

DATE: May 12, 2000

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 99-0473

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

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

**FOR APPLICANT**

*Pro Se*

Administrative Judge John G. Metz, Jr., issued a decision, dated December 27, 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 that Applicant knowingly falsified a security questionnaire he completed in September 1998 and a written statement he gave in November 1998.; and (2) whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

**Procedural History**

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated July 30, 1999 to Applicant. The SOR was based on Criterion E (Personal Conduct) and Criterion J (Criminal Conduct). A hearing was held on November 17, 1999. The Administrative Judge issued a written decision, dated December 27, 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<sup>(1)</sup>**

1. Whether the Administrative Judge erred by finding that Applicant knowingly falsified a security questionnaire he completed in September 1998 and a written statement he gave in November 1998. The Administrative Judge found that Applicant falsified a security questionnaire he completed in September 1998 when he: (a) answered YES to question 24 <sup>(2)</sup> and listed a March 1990 arrest for driving under the influence, but did not list a February 1992 alcohol-related incident that resulted in Applicant's arrest and conviction, an April 1994 alcohol and drug-related incident that lead to Applicant's arrest, or a November 1995 alcohol-related incident that lead to Applicant's arrest; and (b) answered NO to question 26 <sup>(3)</sup> despite the fact that he had been arrested, charged, or convicted of incidents that occurred in June 1993

(twice), August 1993, July 1994, and May 1995. The Judge also found Applicant falsified material facts in a written statement he gave to a federal investigator in November 1998 by stating that he had no traffic violations and no other arrests since 1994, even though he had been arrested twice in 1995. On appeal, Applicant argues he never intended to knowingly falsify any sworn statements, and he never tried to conceal or cover up any of his past incidents.

During the proceedings below, Applicant denied any intent to falsify the security questionnaire in September 1998 and his written statement in November 1998. Applicant's denials were relevant and material evidence. However, those denials were not conclusive and binding on the Administrative Judge. Rather, the Judge had to consider Applicant's denials in light of the record as a whole and his assessment of the credibility of Applicant's hearing testimony. *See, e.g.*, ISCR Case No. 99-0005 (April 19, 2000) at p. 3. An intent to falsify can be shown by circumstantial evidence even in the face of denials of any intent to falsify. *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). A review of the decision below shows the Judge took into account Applicant's denials of any intent to falsify, evaluated them in light of the record evidence as a whole, and concluded they were not credible. Considering the record evidence as a whole, the Judge had a rational basis to find that Applicant's omissions about his past criminal record were intentional, not inadvertent or the result of a reasonable belief that his answers were correct.

## 2. Whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

Applicant also argues: (a) since being hired in June 1998, he has been a reliable, trustworthy, and dependable employee of a defense contractor; (b) he has received favorable evaluations from his superiors; (c) since 1995, he has not been arrested or "had any other legal issues that would impair his opportunity to perform his job within government guidelines"; (d) the Judge made favorable formal findings with respect to SOR subparagraphs 1.a. through 1.h.; and (e) his superiors gave favorable testimony and letters of recommendation on his behalf. The Board construes these arguments as raising the issue of whether the Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). Security clearance decisions are not an exact science, but rather are predictive judgments about a person's security suitability in light of that person's past conduct and present circumstances. *Department of Navy v. Egan*, 484 U.S. 518, 528-29 (1988). The federal government need not wait until an applicant actually mishandles or fails to properly handle or safeguard classified information before it can deny or revoke access to such information. *Adams v. Laird*, 420 F.2d 230, 238-39 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). Direct or objective evidence of nexus is not required before the government can deny or revoke access to classified information. *Gayer v. Schlesinger*, 490 F.2d 740, 750 (D.C. Cir. 1973). All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. *See, e.g.*, ISCR Case No. 99-0296 (April 18, 2000) at p. 5.

Security clearance decisions are not limited to consideration of an applicant's job performance. An applicant with good or exemplary job performance may engage in conduct that has negative security implications. *See, e.g.*, ISCR Case No. 99-0123 (January 11, 2000) at p. 3. Falsification of a security questionnaire or a written statement given to a federal investigator demonstrates poor judgment, untrustworthiness and unreliability that clearly has negative implications for an applicant's suitability for a security clearance. As discussed earlier in this decision, the Administrative Judge had a rational basis to find Applicant engaged in deliberate falsification of material facts about his past criminal conduct. The Judge's findings about Applicant's falsifications in September 1998 and November 1998 provide a rational basis for the Judge's adverse conclusions about Applicant's security eligibility.

The favorable evidence cited by Applicant did not compel the Administrative Judge to make a favorable security clearance decision. The Judge had to consider the record evidence as a whole and consider whether the favorable evidence outweighed the unfavorable evidence or *vice versa*. *See, e.g.*, ISCR Case No. 99-0296 (April 18, 2000) at p. 6. Considering the record as a whole, the Board concludes the Judge did not weigh the evidence in this case in a manner that is arbitrary, capricious, or contrary to law.

## Conclusion

Applicant has failed to meet his burden of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's December 27, 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 entered formal findings in favor of Applicant with respect to SOR subparagraphs 1.a through 1.h. Those favorable formal findings are not at issue on appeal.

2. Question 24 reads: "**Your Police Record - Alcohol/Drug Offenses** Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs? For this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607."

3. Question 26 reads: "**Your Police Record - Other Offenses** In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in modules 21, 22, 23, 24, or 25? (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related.) For this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607."