That finding ("The Applicant failed to admit his first arrest during a DSS interview") is not supported by the record evidence.

Even reading Applicant's September 3, 1998 written statement (FORM, Item 6) in a light most favorable to the nonappealing party, that written statement is insufficient to support the Administrative Judge's finding that Applicant engaged in falsification during the September 3, 1998 interview. That written statement does not contain an admission of falsification. In addition, neither Applicant's answer to the SOR nor Applicant's response to the FORM supports the Judge's statement that "Applicant said the Special Agent never asked him about the previous shoplifting until the end of the interview and when asked about the previous incident he voluntarily provided correct information" (Decision at p. 3). Those two documents do not provide a sufficient basis for the Judge to find that: (a) the Special Agent asked Applicant about the previous shoplifting incident, or (b) Applicant did not offer information about the previous shoplifting incident until after being asked about it by the Special Agent. Finally, the Judge's finding ("The Applicant failed to admit his first arrest during a DSS interview") is at odds with the simple fact that Applicant's September 3, 1998 written statement admits that arrest.

Even if the Administrative Judge disbelieved Applicant's denial of falsification (Applicant's answer to SOR), such disbelief, standing alone, is not sufficient to support the Judge's finding of falsification. *See, e.g.*, ISCR Case No. 96-0461 (December 31, 1997) at pp. 3-4 (citing earlier Board decisions). And, if there is insufficient evidence to support an SOR allegation, then Judge must enter a finding in favor of the applicant with respect to such an unproven allegation. *See, e.g.*, ISCR Case No. 97-0016 (December 31, 1997) at p. 3.⁽²⁾

Considering the record as a whole, there was insufficient information to support the Administrative Judge's finding of falsification. Accordingly, the Board cannot sustain that finding (Additional Procedural Guidance, Item 32.a.) or the adverse conclusions the Judge reached based on his finding of falsification (Additional Procedural Guidance, Item 32.c.).

2. Whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. Applicant also argues: (a) his involvement in a 1974 incident should not be held against him in deciding his security eligibility today because that incident is dated; and (b) there is favorable evidence concerning his past military service and work with a defense contractor that weighs in his favor. The Board construes these arguments as raising the issue of whether the Judge's adverse decision is arbitrary, capricious, or contrary to law.

(a) The Administrative Judge entered a formal finding in favor of Applicant with respect to the 1974 incident (SOR 2.c.). Because of that favorable formal finding, Applicant's argument about the 1974 incident is moot.

(b) The mere presence of favorable evidence does not require an Administrative Judge to make a favorable security clearance decision. The Judge must consider 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. 98-0614 (July 12, 1999) at p. 3. Absent a showing that a Judge acted in a manner that is arbitrary, capricious, or contrary to law, the Board will not disturb a Judge's weighing of the record evidence. *See, e.g.*, ISCR Case No. 98-0394 (June 10, 1999) at p. 6. Applicant's disagreement with the weight the Judge placed on the favorable and unfavorable evidence is not enough to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 98-0614 (July 12, 1999) at pp. 3-4.

As discussed earlier in this decision, the Administrative Judge's finding of falsification is not supported by the record evidence. However, the Judge's findings about Applicant's involvement in shoplifting incidents in March 1997 and

November 1997 are not challenged on appeal. Those unchallenged findings provide a sufficient basis to support the Judge's adverse security clearance decision in this case, despite the favorable evidence cited by Applicant on appeal. Accordingly, the Judge's erroneous finding of falsification is harmless and does not warrant a remand. *See, e.g.*, ISCR Case No. 98-0355 (March 12, 1999) at p. 3 (error by Administrative Judge is harmless when his sustainable findings and conclusions are sufficient to support his final adverse security clearance decision).

Conclusion

Applicant has failed to meet his burden of demonstrating error that warrants remand or reversal. Accordingly, the Board affirms the Administrative Judge's May 5, 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. Although the Administrative Judge refers to Applicant's response to the FORM, a review of the content of Applicant's response to the FORM and the content of Applicant's answer to the SOR shows the Judge had to be referring to Applicant's answer to the SOR. And, contrary to the Judge's characterization, Applicant's answer to the SOR does not contradict, factually or logically, his September 3, 1998 written statement.

2. Footnote 7 of the Judge's decision is not well-founded because, without evidence of what questions were on Applicant's job application, Applicant's statement that he "did not list [his] first arrest" on that application is not sufficient to support a finding of falsification. Therefore, given the sparse record evidence in this case, Applicant's failure to list his first arrest on his job application cannot be relied on by Judge to infer Applicant was more likely than not to have lied during the September 1998 interview.