

DATE: February 29, 2000

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 99-0194

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Arthur A. Elkins, Esq., Department Counsel

FOR APPLICANT

David M. Davenport, Esq.

Administrative Judge Jerome H. Silber issued a decision, dated August 26, 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 Applicant did not deliberately falsify a security questionnaire in June 1998; and (2) whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law because the record evidence does not support the Administrative Judge's application of Personal Condition Mitigating Condition 6.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated March 22, 1999. The SOR was based on Criterion E (Personal Conduct) and Criterion J (Criminal Conduct).

A hearing was held on June 24, 1999. The Administrative Judge issued a written decision, dated August 26, 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 Administrative Judge's favorable security clearance decision.

Appeal Issues⁽¹⁾

1. Whether the Administrative Judge erred by finding Applicant did not deliberately falsify a security questionnaire in June 1998. Applicant executed a security questionnaire in June 1998. When doing so, Applicant did not list two citations he received from campus security personnel in April 1995 and September 1995 in connection with alcohol-

related incidents, or the felony charges filed against him in connection with a March 1997 incident. The Judge found Applicant did not falsify the security questionnaire by not listing the two citations because Applicant thought question 24 did not cover citations made by entities such as campus security personnel, who were not official police officers. The Judge also found that Applicant did not falsify the security questionnaire by not listing the felony charges filed in connection with the March 1997 incident because Applicant was told by his attorney at the time (hereinafter "State X attorney")⁽²⁾ that he was not being charged with anything. Department Counsel challenges both those findings.

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. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge." Directive, Additional Procedural Guidance, Item 32.a. The presence of conflicting record evidence does not diminish a Judge's fact-finding responsibility. When the record contains conflicting evidence, the Judge must carefully weigh the evidence in a reasonable, common sense manner and make findings that reflect a reasonable interpretation of the evidence that takes into account all the record evidence. *See, e.g.*, ISCR Case No. 98-0507 (May 17, 1999) at p. 6. *See also* ISCR Case No. 97-0727 (August 3, 1998) at p. 3 ("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.").

(a) Citations by campus security personnel. The Board need not agree with the Administrative Judge's finding concerning Applicant's understanding of question 24 to conclude that finding reflects a plausible interpretation of the record evidence in this case. Department Counsel's appeal arguments about this finding fail to demonstrate the Judge erred.

(b) Felony charges filed in connection with March 1997 incident. The Administrative Judge's finding that Applicant did not deliberately falsify material facts by failing to list this matter in the security questionnaire is based on the Judge's acceptance of Applicant's explanation for the omission. Applicant's denials of any intention to falsify his criminal record when he executed the security questionnaire are relevant and material evidence. However, those denials are not conclusive evidence. Rather, Applicant's denials had to be considered in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 98-0620 (June 22, 1999) at p. 2. An intent to falsify can be shown by circumstantial evidence even in the face of denials of any intent to falsify. *See, e.g.*, DISCR Case No. 90-0770 (July 16, 1992) at p. 3. *Cf. Foster v. Dalton*, 71 F.3d 52, 56 (1st Cir. 1995) ("Notwithstanding a person's disclaimers, a contrary state of mind may be inferred from what he does and from a factual mosaic tending to show that he really meant to accomplish what he professes not to have intended.") (quoting earlier decision). Even though the Judge's acceptance of Applicant's explanation is based on his favorable assessment of Applicant's credibility, that does not end the analysis.

The deference owed to an Administrative 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. 97-0356 (April 21, 1998) at p. 3; ISCR Case No. 95-0178 (March 29, 1996) at pp. 2-3. The record evidence in this case demonstrates the kind of situation the Supreme Court discussed in *Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985):

"[T]he trial judge may [not] insulate his findings from review by denominating them credibility determinations, for 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. Where such factors are present, the court of appeals may well find clear error even on a finding purportedly based on a credibility determination."

The Judge's acceptance of Applicant's explanation for his omission of the felony charges from the security questionnaire cannot be sustained because it does not reflect a reasonable, plausible interpretation of the record evidence as a whole. Applicant's explanation for his omission is implausible when it is considered in light of the record evidence as a whole.

There is significant record evidence that, viewed in its entirety, undercuts the plausibility of Applicant's explanation that he did not believe he had been charged at all in connection with the March 1997 incident. That evidence includes the following: (i) Applicant was questioned by police (not campus security personnel) about the March 1997 incident and

was told that charges were being prepared (Exhibit 5); (ii) Applicant promptly got a lawyer to represent him (TR at 144, 179-180); (iii) a criminal complaint (which listed felony charges) was filed that listed Applicant's legal address (in State Y) where his mother lived at the time, but Applicant denied ever seeing the complaint until his current lawyer got a copy (Exhibit 5; TR 152, 163, 173); (iv) Applicant signed a bail document which listed the criminal charges against him and set bail at \$12,000, but Applicant claimed he did not know if he was at a bail hearing or whether he took out bond (Exhibit 5; TR at 156, 164, 171-172); (v) a State X judge sent a May 20, 1997 letter (which contained a reference to felony charges pending against Applicant) to Applicant's legal address (in State Y), but Applicant denied he ever received that letter (Exhibit 5; TR at 163-164, 172); (vi) upon graduation from college in late May 1997, Applicant returned to live at his legal address in State Y, residing there from June 1, 1997 to March 16, 1998 (Exhibit 1); and (vii) Applicant's State X lawyer entered into a plea agreement on his behalf, which resulted in the charges being dismissed (Exhibits A and G). Given the totality of the record evidence, to accept Applicant's explanation, it would be necessary to conclude that some combination of the following events occurred: (aa) the State X lawyer representing Applicant did not tell him what he was charged with, even though felony charges had been filed against him; (bb) Applicant signed the bail document without the State X lawyer telling him what he was signing; (cc) the State X lawyer entered into a plea agreement with the prosecutor without telling Applicant about the felony charges against him or the terms of the plea agreement; (dd) the criminal complaint and the Judge's letter were prepared but not mailed to Applicant's legal address or otherwise served on him; (ee) the criminal complaint and the Judge's letter were mailed, but were lost or misdelivered by the U.S. Postal Service; (ff) the criminal complaint and the Judge's letter were mailed and received at Applicant's legal address, but Applicant's mother (or someone else in the residence) threw them out, lost them, or kept them hidden from Applicant; (gg) the criminal complaint and the Judge's letter were mailed and received at Applicant's legal address, but Applicant's mother (or someone else in the residence) returned them to the senders without telling Applicant; and/or (hh) Applicant returned to live at his legal address on June 1, 1997 and he failed to check for mail sent to him at that address.

Given the totality of the record evidence, this case cannot turn on the simple question of whether the Administrative Judge found credible Applicant's explanation for his omission of the felony charges from the security questionnaire. Acceptance of Applicant's explanation would require acceptance of several implausible inferences about the actions or inactions by Applicant's State X lawyer, the State X criminal justice system, the U.S. Postal Service, Applicant's family, and Applicant himself.

Given the totality of the record evidence, it was untenable for the Administrative Judge to accept Applicant's claim that he was innocently unaware of the felony charges brought against him. The Board cannot sustain the Judge's finding that Applicant did not deliberately falsify the security questionnaire in June 1998 by failing to list those felony charges because that finding does not reflect a reasonable, plausible interpretation of the record evidence as a whole.

(2) Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law because the record evidence does not support the Administrative Judge's application of Personal Condition Mitigating Condition 6. Department Counsel contends the Administrative Judge acted in a manner that is arbitrary, capricious, or contrary to law because the record evidence does not support the Judge's application of Personal Conduct Mitigating Condition 6. (3) The Judge's reference to that mitigating condition in his decision is somewhat cryptic. Although it is difficult to discern what the Judge may have intended to convey with his cryptic reference to that mitigating condition, it does not seem that the Judge actually relied on it in reaching his conclusions about Applicant's omission of the 1997 felony charges from the security questionnaire he executed in June 1998.

Conclusion

Department Counsel has met its burden of demonstrating error that warrants reversal. 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: 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's formal finding for Applicant with respect to SOR 2.a. is not at issue on appeal.
2. The attorney representing Applicant during these proceedings is not the same attorney as the one who represented him in connection with the criminal charges filed in State X as a result of the March 1997 incident.
3. "[A] refusal to cooperate was based on advice from legal counsel or other officials that the individual was not required to comply with security processing requirements and, upon being made aware of the requirement, fully and truthfully provided the requested information."