

DATE: February 11, 2000

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 99-0144

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Arthur A. Elkins, Esq., Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Kathryn M. Braeman issued a decision, dated August 26, 1999, in which she 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 Applicant did not intend to falsify a security questionnaire in June 1998 when he omitted his criminal record; (2) whether the Administrative Judge erred in her application of the Adjudicative Guidelines; and (3) whether the Administrative Judge's favorable security clearance decision should be reversed.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated March 3, 1999 to Applicant. The SOR was based on Criterion E (Personal Conduct) and Criterion J (Criminal Conduct).

A hearing was held on July 9, 1999. The Administrative Judge issued a written decision, dated August 26, 1999, in which she 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 Administrative Judge's favorable security clearance decision.

Appeal Issues

1. Whether the Administrative Judge erred by finding Applicant did not intend to falsify a security questionnaire in June 1998 when he omitted his criminal record. There is no dispute that Applicant executed a security questionnaire in June 1998, and that when doing so he did not disclose a 1991 felony charge and a 1988 driving while intoxicated (DWI) charge. The Administrative Judge found that Applicant did not intend to falsify the security questionnaire because: (a)

on the security questionnaire, Applicant listed three references who knew about the 1991 incident and who testified on his behalf; (b) Applicant's employer, a defense contractor, knew about the 1991 incident; (c) Applicant did not read the questions thoroughly enough; (d) Applicant believed he did not have to list the 1991 felony charge because he was not convicted of a felony; (e) Applicant had previously filled out another security questionnaire in 1996, in which he disclosed the 1991 felony charge and the 1988 DWI charge, but he no longer has that questionnaire, which was not submitted to the government; (f) Applicant revealed the two criminal charges when he was interviewed by a Special Agent of the Defense Security Service (DSS); (g) Applicant denies that he intended to falsify the June 1998 security questionnaire; (h) the DSS Special Agent who interviewed Applicant believed him; and (i) Applicant called as witnesses the three references listed on the security questionnaire, one of whom was aware of the 1988 DWI, and all three were aware of the 1991 incident.

Department Counsel contends the Administrative Judge erred by finding Applicant did not intend to falsify the security questionnaire in June 1998. In support of that contention, Department Counsel argues: (i) the record evidence as a whole does not support the Judge's finding; (ii) the Judge erred by relying on the testimony of the three witnesses that they were aware of Applicant's criminal record; (iii) the Judge drew inferences and reached conclusions that are not supported by the record evidence; (iv) the Judge gave undue weight to Applicant's testimony that he had listed his criminal record on a security questionnaire in 1996, which was never submitted to the government and which Applicant did not have a copy of; (v) Applicant's claim that he thought he did not have to list the two criminal charges because they occurred more than seven years earlier is suspect because it flies in the face of the plain language of the pertinent questions on the security questionnaire; and (vi) in finding Applicant credible, the Judge ignored evidence that Applicant did not truthfully answer a question on the security questionnaire that dealt with his military record, especially in light of the fact that a truthful answer to that question would have provided the government with a direct lead to the 1991 incident (which resulted in Applicant's discharge from the military).

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 that might find 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. 98-0582 (November 12, 1999) at p. 2. Whether there is sufficient record evidence to support a Judge's findings is a question of law, not one of fact. *See, e.g.*, ISCR Case No. 98-0419 (April 30, 1999) at p. 3. 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. 99-0355 (December 14, 1999) at p. 2. Furthermore, the Board will not disturb a Judge's findings so long as they reflect a reasonable, plausible interpretation of the record evidence. *See, e.g.*, ISCR Case No. 98-0592 (May 4, 1999) at p. 4. ⁽¹⁾

Applicant denied any intent to conceal his criminal record when he executed the security questionnaire in June 1998. Applicant's statements about his intent or state of mind are clearly evidence that the Administrative Judge had to consider. However, the Judge could not simply accept Applicant's statements about his intent or state of mind at face value. Rather, the Judge had the obligation to consider Applicant's statements in light of the record as a whole. *See, e.g.*, ISCR Case No. 99-0355 (December 14, 1999) at p. 2; ISCR Case No. 98-0582 (November 12, 1999) at p. 3.

It was arbitrary and capricious for the Administrative Judge to infer that Applicant did not intend to falsify the June 1998 security questionnaire because three persons he listed as references on the questionnaire knew about his criminal record. Absent evidence that Applicant was familiar with DSS investigative techniques or thought that the references would be asked specific questions about his criminal past, there is no factual or logical connection between the knowledge of the references about Applicant's criminal record and his intent or state of mind when he omitted his criminal record from the security questionnaire. Furthermore, the Judge's reasoning on this point is inconsistent with other reasons the Judge gave for finding Applicant did not intend to falsify the security questionnaire. If, as the Judge found, Applicant did not read the questions on the security thoroughly enough, and if, as the Judge found, Applicant believed he did not have to list the 1991 felony charge because he was not convicted of a felony, then Applicant's listing of the three references on the questionnaire (who knew about the 1991 incident) has no probative value as to Applicant's state of mind when he executed the questionnaire. It was arbitrary and capricious for the Judge to rely on inconsistent reasons to support her finding that Applicant did not intend to falsify the June 1998 security questionnaire.

It was arbitrary and capricious for the Administrative Judge to infer that Applicant did not intend to falsify the June 1998 security questionnaire because Applicant disclosed his criminal record to the DSS Special Agent in November 1998. As Department Counsel notes, Applicant's disclosure was not really a voluntary disclosure, but rather a disclosure brought about after the DSS Special Agent confronted Applicant in the interview about the criminal matters Applicant had failed to disclose in the security questionnaire. Furthermore, a falsification is not rendered any less false or deliberate by a subsequent disclosure of the truth several months later.

The Administrative Judge acted in an arbitrary and capricious manner by relying on Applicant's claim that he disclosed his criminal record on a security questionnaire that he completed in 1996, which was not submitted to the government, and which Applicant had no copy of. There is no logical basis for the Judge to infer that a listing of Applicant's criminal record on a form in 1996 (that was never disclosed to the government) proves he did not intend to conceal his criminal record when he failed to list it in the security questionnaire he completed in June 1998. First, a prior disclosure of information to the government does not preclude a finding that an applicant sought to conceal or mislead the government about that information at a later time. *See, e.g.*, ISCR Case No. 98-0583 (November 18, 1999) at p. 5. Second, it was untenable for the Judge to characterize as a prior disclosure the listing of information that was never submitted to the government in 1996.

Department Counsel persuasively argues that the Administrative Judge erred by not taking into account the record evidence that Applicant did not provide a truthful answer to a question about his military record when he executed the security questionnaire in June 1998. Although the SOR did not allege Applicant falsified the security questionnaire by failing to answer the military record question correctly, such uncharged conduct can be considered in evaluating Applicant's credibility. *See, e.g.*, ISCR Case No. 98-0582 (November 12, 1999) at p. 9. Given the importance of Applicant's credibility in this case, the Judge's failure to discuss this evidence was inconsistent with the Judge's obligation to consider the record evidence as a whole, including when assessing an applicant's credibility. *See, e.g.*, ISCR Case No. 98-0583 (November 18, 1999) at p. 3 (quoting *Anderson v. City of Bessemer*, 470 U.S. 564 (1985)).

Considering the record as a whole, the Administrative Judge's finding that Applicant did not intend to falsify the security questionnaire in June 1998 cannot be sustained because the Judge's finding is based on arbitrary and capricious reasoning and does not reflect a reasonable, plausible interpretation of the record evidence as a whole.

2. Whether the Administrative Judge erred in her application of the Adjudicative Guidelines. The Administrative Judge ruled, in the alternative, that even if Applicant did falsify the security questionnaire in June 1998, Applicant had demonstrated mitigation. In support of that ruling, the Judge gave the following reasons: (a) Applicant volunteered the information about his criminal record in his initial interview with the DSS Special Agent (citing Personal Conduct Mitigating Condition 2); (b) Applicant took positive steps to significantly reduce or eliminate his vulnerability to coercion, exploitation, or pressure by revealing the 1991 incident to his wife and significant people at his workplace (citing Personal Conduct Mitigating Condition 5); (c) the criminal charges that Applicant omitted from the security questionnaire in June 1998 did not have any security significance in 1998 because they were dated and minor; (d) since the 1991 incident, Applicant has distinguished himself on the job and demonstrated rehabilitation. The Judge also concluded Department Counsel did not establish that Applicant had engaged in criminal conduct under Criterion J because: (e) Applicant was never charged with a criminal violation of 18 U.S.C. 1001; and (f) Applicant did not intend to falsify the security questionnaire in June 1998. The Judge ruled, in the alternative, that even if Applicant's conduct were viewed "more stringently," it was mitigated under Criterion J because it was isolated and there is clear evidence of rehabilitation (citing Criminal Conduct Mitigating Conditions 2 and 5).

Department Counsel contends the Administrative Judge erred in finding Applicant demonstrated mitigation because: (i) the record evidence does not support the Judge's finding that Applicant voluntarily disclosed the information about his criminal record before being confronted by the DSS Special Agent about it; (ii) the Judge misapplied Personal Conduct Mitigating Condition 2 by referring to the dated nature of Applicant's criminal conduct and ignoring the recency of his falsification; (iii) the Judge's reasoning improperly allows an applicant to decide whether to disclose information to the government; (iv) the Judge erred by relying on her conclusion that Applicant was never charged with a criminal violation of 18 U.S.C. 1001; (v) the Judge erred by applying Criminal Conduct Mitigating Condition 2 because Applicant's falsification was not an isolated incident; and (vi) the Judge erred by applying Criminal Conduct Mitigating Condition 5 because the record evidence does not support the Judge's finding that there is clear evidence of successful

rehabilitation.

To the extent the Administrative Judge's mitigation analysis addressed Applicant's reform since the 1991 incident, it is totally irrelevant to the SOR allegations, which deal with Applicant's falsification of the security questionnaire in June 1998, not the 1991 incident. It was arbitrary and capricious for the Judge to conclude Applicant had demonstrated mitigation of his June 1998 falsification by virtue of evidence of mitigation of the 1991 incident.

Department Counsel is correct in challenging the Administrative Judge's statement that Applicant was not charged with violating 18 U.S.C. 1001. The Judge's statement is contrary to the plain language of Criminal Conduct Disqualifying Condition 1. (2) It was arbitrary, capricious, and contrary to law for the Judge to cite Criminal Conduct Disqualifying Condition 1 in her decision and then rely on a statement that Applicant was never charged with violating 18 U.S.C. 1001.

The Administrative Judge's application of Personal Conduct Mitigating Condition 2 (3) was arbitrary and capricious. As a preliminary matter, Personal Conduct Mitigating Condition 3, (4) not Personal Conduct Mitigating Condition 2, was the pertinent Adjudicative Guideline under the facts of this case. *See, e.g.*, ISCR Case No. 98-0582 (November 12, 1999) at p. 7. A Judge does not have the authority or discretion to ignore the plain language of a pertinent Adjudicative Guideline and seek to apply another Adjudicative Guideline that, on its face, does not apply to the particular facts of a case. Apart from the clear relevance of Personal Conduct Mitigating Condition 3, the Judge failed to articulate a rational basis for applying Personal Conduct Mitigating Condition 2 in this case. The Judge's conclusions about the dated nature of the 1988 and 1991 incidents provide no rational basis for the Judge to consider Applicant's June 1998 falsification was "not recent" under Personal Conduct Mitigating Condition 2. Furthermore, the record evidence shows Applicant did not voluntarily disclose his criminal record until he was confronted by the DSS Special Agent. Disclosure of that information under those circumstances does not constitute a voluntary disclosure under Personal Conduct Mitigating Condition 3.

The Administrative Judge's application of Criminal Conduct Mitigating Condition 5 (5) was arbitrary and capricious because it was based heavily on the Judge's analysis of the 1991 incident and Applicant's change of conduct after that incident. As noted earlier in this decision, the SOR allegations against Applicant were based on his falsification of a security questionnaire in June 1998. The Judge's findings of extenuation and mitigation concerning the 1991 incident are totally irrelevant to the June 1998 falsification. The Judge's analysis of the 1991 incident and Applicant's change of conduct after that incident provides no rational basis for the Judge's application of Criminal Conduct Mitigating Condition 5 in this case.

3. Whether the Administrative Judge's favorable security clearance decision should be reversed. Department Counsel contends the totality of the Administrative Judge's errors warrant reversal. The Board finds that contention persuasive. The Board need not decide whether the Judge's various errors, viewed individually, are sufficient to warrant reversal. The totality of the Judge's errors is harmful and warrants reversal under the particular facts and circumstances of this case.

Conclusion

Department Counsel has met its burden on appeal of demonstrating harmful error that warrants reversal. Accordingly, pursuant to Item 33.c. of the Directive's Additional Procedural Guidance, the Board reverses the Administrative Judge's August 26, 1999 decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Dissenting Opinion of Administrative Judge Michael Y. Ra'anan

I disagree with reversing the Administrative Judge's decision for two reasons:

1) I believe there are logical inferences which may be drawn from the fact that, at the time of the alleged falsification, Applicant offered several character references who knew about Applicant's incidents of bad conduct. (Applicant knew that the references knew about the incidents because Applicant had told them.) While those inferences need not be dispositive they do tend to support Applicant's assertion that he did not intend to falsify his form when he failed to report the incidents of bad conduct.

2) I also believe that the testimony of the investigator was important. He testified that Applicant was "up front" about the incidents of bad conduct. The investigator three times said either that he believed Applicant or that he had no reason to doubt Applicant.

Given the two points discussed above, I believe the Administrative Judge had it within her discretion to find for Applicant.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

1. The Administrative Judge's conclusion that Applicant was credible is not dispositive. The deference owed to a Judge's credibility determinations (Directive, Additional Procedural Guidance, Item 32.a.) does not immunize them from review, nor does it preclude the Board from concluding that a challenged credibility determination cannot be sustained. *See, e.g.*, ISCR Case No. 98-0583 (November 18, 1999) at p. 3.

2. "[A]ny criminal conduct, regardless of whether the person was formally charged."

3. "[T]he falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily."

4. "[T]he individual made prompt, good-fath efforts to correct the falsification before being confronted with the facts."

5. "[T]here is clear evidence of successful rehabilitation."