

DATE: September 22, 2000

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 99-0435

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Carol A. Marchant, Esq., Department Counsel

FOR APPLICANT

Patrick K. Dunphy, Esq.

Administrative Judge Claude R. Heiny issued a decision, dated May 12, 2000, 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 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.

Department Counsel's appeal presents the following issues: (1) whether the Administrative Judge erred in not giving sufficient weight to the testimony and documentary evidence presented by Department Counsel; (2) whether the Administrative Judge erred in his evaluation of evidence that contradicted Applicant's statements; and (3) whether the Administrative Judge erred by concluding Applicant's termination by a defense contractor in 1997 "has not been shown to be a security concern."

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated December 13, 1999 to Applicant. The SOR was based on Guideline E (Personal Conduct) and Guideline J (Criminal Conduct).

A hearing was held on March 30 and March 31, 2000. The Administrative Judge issued a written decision dated May 12, 2000 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 Judge's favorable security clearance decision.

Appeal Issues

This case involves a strong disagreement over the meaning and significance of Applicant's actions when he was employed by a defense contractor. Department Counsel's position in this case is that (1) Applicant engaged in acts of insubordination and sabotage while working for a defense contractor that fired him in November 1997, and (2) Applicant lied about his actions in a written statement he gave to a government investigator in August 1998. Applicant's position in this case is that (a) he did not engage in insubordination or sabotage of his former employer, (b) his former

employer did not make any allegation against him to the government until 1998 after it learned he might pose an economic threat to it as an employee of a competitor, (c) the reasons he was terminated in November 1997 were largely pretextual, and (d) he did not lie about his actions in his August 1998 written statement. The Administrative Judge's findings and conclusions indicate the Judge: (i) essentially accepted Applicant's position, (ii) essentially rejected Department Counsel's position, and (iii) concluded that the particular reasons underlying Applicant's termination in November 1997 did not pose a security concern.

Department Counsel contends the Administrative Judge erred by not applying Personal Conduct Disqualifying Conditions 1, 3 and 5.⁽¹⁾ In support of this contention, Department Counsel argues: (1) the Administrative Judge erred in not giving sufficient weight to the testimony and documentary evidence presented by Department Counsel; (2) the Judge erred in his evaluation of evidence that contradicted Applicant's statements; and (3) the Judge erred by concluding Applicant's termination by a defense contractor in 1997 "has not been shown to be a security concern." For the reasons that follow, the Board concludes Department Counsel has failed to demonstrate the Judge acted in a manner that is arbitrary, capricious, or contrary to law.

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. *See, e.g.*, ISCR Case No. 96-0785 (June 1, 1999) at p. 7. 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."). *Cf. NLRB v. Beverly Enterprises-Massachusetts, Inc.*, 174 F.3d 13, 21 (1st Cir. 1999) (when agency engages in fact-finding it is not free to simply decide which inferences from the evidence it will accept or reject; rather, the agency must draw all inferences that the evidence fairly demands). Absent a showing that a Judge has weighed the evidence in a manner that is arbitrary, capricious, or contrary to law, the Board will not disturb the Judge's factual findings. *See, e.g.*, ISCR Case No. 99-0554 (July 24, 2000) at p. 6.

In challenging the Administrative Judge's findings, Department Counsel asserts the Administrative Judge erred by not accepting the testimony of a government witness that contradicted Applicant's written statements and testimony.⁽²⁾ The deference owed to a Judge's credibility determinations (Directive, Additional Procedural Guidance, Item E3.1.32..1) does not immunize them from review, nor does it preclude the Board from concluding that a challenged credibility determination is not sustainable. *See, e.g.*, ISCR Case No. 99-0194 (February 29, 2000) at p. 3; ISCR Case No. 97-0356 (April 21, 1998) at p. 3; ISCR Case No. 95-0178 (March 29, 1996) at pp. 2-3. However, Department Counsel's disagreement with the Judge's credibility determinations is not enough for the Board to conclude those determinations are arbitrary, capricious, or contrary to law. Given the conflicting nature of the record evidence in this case, the Board cannot conclude that the Judge was compelled, as a matter of logic or law, to give full weight to the testimony of the government witness referred to by Department Counsel or to disbelieve Applicant's testimony.

Department Counsel's appeal arguments set forth a possible interpretation of the record evidence that runs contrary to the Administrative Judge's findings. However, the ability of an appealing party to make such arguments is not sufficient to demonstrate the Judge's findings are erroneous. *See, e.g.*, ISCR Case No. 98-0515 (March 23, 1999) at p. 4. Under the substantial evidence standard, a Judge's factual findings may be sustained even if it is possible to draw different, inconsistent conclusions from the record evidence. *See, e.g.*, *NLRB v. Beverly Enterprises-Massachusetts, Inc.*, 174 F.3d 13, 21 (1st Cir. 1999) (possibility of drawing two inconsistent conclusions from the evidence does not mean an agency's findings are not supported by substantial evidence); ISCR Case No. 98-0620 (June 22, 1999) at p. 3 (citing federal cases).

Department Counsel is correct in arguing that Personal Conduct Disqualifying Condition 5 is broad enough to cover acts of dishonesty and rule violations that occur in the private sector. However, an Administrative Judge is not compelled to apply Disqualifying Condition 5 without regard to the nature of the rule violations, without regard to whether those

violations are minor or serious in nature, or without regard to the facts and circumstances surrounding those rule violations. Provisions of the Directive must be interpreted and applied in a reasonable, commonsense manner. *See, e.g.*, ISCR Case No. 99-0201 (October 12, 1999) at p. 3. Furthermore, the interpretation and application of an Adjudicative Guideline provision should not be undertaken without consideration of appropriate factors such as those set forth in Sections 6.3 and E2.2.1 (including E2.2.1.1 through E2.2.1.9). *Cf.* ISCR Case No. 99-0447 (July 25, 2000) at p. 5 (holding Administrative Judge erred by applying literal language of provisions of Additional Procedural Guidance without regard to other relevant provisions of the Directive). Moreover, a Judge should not consider an Adjudicative Guidelines disqualifying or mitigating condition in isolation without regard to the record evidence as a whole. *See, e.g.*, ISCR Case No. 98-0803 (August 17, 1999) at p.4. The logical extension of Department Counsel's argument is that any rule violation --- regardless of its nature, regardless of its significance (or lack thereof), regardless of the context in which it occurs --- has negative security significance and requires application of Personal Conduct Disqualifying Condition 5. The Judge's findings reflect a plausible, legally permissible interpretation of the record evidence. Given those findings, it was not arbitrary, capricious, or contrary to law for the Judge to not apply Personal Conduct Disqualifying Condition 5 in this case.

Department Counsel also argues that the Judge erred by concluding Department Counsel failed to present evidence sufficient to warrant application of the Guideline E Disqualifying Conditions and the Judge erred by failing to shift the burden to Applicant to rebut, refute, extenuate, mitigate or explain his conduct. Department Counsel's argument lacks merit. An applicant has the burden of presenting evidence "to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel" (Directive, Additional Procedural Guidance, Item E3.1.15). In this case, Applicant presented evidence to rebut the evidence Department Counsel presented against him and to explain his conduct. By weighing the conflicting record evidence and deciding the evidence as whole supported Applicant's explanations more than it supported Department Counsel's theory of the case, the Judge was carrying out his fact-finding responsibilities (Directive, Additional Procedural Guidance, Item E3.1.25) and did not violate Item E3.1.15. Therefore, there was no impermissible shifting of the burden of proof by the Judge in this case. Furthermore, given the record evidence in this case, it ultimately did not matter whether the Judge concluded that Applicant had rebutted the government's *prima facie* case or that no such case had been established.

Conclusion

Department Counsel has failed to demonstrate that the Administrative Judge erred. Accordingly, the Board affirms the Judge's May 12, 2000 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. Personal Conduct Disqualifying Condition 1 (Directive, Section E2.A5.1.2.1) reads "Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances."

Personal Conduct Disqualifying Condition 3 (Directive, Section E2.A5.1.2.3) reads "Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination."

Personal Conduct Disqualifying Condition 5 (Directive, Section E2.A5.1.2.5) reads "A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency."

2. Department Counsel's reliance on Government Exhibits 3 and 4 appears to be based on its view that those documents have significant evidentiary value independent of the testimonial evidence in this case. Under the particular facts of this case, the meaning and significance of Government Exhibits 3 and 4 cannot reasonably be evaluated in isolation from the testimonial evidence. Considering the record as a whole, the Administrative Judge was not required to give full or decisive weight to Government Exhibits 3 and 4.