

DATE: May 3, 2000

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 99-0382

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Matthew E. Malone, Esq., Department Counsel

FOR APPLICANT

William R. Brummett, Esq.

Administrative Judge John G. Metz, Jr., issued a decision, dated November 15, 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 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 erred by finding Applicant falsified a security questionnaire; and (2) whether the Administrative Judge erred by finding against Applicant under Criterion J.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated June 7, 1999 to Applicant. The SOR was based on Criterion E (Personal Conduct) and Criterion J (Criminal Conduct). A hearing was held on October 26, 1999. The Administrative Judge issued a written decision, dated November 15, 1999, in which he 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 security clearance decision.

Appeal Issues

1. Whether the Administrative Judge erred by finding Applicant falsified a security questionnaire. The Administrative Judge found that Applicant falsified a security questionnaire in August 1998 by failing to disclose a June 1991 arrest for burglary and criminal damage to property and a July 1994 arrest for criminal trespass. Applicant contends the Judge erred because: (a) under state law, Applicant was not charged by information or indictment with any crime in connection with the June 1991 incident and, therefore, his NO answer to Question 23 a ⁽¹⁾ on the security questionnaire was not a falsification in fact or in law; and (b) there is no record evidence that Applicant was charged with a crime in connection with the July 1994 incident and, therefore, his NO answer to Question 23 f ⁽²⁾ was not a falsification in fact.

Applicant's position on appeal concerning the falsification issues in this case is different from the position he took below. When interviewed by an investigator in March 1999, Applicant stated he had not listed the June 1991 and July 1994 incidents on the security questionnaire because he had forgotten them (Government Exhibit 5 at p. 4; TR at pp. 19, 23). In response to the SOR, Applicant again indicated he had forgotten the incidents when he filled out the security questionnaire (Answer to Statement of Reasons at p. 1) and further stated he would have disclosed the incidents if he had remembered them (Answer to Statement of Reasons at p. 2). At the hearing, Applicant denied any intent to conceal the incidents or mislead the government about them (TR at p. 33). He testified "Well, at the time originally I did not remember that I had not (sic) been arrested. But I was unclear about the context of the statement, namely, I sort of - I think that I misinterpreted the document to suggest that had I been charged with, convicted of, and arrested. So under that interpretation the answer is 'no.'" (TR at p. 28). Applicant also testified he did not list the July 1994 incident on the security questionnaire "Because I didn't believe that I had really been charged with anything." (TR at p. 30). Applicant further testified that "based on the questions that were suggested to me I did not recall the incident[ts]" (TR at p. 30) and that he did not recall the two incidents (TR at pp. 31, 40). Applicant also testified that "in hindsight of probably rushing through this document much faster than I should have, I made a mistake." (TR at p. 44). In closing argument, Applicant's counsel asserted Applicant had forgotten the two incidents and did not intend to omit them from the security questionnaire (TR at pp. 52-54). On appeal, Applicant has dropped the defense that he forgot the incidents when he executed the security questionnaire in August 1998 and raises a technical challenge based on the legal status of the two incidents under state law.

Having taken the position below that no falsification occurred because Applicant had forgotten the June 1991 and July 1994 incidents when he executed the security questionnaire in August 1998, Applicant cannot simply drop that defense on appeal and raise a totally new defense based on a technical reading of state law that was not raised below. [\(3\)](#)

Furthermore, a statement of reasons in these proceedings need not be construed strictly like a criminal indictment. *See, e.g.*, ISCR Case No. 98-0529 (June 15, 1999) at p. 2. In addition, strictly technical legal defenses that may be appropriate to raise in a criminal prosecution are out of place in industrial security clearance adjudications. *Cf.* ISCR Case No. 98-0761 (December 27, 1999) at p. 2 ("The rules of evidence and burdens of proof associated with criminal proceedings are not applicable in these proceedings."); ISCR Case No. 97-0184 (June 16, 1998) at p. 2 ("Because DOHA proceedings are civil, not criminal, in nature, the procedural protections available to defendants in criminal proceedings are not applicable."); ISCR Case No. 96-0127 (July 29, 1997) at p. 2 ("Because DOHA proceedings are civil, not criminal, in nature, the ineffective assistance of counsel doctrine does not apply to them."). These proceedings do not involve a criminal prosecution of Applicant, but rather an evaluation of his judgment, reliability, and trustworthiness to determine whether he is a suitable person to be granted access to classified information. Furthermore, there is no record evidence that Applicant, at the time he executed the security questionnaire in August 1998, knew or relied on the technicalities of state law raised

Applicant's denials of any intent to falsify the security questionnaire, as well as his statements and testimony about forgetting the two incidents when he executed the questionnaire, are relevant and material evidence. However, that evidence was not conclusive or binding on the Administrative Judge. Rather, the Judge had to consider that evidence in light of the record as a whole, as well as his assessment of Applicant's credibility when he testified at the hearing. *See, e.g.*, ISCR Case No. 99-0298 (April 13, 2000) at p. 2; ISCR Case No. 99-0194 (February 29, 2000) at p. 3. Considering the record as a whole, the Judge's finding that Applicant falsified the security questionnaire by omitting the June 1991 and July 1994 incidents is sustainable.

2. Whether the Administrative Judge erred by finding against Applicant under Criterion J. The Administrative Judge found against Applicant under Criterion J (Criminal Conduct) based on his finding that Applicant had falsified the security questionnaire and that the falsification was a violation of 18 U.S.C. 1001. Applicant contends the Judge erred because: (a) there is no pattern or history of criminal conduct in this case because, apart from the alleged falsification of the security questionnaire, there is no evidence that Applicant has been convicted of a crime at any time in the past; and (b) even if Applicant technically answered question 23 f incorrectly because he had been "booked" by the county sheriff's office, he did not remember the "booking" when he filled out the security questionnaire.

As discussed earlier in this decision, the Board found sustainable the Administrative Judge's finding that Applicant falsified the security questionnaire in August 1998. Such a falsification is a violation of 18 U.S.C. 1001, a felony. The

fact that Applicant has not been criminally charged with or convicted of a violation of 18 U.S.C. 1001 did not preclude the Judge from finding Applicant engaged in conduct that constituted a violation of that statute. *See, e.g.*, ISCR Case No. 95-0818 (January 31, 1997) at p. 4. *See also* Criminal Conduct Disqualifying Condition 1 ("[A]ny criminal conduct, regardless of whether the person was formally charged"). Furthermore, a single serious criminal incident falls within the scope of Criterion J. *See* Criminal Conduct Disqualifying Condition 2 ("[A] single serious crime . . ."). A federal felony constitutes a serious crime.

The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. Applicant's falsification of a security questionnaire provides a rational basis for the Administrative Judge's adverse security clearance decision. *See, e.g.*, ISCR Case No. 99-0355 (December 14, 1999) at p. 3.

Conclusion

Applicant has failed to meet his burden of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's November 15, 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. Question 23 is captioned **Your Police Record** (bold in original). Question 23 a reads "Have you ever been charged with or convicted of any felony offense? (Include those under Uniform Code of Military Justice)"
2. Question 23 is captioned **Your Police Record** (bold in original). Question 23 f reads "In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in response to a, b, c, d, or e above? (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related.)"
3. Furthermore, under the doctrine of federal supremacy, security clearance decisions under Executive Order 10865 and the Directive need not comply with the technical requirements of state law.