DATE: July 10, 2000

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 99-0557

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Carol A. Marchant, Department Counsel

Peregrine Russell-Hunter, Chief Department Counsel

FOR APPLICANT

Earl G. Kauffman, Esq.

Administrative Judge Kathryn Moen Braeman issued a decision dated January 10, 2000, in which she 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 reverses the Administrative Judge's decision.

The 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 by concluding Applicant had a reasonable legal basis for failing to disclose on his security clearance application a 1996 incident which resulted in five criminal charges and ultimately one conviction against him; (2) whether the Administrative Judge's determination that embarrassment is an acceptable basis for mitigation of falsification is consistent with the Directive; (3) whether the Administrative Judge's application of Mitigating Condition 2 under Criterion E is arbitrary, capricious and contrary to law; and (4) whether the record supports the Administrative Judge's conclusion that Applicant's conduct was excusable as a result of stress.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated September 7, 1999. The SOR was based on Criterion E (Personal Conduct) and Criterion J (Criminal Conduct). A hearing was held on December 6, 1999. The Administrative Judge issued a written decision dated January 10, 2000, in which she concluded that 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 Administrative Judge's favorable security clearance decision.

Appeal Issues

1. Whether the Administrative Judge erred by concluding Applicant had a reasonable legal basis for failing to disclose

on his security clearance application a 1996 incident which resulted in five criminal charges and ultimately one conviction against him. In 1996, Applicant was arrested and charged with Driving While Intoxicated (DWI), Speeding, Failure to Maintain Lane, No Turn Signal and Refusal to Submit to a Breathalyzer Test. Applicant was found not guilty on all charges but one. Applicant was found guilty of refusal to take a breathalyzer test. His driver's license was suspended for six months he also was required to pay $3,280 in surcharges, fines and court costs. Applicant executed an SF-86 security clearance application form in May 1998, and answered "no" to all questions that should have elicited information regarding the 1996 incident. In June 1999, Applicant was questioned by a Defense Security Service Special Agent about the 1996 incident and his failure to list it in his 1998 application. Applicant stated: "I did not list this incident because I was embarrassed. I was looking at the paperwork and looking for a way to not have to list this event on my paperwork. I felt that Refusing to Submit to a Breath Test was not an alcohol-related incident, so I did not list it. I was looking for a technicality so that I would not have to list it on my paperwork. I was trying to hide this incident from the government because I was embarrassed. I know that this was wrong and I will not do it again."

Department Counsel argues that the Administrative Judge erred when she concluded in essence that Applicant had a legal basis for failing to disclose the 1996 incident because the state law under which Applicant was found guilty distinguishes between refusal to take a breathalyzer test and driving while under the influence. Department Counsel's argument has merit.

Applicant failed to disclose not merely the one conviction, but the incident itself and all the other charges that grew out of it. Even if it were permissible for Applicant to omit the conviction on the narrow grounds asserted, he had no legitimate basis for failing to report the entire incident and the other resulting charges. The alcohol-related incident question on the security form read "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?" A reasonable person would know or should know that the charges arising out of the 1996 incident were alcohol-related.

Applicant's argument that the conviction was not an alcohol-related incident goes beyond the scope of the applicable state law which merely distinguishes between refusal to take a breathalyzer test and DWI. The Administrative Judge's assertion that the state law supports Applicant on this point is in error. There is no evidence that Applicant knew about or relied on the state law when he omitted the 1996 incident from the security questionnaire in 1998. Furthermore, even if state law did go as far Applicant would have DOHA accept, it would only explain Applicant's failure to acknowledge the conviction in answer to the question regarding alcohol-related events. It would explain neither his failure to identify the conviction in answer to other pertinent questions[(1)] nor his failure to disclose the other charges from the 1996 incident in answer to the alcohol-related incident question.

Additionally, as Department Counsel notes, the record evidence shows Applicant's own words conflict with the Administrative Judge's conclusion. He acknowledges that he was trying to hide the incident, not omitting the 1996 incident based on an innocent misunderstanding or good-faith reliance on state law. Also the Judge's other analysis, including her application of disqualifying conditions, is not consistent with her conclusion on this matter.

2. Whether the Administrative Judge's determination that embarrassment is an acceptable basis for mitigation of falsification is consistent with the Directive. Department Counsel challenges the Administrative Judge's conclusion that embarrassment is a mitigating circumstance for falsification. Department Counsel's claim has merit.

The Directive does not support the Administrative Judge's contention. Indeed, Item E2.A5.1.2.4. cites as a disqualifying (not mitigating) condition "...concealment of information... which, if known, may affect the person's personal, professional, or community standing..." In light of this language, it is not tenable for the Judge to assert that embarrassment is a mitigating condition. The Judge's discretion does not extend to ignoring the plain language of the pertinent provision of the Directive.

3. Whether the Administrative Judge's application of Mitigating Condition 2 under Criterion E is arbitrary, capricious and contrary to law. The Administrative Judge cited Personal Conduct Mitigating Condition 2 [(2)] (Item E2.A5.1.3.2. under the current Directive) as applicable in this case. Department Counsel challenges the application of that Mitigating Condition on appeal. The Board finds merit in Department Counsel's challenge.

The Board has discussed in several cases the difference between Mitigating Condition 2 (E2.A5.1.3.2) and Mitigating Condition 3 (E2.A5.1.3.3). (*See*, ISCR Case No. 99-0417, February 24, 2000 at p.3-4; ISCR Case No. 98-0582, November 12, 1999 at p. 7; ISCR Case No. 97-0595, May 22, 1998, at p. 4; ISCR Case No. 97-0289, January 22, 1998 at p. 3).[(3)]

Mitigating Condition 2 is properly used in a case where the falsification is old and the applicant subsequently provides correct information to the government about other matters not covered by the old falsification (to elaborate, in a hypothetical case, if an applicant made a false declaration in 1986 but subsequently provided truthful statements about matters other than the false declaration in his re-investigations in 1992 and 1999 and did not repeat the false declaration, then itigating Condition 2 would be applicable). In a situation where an applicant seeks to correct a falsification, such as the instant case, the potentially applicable factor, if there is one, is Mitigating Condition 3 (E2.A5.1.3.3), not Mitigating Condition 2.

Furthermore, even if one were to conclude that Mitigating Condition 2 was potentially applicable, as Department Counsel points out it is untenable to maintain on this record (1) that Applicant's falsification was not recent or (2) that Applicant subsequently provided correct information voluntarily. The delay between the falsification and his belated disclosures to the investigators can be charged to Applicant's falsification itself. It does not make sense to give Applicant credit for the time it took the government to find out he lied. It is not tenable for an Administrative Judge to conclude that a falsification is extenuated or mitigated as a result of an applicant's degree of success in hiding the truth from the government. Also, Applicant did not volunteer the information; he responded to questions about the 1996 incident only after an investigator told him the government had learned about the incident.

4. Whether the record supports the Administrative Judge's conclusion that Applicant's conduct was excusable as a result of stress. Department Counsel argues that the record does not support the Administrative Judge's conclusion that Applicant's conduct was excusable as a result of stress. Department Counsel's argument has merit.

The stress discussed in the record grew from Applicant's 1996 divorce and is tied to the 1996 alcohol-related incident. The 1998 falsification can not reasonably be linked to the stress from the 1996 divorce. Indeed, Applicant's explanation for his omission of the 1996 incident from the security questionnaire does not support the Administrative Judge's conclusion that the omission was the result of stress from the 1996 divorce. Furthermore, as discussed earlier in this decision, whatever concern Applicant had for his professional or business standing was not an extenuating or mitigating factor.

Conclusion

Department Counsel has met its burden on appeal of demonstrating reversible error. Therefore, the Appeal Board reverses the Administrative Judge's January 10, 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. In this case the Applicant was clearly on notice that his failure to disclose the 1996 incident in the 1998 security questionnaire was the basis for the government's contention that he had committed falsification under Criterion E. Even if the Administrative Judge accepted Applicant's explanation for his omission of the 1996 incident from the alcohol-related incident question, it was arbitrary and capricious for the Judge to ignore the fact that Applicant's explanation does not excuse his failure to list the incident elsewhere on the form (Applicant answered "NO" to question 26 "Your Police Record - Other Offenses") *Cf.* ISCR Case No. 95-0178 (March 29, 1996) at p. 5 ("If the Judge finds that [an] affirmative defense of alternative misconduct is believable, then it would be unduly stringent for the Judge to ignore such admitted misconduct in deciding whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.") Although the SOR only cites Applicant's failure to answer accurately the alcohol-related incidents question, an Administrative Judge can amend the SOR on his or her own motion to render it in conformity with the evidence. Directive, Section E3.1.17. Also the Board has previously noted that administrative pleadings such as an SOR need not be held to the rigorous standards of a criminal indictment so long as Applicant is reasonably informed of the Department's reasons for asserting that he is not eligible for a clearance. *See, e.g. Citizens State Bank of Marshfield, Missouri v. FDIC*, 751 F.2d 209, 213 (8th Cir. 1984); *Yellow Freight System, Inc. v. Martin*, 954 F. 2d 353, 358 (6th Cir. 1992); ISCR Case No. 99-0382 (May 3, 2000) at p. 3. Here, Applicant was clearly on notice that his failure to inform the government of the 1996 incident was the obstacle to his receipt of a clearance.

2. For reasons not apparent to the Board the Administrative Judge cited language from an earlier version of the Directive to adjudicate the case. It was arbitrary, capricious and contrary to law for the Judge to fail to cite the appropriate language from the version of the Directive applicable to Applicant's case.

3. Change 4 to the Directive did not amend or otherwise change the language of Personal Conduct Mitigating Conditions 2 and 3.