

DATE: April 19, 2000

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 99-0005

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Roger C. Wesley issued a decision, dated September 24, 1999, 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 by finding that Applicant did not intend to falsify a security questionnaire she executed in October 1997; and (2) whether the Administrative Judge's favorable security clearance decision is arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated January 8, 1999. The SOR was based on Criterion E (Personal Conduct) and Criterion J (Criminal Conduct).

Applicant submitted an answer to the SOR, in which she indicated she did not want a hearing. A File of Relevant Material (FORM) was prepared. A copy of the FORM was given to Applicant, who did not submit a response to it. The case was then assigned to an Administrative Judge for determination.

The Administrative Judge issued a written decision, dated September 24, 1999, 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 Department Counsel's appeal from the Judge's favorable security clearance decision.

Appeal Issues

1. Whether the Administrative Judge erred by finding that Applicant did not intend to falsify a security questionnaire she executed in October 1997. When Applicant executed a security questionnaire in October 1997, Applicant answered "No" to questions asking whether she had ever been charged or convicted with any prior felony offenses and whether she had ever been arrested, charged or convicted of any other offenses within the last 7 years. In fact, Applicant had

been arrested in August 1988 on a felony charge; arrested in June 1995 on misdemeanor charges of larceny, possession of stolen goods, conspiracy to commit larceny, and resisting arrest; and investigated in 1993 for theft of government property. The Administrative Judge found that Applicant did not intend to falsify the security questionnaire, based on the following reasons: (a) she did not list the 1988 felony arrest because she had a mistaken misunderstanding whether the arrest should have been classed as an embezzlement and because a misdemeanor charge was substituted for the felony charge; (b) the record evidence does not show that Applicant was ever arrested, charged, or convicted in connection with the 1993 investigation for theft of government property; and (c) she mistakenly believed she did not have to list the June 1995 arrest because the criminal charges had been dismissed later.

Department Counsel contends the Administrative Judge erred because: (i) the Judge's acceptance of Applicant's explanations for her omissions is not entitled to the deference owed to a credibility determination based on personal observation of testimony at a hearing; (ii) the Judge's findings are based on a piecemeal analysis of the record evidence; (iii) the Judge should have concluded the record evidence was sufficient to find Applicant had been charged in connection with the 1993 investigation for theft of government property; and (iv) Applicant's omissions about her criminal record show a pattern of concealment. Department Counsel's arguments have mixed merit.

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 accept as adequate to support a conclusion in light of all the contrary evidence in the same record." Directive, Additional Procedural Guidance, Item 32.a. The Board must consider not only whether there is evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings. *See, e.g.*, ISCR Case No. 99-0144 (February 11, 2000) at p. 3. A Judge's credibility determinations are entitled to deference on appeal. Directive, Additional Procedural Guidance, Item 32.a. However, when credibility determinations are based on a Judge's evaluation of a FORM, they are not entitled to the same degree of deference given to credibility determinations based on personal observation of an applicant's testimony at a hearing. *See, e.g.*, ISCR Case 98-0257 (January 22, 1999) at p. 2.

Applicant's denials of any intent to falsify the security questionnaire in October 1997 are relevant and material evidence. However, those denials are not conclusive and binding on the Administrative Judge. Rather, the Judge had to consider Applicant's denials in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 99-0298 (April 13, 2000) at p. 2.

The Board does not find merit in Department Counsel's argument that the Administrative Judge erred by finding that Applicant had not been charged in connection with the 1993 investigation for theft of government property. The record evidence clearly shows Applicant was investigated for theft of government property. Indeed, given the record evidence as a whole, it is understandable that the Judge found that Applicant was involved in dishonest and criminal conduct in connection with that matter. However, it was reasonable for the Judge to conclude there was insufficient evidence to warrant a finding that Applicant had ever been arrested, charged or convicted in connection with that matter. Department Counsel's arguments on this point are strained and plainly fail to demonstrate the Judge erred in connection with this aspect of the case.

The Administrative Judge stated Applicant was entitled to the benefit of the doubt with respect to her denials unless there was evidence that impugns her veracity (Decision at p. 3).⁽¹⁾ The Judge erred because there is no rule of evidence that compels the acceptance of testimony or statements merely because they are unrebutted. *See, e.g.*, ISCR Case No. 99-0012 (December 1, 1999) at p. 2; ISCR Case No. 98-0583 (November 18, 1999) at p. 4. *Cf. Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985) ("... factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable fact-finder would not credit it. When such factors are present, the court of appeals may well find clear error even on a finding purportedly based on a credibility determination."). And, in this case, the criminal and dishonest conduct in which Applicant engaged raised, as a matter of common sense, questions about her honesty and integrity sufficient to require the Judge to engage in a critical evaluation of Applicant's statements and denials. Considering the record as a whole, Applicant's denials of an intent to falsify a security questionnaire in October 1997 by omitting her criminal record are strained and implausible, particularly in light of Applicant's overall history of criminal and dishonest conduct. The Judge's finding to the contrary is not sustainable under Item 32.a. of the Additional Procedural Guidance.

2. Whether the Administrative Judge's favorable security clearance decision is arbitrary, capricious, or contrary to law. Department Counsel contends the Administrative Judge's favorable decision is arbitrary, capricious, or contrary to law because: (a) the Judge analyzed the record evidence in a piecemeal manner; (b) it was arbitrary and capricious for the Judge to apply Criminal Conduct Mitigating Conditions 2 and 5; and (c) the record evidence does not support the Judge's finding that Applicant demonstrated mitigation sufficient to warrant a favorable security clearance decision.

A review of the Administrative Judge's decision as a whole persuades the Board that the Judge erred by considering the evidence in a piecemeal manner in making his findings and conclusions. The Judge's piecemeal approach to the evidence resulted in findings that do not reflect a reasonable, plausible interpretation of the record evidence.

It was arbitrary and capricious for the Administrative Judge to apply Criminal Conduct Mitigating Condition 2. (2) Department Counsel persuasively argues it was arbitrary and capricious for the Judge to treat Applicant's 1988 criminal conduct as "relatively aged" despite the Judge's own finding that Applicant engaged in similar misconduct in 1993. Such a piecemeal analysis by the Judge fails to comply with the requirements of Section F.3. of the Directive. Given Applicant's overall history of criminal conduct (including her falsification of a security questionnaire in October 1997), it was untenable for the Judge to apply Criminal Conduct Mitigating Condition 2.

The Administrative Judge's application of Criminal Conduct Mitigating Condition 5 (3) was based, in part, on his finding that Applicant did not intentionally falsify a security questionnaire in October 1997. As discussed earlier, that finding by the Judge is not sustainable. Applicant's failure to disclose her criminal record when she executed a security questionnaire in October 1997 fatally undercuts the Judge's conclusion that Applicant "avoided any further acts of dishonesty or criminal conduct" since 1993. (4) The Judge's application of Mitigating Condition 5 is also undercut by his erroneous application of Criminal Conduct Mitigating Condition 2.

Given the record evidence in this case demonstrating criminal and dishonest conduct by Applicant, the burden shifted to Applicant to present evidence of refutation, extenuation, mitigation, or changed circumstances sufficient to warrant a favorable security clearance decision. Directive, Additional Procedural Guidance, Item 15. Given the "clearly consistent with the national interest" standard, Applicant had a heavy burden of persuasion. As discussed in the preceding paragraphs, the Administrative Judge committed several errors in connection with his finding that Applicant had succeeded in demonstrating mitigation of her criminal and dishonest conduct. Furthermore, given the record evidence of Applicant's history of criminal and dishonest conduct, it was arbitrary and capricious for the Judge to give full weight to Applicant's undocumented and uncorroborated claims of reform and rehabilitation.

Conclusion

Department Counsel has met its burden of demonstrating harmful error. Pursuant to Item 33.c. of the Directive's Additional Procedural Guidance, the Board reverses the Administrative Judge's September 24, 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. In accepting Applicant's denials, the Judge relied, in part, on his statement that "[a]pparently accepting [Applicant's] story, the district attorney dismissed all of the [1995] charges." Applicant's statements about the reason(s) why the criminal charges against her in 1995 were dismissed do not provide any meaningful evidence as the mental processes of the district attorney handling the case in 1995. And, in any event, the mental processes and decisions of the district attorney in 1995 have no relevance to Applicant's intentions and state of mind when she executed the security questionnaire in October 1997.

2. "[T]he crime was an isolated incident."

3. "[T]here is clear evidence of rehabilitation."

4. The Administrative Judge found that Applicant did not engage in the criminal conduct for which she was arrested in June 1995. Department Counsel's appeal brief seems to indirectly question, but does not squarely challenge, that finding by the Judge.