

DATE: February 24, 2000

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 99-0417

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Administrative Judge Darlene Lokey-Anderson issued a decision, dated October 20, 1999, in which she 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 failed to apply pertinent mitigating factors; and (2) whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated June 22, 1999 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 he was "choosing a decision without hearing." A File of Relevant Material (FORM) was prepared. A copy of the FORM was given to Applicant, who submitted a response to it. The case was then assigned to the Administrative Judge for disposition.

The Administrative Judge issued a written decision, dated October 20, 1999, in which she 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 the Judge's adverse decision.

Appeal Issues

1. Whether the Administrative Judge failed to apply pertinent mitigating factors. Applicant does not challenge the Administrative Judge's findings about his falsification of material facts about his drug abuse history when he completed security questionnaires in January 1993, February 1996 and June 1998, or her finding that Applicant concealed his drug abuse history when he submitted an application for employment to a defense contractor. However, Applicant contends the Judge erred by failing to apply pertinent mitigating factors under Section F.3. and the Adjudicative Guidelines.

In support of the contention that the Administrative Judge failed to apply pertinent mitigating factors under Section F.3., Applicant argues: (a) his falsifications were not frequent or recent; (b) the Judge should have found Applicant was rehabilitated based on her finding that Applicant sincerely regrets his past mistakes and regrets not having been honest and candid with the government from the beginning; and (c) his misconduct is not likely to recur because his past drug abuse and his concerns about revealing it no longer exist.

In support of the contention that the Administrative Judge failed to apply pertinent mitigating factors under the Adjudicative Guidelines, Applicant argues: (d) the Judge should have applied Personal Conduct Mitigating Condition 2 because his falsifications were isolated and he voluntarily disclosed his past drug abuse in a November 1998 interview; (e) the Judge should have applied Personal Conduct Mitigating Condition 3 because he corrected the falsifications before being confronted with the facts; (f) the Judge should have applied Personal Conduct Mitigating Condition 5 because he is no longer vulnerable to coercion, exploitation, or pressure due to his past drug abuse; (g) the Judge should have applied Criminal Conduct Mitigating Condition 1 for the same reasons the Judge should have applied Personal Conduct Mitigating Condition 2; (h) the Judge should have applied Criminal Conduct Mitigating Condition 3 because he is no longer vulnerable to pressure or coercion; (i) the Judge should have applied Criminal Conduct Mitigating Condition 5 because, apart from his falsifications, there is no evidence of a negative character since 1992, he now has nothing to conceal in his life, he has not used drugs since 1992, his work performance is excellent, he is trusted by others, he has no legal issues in his life, and he is on solid financial ground, and he has changed.

(a) There is no merit to the argument that the Administrative Judge should have concluded Applicant's falsifications were mitigated under Section F.3.b. ("Frequency and recency of the conduct") because they were not frequent or recent. Applicant deliberately omitted his drug abuse history from his job application with a defense contractor, and falsified material information about his drug abuse history when he executed security questionnaires in January 1993, February 1996, and June 1998. Applicant's concealment of his drug abuse history involved multiple acts of dishonesty that spanned a period of several years that did not end until November 1998.

(b) Applicant contends the Administrative Judge should have found he was rehabilitated based on her finding that he sincerely regrets his past mistakes and regrets not having been honest and candid with the government from the beginning. Expressions of regret and remorse, however, sincere, do not compel a Judge to make a favorable security clearance decision. An applicant's acknowledgment of the wrongfulness of his or her past misconduct, if found to be credible, is merely a first step and does not constitute evidence of conduct that demonstrates reform and rehabilitation. *See, e.g.*, ISCR Case No. 98-0424 (July 16, 1999) at p. 3.

(c) Applicant's argument that his falsifications will not recur because his past drug abuse is not likely to happen again fails to demonstrate the Administrative Judge erred. Applicant's falsification conduct shows that he has been willing to lie to his employer and the federal government to conceal negative information about himself whenever he believed it was in his personal interest to do so. Given the record evidence in this case, the Judge had a rational basis for concluding Applicant's acts of dishonesty demonstrated poor judgment, unreliability, and untrustworthiness.

(d) Applicant's cites Personal Conduct Mitigating Condition 2⁽¹⁾ and argues the Administrative Judge should have applied it to his case because: (i) his "falsifications are isolated as the only offenses identified throughout the investigations"; (ii) his falsifications pertain to "essentially the same question set" about drug abuse; and (iii) he voluntarily provided correct information about his drug abuse history to a Special Agent of the Defense Security Service in a November 1998 interview.

As a preliminary matter, Personal Conduct Mitigating Condition 3,⁽²⁾ not Personal Conduct Mitigating Condition 2, is the Adjudicative Guideline that needs to be considered under the facts of this case. *See, e.g.*, ISCR Case No. 98-0582 (November 12, 1999) at p. 7. Apart from the clear relevance of Personal Conduct Mitigating Condition 3 (as opposed to Personal Conduct Mitigating Condition 2), it is untenable for Applicant to argue his acts of dishonesty, occurring on four separate occasions over a span of several years, were "an isolated incident" within the meaning of Personal Conduct Mitigating Condition 2. Furthermore, the record evidence shows Applicant did not disclose his drug abuse history until he was faced with an allegation by his ex-wife that he had used illegal drugs in the past. Applicant's disclosure of information about his drug abuse history under those circumstances does not constitute a voluntary disclosure under Personal Conduct Mitigating Condition 2.

(e) It is untenable for Applicant to assert the Administrative Judge should have applied Personal Conduct Mitigating Condition 3. Applicant engaged in separate acts of falsification in connection with his execution of security questionnaires in January 1993, February 1996, and June 1998. Furthermore, as discussed in the preceding paragraph, Applicant disclosed his drug abuse history only after he was confronted with the fact that the Special Agent had learned about it through information provided by Applicant's ex-wife. Applicant's disclosures in November 1998, made only after he was confronted with the fact that his ex-wife had told the Special Agent about his past drug abuse, do not constitute a prompt, good-faith effort to correct his multiple falsifications before he was confronted with the facts.

(f) Applicant contends the Administrative Judge should have applied Personal Conduct Mitigating Condition 5⁽³⁾ because he is no longer vulnerable to coercion, exploitation, or pressure due to his past drug abuse. Applicant's contention fails to demonstrate the Judge erred. The Judge did not find that Applicant's falsifications made him vulnerable to coercion, exploitation, or pressure; nor did the Judge apply Personal Conduct Disqualifying Condition 4.⁽⁴⁾ Accordingly, the Judge was not required to apply Personal Conduct Mitigating Condition 5 in this case. *See, e.g.*, ISCR Case No. 97-0595 (May 22, 1998) at p. 5.

(g) Applicant contends that the Administrative Judge should have applied Criminal Conduct Mitigating Condition 1⁽⁵⁾ for the same reasons the Judge should have applied Personal Conduct Mitigating Condition 2. This contention lacks merit. As discussed earlier in this decision, the Judge did not have to find Applicant's conduct was not recent under Section F.3.b., and the Personal Conduct Mitigating Condition 2 is not applicable to the facts and circumstances of Applicant's case. Accordingly, the Judge was not required to apply Criminal Conduct Mitigating Condition 1.

(h) Applicant's argument about Criminal Conduct Mitigating Condition 3⁽⁶⁾ lacks merit. There is no record evidence that indicates Applicant was pressured or coerced into lying about his past drug abuse. Accordingly, this mitigating condition is inapplicable to Applicant's case.

(i) Applicant's argument about Criminal Conduct Mitigating Condition 5⁽⁷⁾ does not demonstrate the Administrative Judge erred. The Judge did not have to consider the favorable evidence cited by Applicant separately from his acts of dishonesty. The Judge had to consider the evidence as a whole, both favorable and unfavorable. Directive, Section F.3. Considering the record as a whole, the favorable evidence cited by Applicant did not require the Judge, as a matter of law, to conclude Applicant had demonstrated "clear evidence of successful rehabilitation" with respect to his falsifications about his drug abuse history.

2. Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. Applicant contends the Administrative Judge's decision is arbitrary, capricious, and contrary to law. In support of this contention, Applicant argues: (a) the Judge denied him due process by issuing a decision that used "cut and paste" methods that show she failed to judge him on the merits of his own case; (b) the Judge failed to consider relevant mitigating factors in his case; (c) the Judge failed to articulate a satisfactory explanation for her conclusions; (d) the Judge failed to apply the whole person concept when deciding his case; and (e) Applicant's past mistakes do not warrant an adverse security clearance decision in light of the mitigating factors that should be applied in his case.

(a) Applicant cites to the following passage in the Administrative Judge's decision: "The evidentiary record has been reviewed, but it does not contain sufficient evidence in mitigation that will overcome or outweigh the negative effects of the Applicant's repeated false statements to DoD, all of which were provided under a certification of truth or a sworn oath." Applicant then notes the Judge used the same sentence, word for word, in five other decisions she issued, and contends this shows the Judge denied him due process by using a "cut and paste" method that demonstrates the Judge did not judge Applicant's security eligibility on the merits of his case, but rather made a decision based on "the prejudicial stereotypes of previous applicants."⁽⁸⁾

Given the Administrative Judge's use of the same sentence (word for word) in several different decisions, Applicant's concern is not frivolous. However, the Board does not review a Judge's decision based on consideration of isolated sentences. Rather, the Board reviews a Judge's decision in its entirety to determine what the Judge found and concluded. *See, e.g.*, ISCR Case No. 98-0164 (July 12, 1999) at p. 4. The Judge made findings of fact concerning Applicant's acts of dishonesty. The Judge specifically considered the favorable evidence presented by Applicant. The Judge gave a

rational explanation for why she concluded Applicant's acts of dishonesty showed he could not be considered trustworthy. Accordingly, viewed in its entirety, the Judge's decision reflects a consideration of the particular merits of Applicant's case.

(b) As discussed earlier in this decision, Applicant's arguments about the Administrative Judge's consideration of relevant mitigating factors do not demonstrate the Judge erred.

(c) An Administrative Judge's decision is not measured against a standard of perfection. *See, e.g.*, ISCR Case No. 98-0394 (June 10, 1999) at p. 5. The Judge's decision in this case provides sufficient discussion and analysis of Applicant's case to persuade the Board that there is a rational connection between the Judge's findings and her conclusions about Applicant's security eligibility.

(d) Applicant contends the Administrative Judge failed to apply the whole person concept. In support of this contention, Applicant argues the Judge gave undue weight to his falsifications and not enough weight to the favorable evidence cited by Applicant on appeal. This contention is not persuasive. As Applicant recognizes, a Judge must weigh the record evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. The Board will not disturb a Judge's weighing of the record evidence unless there is a showing that the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 99-0355 (December 14, 1999) at p. 2. Applicant's disagreement with the Judge's weighing of the evidence does not demonstrate the Judge acted in a manner that is arbitrary, capricious, or contrary to law. Considering the record as a whole, the Judge's weighing of the evidence in Applicant's case does not indicate any action that is arbitrary, capricious, or contrary to law.

(e) Applicant's last argument is a variation of his other arguments about mitigating factors. As discussed earlier in this decision, Applicant's arguments about the mitigating factors under Section F.3. and the Adjudicative Guidelines fail to demonstrate the Administrative Judge erred. Furthermore, Applicant's acts of dishonesty provide a rational basis for the Judge's adverse conclusions about his security eligibility.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's October 20, 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. "[T]he falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntary."
2. "[T]he individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts."
3. "[T]he individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or pressure."
4. "[P]ersonal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or pressure."
5. "[T]he criminal behavior was not recent."
6. "[T]he person was pressured or coerced into committing the act and those pressures are no longer present in that person's life."
7. "[T]here is clear evidence of successful rehabilitation."
8. In support of this contention, Applicant also cites another decision by the Administrative Judge that was posted on the DOHA Web page under an incorrect case number. The Judges in the Hearing Office are not responsible for posting their decisions on the DOHA Web page. And, in any event, an administrative error in the posting of a redacted decision on the DOHA Web page has no probative value toward demonstrating a Judge did not adjudicate an applicant's case on its merits.