

DATE: January 26, 2001

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 99-0703

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

William S. Fields, Deputy Chief Department Counsel

Erin C. Hogan, Department Counsel

FOR APPLICANT

William L. Enyart Esq.

Administrative Judge Claude R. Heiny issued a decision dated September 7, 2000, in which he concluded that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Department Counsel appealed. The Board affirms the Administrative Judge's decision for the reasons explained below.

The Board has jurisdiction on appeal under Executive Order 10865 and Department of defense Directive 5220.6, dated January 2, 1992 as amended.

Department Counsel's appeal presents the following issues: 1. Did the Administrative Judge shift the burden of proof for resolving doubts to the government? 2. Was the Administrative Judge's decision arbitrary, capricious and contrary to law?

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) to Applicant dated February 17, 2000. The SOR was based on Guideline E (Personal Conduct) and Guideline J (Criminal Conduct). Applicant requested a hearing which was held on Friday, July 28, 2000.

The Administrative Judge issued a decision dated September 7, 2000 in which he found for Applicant. The case is before the Board on Department Counsel's appeal of that decision.

Appeal Issues

1. Did the Administrative Judge shift the burden of proof for resolving doubts to the government? Department Counsel argues that they established a prima facie case of falsification under two guidelines against Applicant by introducing two signed statements from Applicant: one statement in which he flatly denies out of court allegations by his ex-wife that at some point in their 27-year marriage he took home classified documents and another statement in which Applicant said that it was "possible" that he had done so at some time with For Official Use Only (FOUO) and confidential documents and concedes at least by inference that this statement appears to contrast with his earlier

statement. Applicant did not actually admit to ever having taken home classified documents although Department Counsel's argument is predicated on an interpretation of the second statement as implying that Applicant had done so. The Administrative Judge attributed the apparent inconsistency of the two statements to differences in the atmosphere and questioning by security officials at the two interviews which produced the two signed statements. The Judge concluded that the statements were reconcilable and that Applicant had told the truth in both documents and at the hearing. Thus, the Judge found no falsification had occurred and implicitly that the government had failed to establish a prima facie case. The Administrative Judge noted that Applicant can not recall a single incident of taking home classified documents and Applicant's assertion that his use of the word "possible" was akin to saying that it is "possible" that there are aliens in outer space.

On appeal, Department Counsel focuses on the lack of corroborating evidence for Applicant's denial of having taken classified documents home. Assuming that Applicant's denial is accurate, it is hard to imagine what such corroborating evidence could be. Department Counsel's argument in this case demands more than is reasonable.

The Administrative Judge must make an overall common sense determination in light of the evidence viewed as a whole. The Administrative Judge's conclusion in this case that Applicant's two statements are reconcilable is sustainable even if the record evidence also lends itself to other plausible interpretations.

Department Counsel's argument that the Administrative Judge shifted the burden of proof to Department Counsel relies on the premise that Department Counsel had already established its prima facie case (The Directive requires Department Counsel to establish controverted facts, see Enclosure 3, E3.1.14.) In the instant case that means that Department Counsel was required to prove that Applicant had falsified one of his statements. Then the burden would indeed be on Applicant to mitigate or extenuate his conduct. However, in this case Applicant's statements were not proven to be falsifications according to the Administrative Judge. Therefore, Department Counsel had not established to the Judge's satisfaction the controverted fact which was the lynchpin of its prima facie case. Thus, Department Counsel had not met its initial burden of proof and there was no burden on Applicant to be shifted back to Department Counsel.

2. Was the Administrative Judge's decision arbitrary, capricious and contrary to law? Department Counsel argues that it was arbitrary, capricious and contrary to law for the Administrative Judge to find that Applicant had not taken classified information home after he admitted that it was "possible" he may have done so. The Board does not agree.

The differences between Applicant's prior statements were explained to the Administrative Judge's satisfaction at the hearing. In reviewing those statements, the Administrative Judge concluded that Applicant's speculation about the possibility that he may have inadvertently taken FOUO and confidential documents home was insufficient to establish the fact that he had indeed taken classified documents home. This conclusion was reasonable considering no additional evidence exists in the record to establish that Applicant had taken classified materials home. While Department Counsel presents a plausible alternative interpretation of the evidence, the Administrative Judge's finding is a reasonable interpretation of the evidence he had before him.

Conclusion

Department Counsel has failed to meet its burden on appeal of demonstrating harmful error. Therefore, the Administrative Judge's September 7, 2000 decision is affirmed.

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

Separate opinion of Chairman Emilio Jaksetic, concurring:

Under the Directive: (a) the Board does not have the authority to conduct *de novo* review of a case on appeal; (b) the Board must give deference to the credibility determinations made by an Administrative Judge; and (c) there is no presumption of error below and the appealing party has the burden of demonstrating the Administrative Judge erred. Constrained by the limits of my authority under the Directive, I concur with my colleagues' conclusion that Department Counsel has failed to meet its burden of demonstrating the Judge erred.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board