DATE: November 10, 1999

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 99-0032

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Chief Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Paul Mason issued a decision, dated July 29, 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 reverses the Administrative Judge's decision.

The 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 when he found that Applicant knew he was committing a crime by falsifying a credit application in 1986. 2. Whether the Administrative Judge erred when he concluded that Applicant would not have pleaded guilty if he did not commit a crime. 3. Whether the Administrative Judge erred when he found that Applicant was charged with a felony in the 1986 case. 4. Whether the Administrative Judge erred when he concluded that Applicant used poor judgment and intentionally falsified or covered-up material facts by omitting the 1986 case from his application for a security clearance.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated January 20, 1999 to Applicant. The SOR was based on Criterion J (Criminal Conduct) and Criterion E (Personal Conduct).

Applicant submitted an answer to the SOR in which he requested a hearing. A hearing was held on May 18, 1999. On July 29, 1999, the Administrative Judge issued a decision in which he concluded that 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 erred when he found that Applicant knew he was committing a crime by falsifying a credit application in 1986. Applicant asserts that the Administrative Judge erred by finding that Applicant knew he was committing a crime by falsifying a credit application. The Board concludes that the Administrative Judge's finding is sustainable given the totality of the record evidence. The Administrative Judge makes it abundantly clear in making

the finding that he is drawing inferences from the evidence which is, of course, permitted, so long as those inferences are reasonable. The Board concludes that the inferences are reasonable. Applicant did deny knowing at the time that his conduct was criminal. However, his initial credit application was denied when it contained truthful information. He then proceeded (albeit on the advice of a realtor) to produce a false application and false supporting documentation. It is reasonable to infer that by that point Applicant understood that he was doing something wrong in order to obtain the credit.

2. Whether the Administrative Judge erred when he concluded that Applicant would not have pleaded guilty if he had not committed a crime? Applicant has at most a technical point here. It is true that there are situations where the courts recognize an individual's guilty plea and concurrent denial of guilt. However, the Administrative Judge's other inferences regarding Applicant's guilt have already been sustained so any error here is harmless.

3. Whether the Administrative Judge erred when he found that Applicant was charged with a felony in the 1986 case. There is no record evidence that Applicant was charged with a felony. The SOR, which is not evidence, cites section 1001 of title 18 the US code which is a felony provision. However, the only probative documentary evidence introduced into the record (which is an FBI identification record, not a primary source such as a charging document) refers only to false statements and cites neither a specific statutory provision nor the word "felony." When testifying, Applicant acknowledged only that FBI Agents had told him that he falsified information "and that was considered a felony." His other testimony, taken as a whole, establishes only that he could not remember whether he had been charged with a felony or a misdemeanor. Under the Directive, Department Counsel is responsible for presenting evidence to establish facts alleged in the SOR that have been controverted. Since no such evidence is in the record, Applicant's argument is persuasive on this point.

4. Whether the Administrative Judge erred when he concluded that Applicant used poor judgment and intentionally falsified or covered up material facts by omitting the 1986 case from his application for a security clearance. In light of the Board's holding for issue 3 above that the record does not support a finding that Applicant was charged with a felony, Applicant's failure to list the 1986 case under the felony question on the application is not disqualifying conduct. The other offenses question on the application is limited to seven years and this matter preceded that time frame. Therefore the Administrative Judge's conclusion as to intentional falsification of this matter is also error as there was no question on the questionnaire which required Applicant to list the 1986 case.

CONCLUSION

The errors cited by the Board are dispositive on allegations 1c. and 2a. Allegation 1a., which was concluded favorably for the Applicant, was not appealed. What remains is the conduct underlying allegation 1b. That conduct is not disqualifying owing to its isolated and dated nature. Therefore, the Administrative Judge's decision is reversed.

See dissenting opinion

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

Separate Opinion of Chairman Emilio Jaksetic,

concurring in part and dissenting in part

For the reasons that follow, I dissent from my colleagues' decision to reverse the Administrative Judge's July 29, 1999 decision.

Applicant's appeal presents the following issues: (1) whether the Administrative Judge erred by finding Applicant knew he was committing a federal crime by falsifying a credit application in 1986; (2) whether the Administrative Judge erred when he concluded Applicant would not have pleaded guilty to a federal crime if he had done nothing wrong; and (3) whether the Administrative Judge erred by finding Applicant falsified or covered up a material fact by omitting his 1986 crime from a security questionnaire.

1. Whether the Administrative Judge erred by finding Applicant knew he was committing a federal crime by falsifying a credit application in 1986. For all the following reasons, I concur with my colleagues' conclusion that Applicant's first appeal issue lacks merit.

The Administrative Judge indicated "I am unable to conclude that Applicant had no idea he was committing a criminal act when he submitted the false credit application." Applicant challenges that statement, contending the record evidence shows (a) he was not aware of the criminality of his false statement until he was visited by Federal Bureau of Investigation agents investigating false loan applications; and (b) he did not realize a realtor was advising him to commit a criminal act. Applicant's arguments fail to demonstrate the Judge committed harmful error.

The record evidence shows Applicant knew that he was making a false statement in connection with a loan application in 1986. The Administrative Judge reasonably could conclude that Applicant knew or should have known that making a false statement in a loan application was a wrongful act. It is legally irrelevant whether Applicant knew that his making a false statement in a loan application was a criminal act. "The general rule that ignorance of the law or a mistake of law is not defense to a criminal prosecution is deeply rooted in the American legal system." *Cheek v. United States*, 498 U.S. 192, 199 (1991). Accordingly, absent a specific statutory requirement to the contrary, a specific intent crime does not require proof that the defendant was specifically aware of the law penalizing his conduct. *See, e.g., United States v. Blair*, 54 F.3d 639, 643 (10th Cir. 1995), *cert. denied*, 516 U.S. 883 (1995). In view of the foregoing, there was no need for the Judge to decide whether Applicant knew he was committing a federal crime by falsifying a loan application in 1986. Even if I were to conclude the Judge erred by making this challenged finding, such an error would be harmless because that finding was unnecessary and, therefore, superfluous.

2. Whether the Administrative Judge erred when he concluded Applicant would not have pleaded guilty to a federal crime if he had done nothing wrong. The Administrative Judge relied, in part, on his conclusion that Applicant would not have pleaded guilty to a federal crime if he had done nothing wrong. Applicant's challenge to this part of the Judge's reasoning is not persuasive.

There are situations where a federal court may accept a defendant's guilty plea even though the defendant also denies guilt. *See North Carolina v. Alford*, 400 U.S. 25 (1970). However, there is no record evidence that Applicant entered such a plea in this case. And, in any event, Applicant's motivation in pleading guilty in 1986 is not relevant to the issues in this case. Accordingly, even if I were to conclude the Judge erred on this point, I would agree with my colleagues' conclusion that such a error would be harmless.

3. Whether the Administrative Judge erred by finding Applicant falsified or covered up a material fact by omitting his 1986 crime from a security questionnaire. For the reasons that follow, I disagree with my colleagues' discussion and disposition of this appeal issue.

The Administrative Judge found that Applicant falsified a security questionnaire in July 1998 by not listing the fact that he was charged in 1986 with making a false statement on a loan application. Applicant contends the Judge erred because he did not conceal that information. In support of that contention, Applicant argues: (a) he did not know whether he was actually charged with a felony in 1986; (b) he wrote information about the 1986 incident on his original security clearance questionnaire by hand, but that information was not placed on the computer-generated copy that was sent to the government; (c) Department Counsel conceded during the hearing that Applicant's explanation about the omission of information concerning the 1986 incident from the security questionnaire was plausible; (d) he did not read the computer-generated copy of the security questionnaire before signing it, and his failure to do so should not be considered a crime or a basis for concluding he is a threat to national security; (e) he spoke with a Special Agent on more than one occasion about the 1986 incident, and that demonstrates he was not trying to conceal the 1986 incident; and (f) he is known by family, friends, and employers as an honest, trustworthy person.

(a) Applicant has made inconsistent statements about whether he knew the nature of the charge brought against him in 1986. On one hand, Applicant has stated he did not know whether he had been charged with a felony in 1986. On the other hand, Applicant stated he made a handwritten notation on his original security clearance questionnaire that he had been charged with a felony in 1986, but was convicted of a misdemeanor.[(1)] Given Applicant's inconsistent statements on this point, the Administrative Judge had the responsibility for weighing Applicant's conflicting statements in light of the record evidence as a whole. Nothing in the record evidence or Applicant's appeal brief persuades me it would be legally impermissible for the Judge to credit the most damaging statements made by Applicant.

(b/c) The Administrative Judge considered Applicant's claim that he had written information about the 1986 incident on his original security clearance questionnaire by hand, but that information was not placed on the computer-generated copy that was sent to the government. As Department Counsel noted at the hearing, Applicant's claim "has a degree of plausibility." The plausibility of Applicant's claim was a matter for the Judge to consider when making his factual findings. The Judge concluded Applicant's claim did not warrant acceptance. Nothing in the record evidence persuades me that the Judge's finding on this point was arbitrary, capricious, or contrary to law.

(d) Applicant claimed that he signed the computer-generated copy of his security questionnaire without reading it. As the trier of fact, the Administrative Judge had the primary responsibility for considering Applicant's claim in light of his assessment of Applicant's credibility and the record evidence as a whole. The Judge could have accepted Applicant's claim, but he did not. Nothing in the record evidence persuades me that the Judge's finding on this point was arbitrary, capricious, or contrary to law.

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). Falsification of a security questionnaire provides a rational basis for an adverse security clearance decision. Applicant's assertion to the contrary is not well-founded.

(e) Applicant's subsequent disclosures about the 1986 incident to a Special Agent did not compel the Administrative Judge to find that Applicant did not falsify the July 1998 security questionnaire. A falsification is not retroactively nullified by subsequent disclosure of the information that was falsified earlier.

(f) The favorable evidence about Applicant's reputation as an honest, trustworthy person was specifically noted by the Administrative Judge. However, that favorable evidence did not require the Judge to make a favorable security clearance decision. A Judge must consider the record evidence, both favorable and unfavorable. Directive, Section F.3. In weighing the record evidence, a Judge must decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. *See, e.g.*, ISCR Case No. 99-0119 (September 13, 1999) at p. 3. Considering the record as a whole, I conclude the Judge did not act in an arbitrary or capricious manner when weighing the favorable reputation evidence cited by Applicant.

The record evidence against Applicant in this case is relatively sparse. However, the Board does not weigh the record evidence *de novo* on appeal and make its own findings of fact. Even though the evidence against Applicant might be

considered too weak to sustain the Administrative Judge's findings under the preponderance of the evidence standard, that standard is not the one used to evaluate a Judge's findings. Rather, a Judge's findings are reviewed under the substantial evidence test. Directive, Additional Procedural Guidance, Item 32.a. Substantial evidence is more than a scintilla, but less than a preponderance of the evidence. *See, e.g., Sprint Spectrum L.P. v. Willroth*, 176 F.3d 630, 638 (2d Cir. 1999). *Cf. Department of Navy v. Egan*, 484 U.S. 518, 531 (1988)(noting use of preponderance of evidence standard would conflict with "clearly consistent with the interests of national security" standard). Under that lesser standard, the Judge's findings are sustainable.

There is no presumption of error below and the appealing party has the burden of demonstrating error. *See, e.g.*, ISCR Case No. 98-0751 (July 21, 1999) at p. 2. Error is not demonstrated merely because the appealing party has shown that the record evidence is capable of being interpreted in a manner favorable to that party's position. *See, e.g.*, ISCR Case No. 98-0614 (July 12, 1999) at pp. 3-4. Although Applicant has presented a plausible, alternate interpretation of the record evidence, that is not enough to demonstrate the Administrative Judge's findings and conclusions are arbitrary, capricious, or contrary to law.

For all the foregoing reasons, I conclude Applicant has failed to meet his burden of demonstrating harmful error below. Therefore, I dissent from my colleagues' decision to reverse the Administrative Judge's July 29, 1999 decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

1. Applicant's statement on this point constitutes a judicial admission on the issue of whether Applicant was charged with a felony in 1986.