

DATE: May 22, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-02046

APPEAL BOARD DECISION AND REMAND ORDER

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Pro Se

Department Counsel has appealed the December 9, 2002 decision of Administrative Judge Wilford H. Ross, in which the Judge concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

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's findings of fact are supported by sufficient record evidence; (2) whether the Administrative Judge's rulings and conclusions are arbitrary, capricious, or contrary to law; and (3) whether the Administrative Judge failed to adhere to pertinent provisions of the Directive. For the reasons that follow, the Board remands the Administrative Judge's decision for further processing consistent with the Board's rulings and instructions.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated February 7, 2002. The SOR was based on Guideline J (Criminal Conduct) and Guideline I (Emotional, Mental, and Personality Disorders). A hearing was held on June 12, 2002. The Administrative Judge issued a written decision, dated December 9, 2002, 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 decision.

Scope of Review

On appeal, the Board does not review a case *de novo*. Rather, the Board addresses the material issues raised by the parties to determine whether there is factual or legal error. There is no presumption of error below, and the appealing party must raise claims of error with specificity and identify how the Administrative Judge committed factual or legal error. *See* Directive, Additional Procedural Guidance, Item E3.1.32. *See also* ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (discussing reasons why party must raise claims of error with specificity).

When an Administrative Judge's factual findings are challenged, 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 E3.1.32.1. The Board must consider not only whether there is record evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings. *See, e.g.*, ISCR Case No. 99-0205 (October 19, 2000) at p. 2.

When a challenge to an Administrative Judge's rulings or conclusions raises a question of law, the Board's scope of review is plenary. *See* DISCR Case No. 87-2107 (September 29, 1992) at pp. 4-5 (citing federal cases).

Appeal Issues

Department Counsel makes several arguments on appeal: (a) the Administrative Judge erred in his evaluation of the expert evidence concerning Applicant's mental condition; (b) the Judge erred by finding that Applicant is not currently suffering from an emotional, mental or personality disorder within the meaning of Guideline I; (c) the Judge erred in his application of pertinent provisions of the Adjudicative Guidelines; and (d) it is arbitrary, capricious, or contrary to law for the Judge to conclude it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Board construes Department Counsel's arguments as raising the following issues:

- (1) whether the Administrative Judge's rulings or conclusions are arbitrary, capricious, or contrary to law (Directive, Additional Procedural Guidance, Item E3.1.32.3);
- (2) whether the Administrative Judge's findings of fact are supported by sufficient record evidence (Directive, Additional Procedural Guidance, Item E3.1.32.1); and
- (3) whether the Administrative Judge adhered to the procedures required by the Directive (Directive, Additional Procedural Guidance, Item E3.1.32.2).

Before dealing with the appeal issues raised by Department Counsel's brief, the Board will address three arguments made in Applicant's reply brief.

Applicant argues that Department Counsel is impermissibly presenting new evidence on appeal by citing decisions from prior security clearance cases. Applicant's argument lacks merit. Department Counsel's citation of decisions in support of its appeal arguments does not contravene the Directive's prohibition against new evidence on appeal (Directive, Additional Procedural Guidance, Item E3.1.29). Citation of prior DOHA decisions or other forms of legal authority in support of appeal arguments does not constitute the presentation of evidence.

Applicant also argues "In no way could my personal life ever affect national security now or in the future." To the extent Applicant is arguing that her personal life has no bearing on evaluating her security eligibility, Applicant's argument lacks merit. The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. In deciding whether to grant or continue access to classified information, the federal government can take into account facts and circumstances of an applicant's personal life that shed light on the person's judgment, reliability, and trustworthiness. Furthermore, security clearance decisions are not limited to consideration of an applicant's conduct during work or duty hours. Even if an applicant has a good work record, an applicant's off-duty conduct or circumstances can have security significance and may be considered in evaluating the applicant's security eligibility. *See, e.g.*, ISCR Case No. 01-01642 (June 14, 2002) at p. 6. Moreover, to the extent that Applicant's personal conduct sheds any light on her mental condition, it could be relevant to the Guideline I issues in this case.

Applicant further argues that her security clearance cannot be revoked legally based on what might happen in the future. That argument lacks merit. Security clearance decisions involve predictive judgments about whether an applicant poses a security risk based on consideration of the applicant's past conduct and present circumstances. *See Department of Navy v. Egan*, 484 U.S. 518, 528-529 (1988).⁽¹⁾ The federal government is not required to wait until an applicant mishandles or fails to properly safeguard classified information before it can decide to deny or revoke access to such information. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970).

1. Whether the Administrative Judge's rulings or conclusions are arbitrary, capricious, or contrary to law. On page 8 of the decision below, the Administrative Judge stated "This case is a battle of paper experts" and indicated his rulings or conclusions about various evaluations of Applicant's mental condition (Government Exhibits 4 and 5; Applicant Exhibits A and B). The Administrative Judge ruled or concluded that he "discounted Government Exhibit 4 because it is almost four years old and the practitioner does not even give a diagnosis under the DSM."⁽²⁾ This failure does not allow other practitioners, or myself, to evaluate his report properly." The Judge ruled or concluded that Government Exhibit 5 "is vague and not specific in stating exactly what personality disorder the Applicant is suffering from." The Judge ruled or concluded Applicant Exhibit B indicated Applicant has "no significant signs of psychological dysfunctioning." The Judge cited Applicant Exhibit A and noted Applicant's psychologist "states that the Applicant is depressed, but that she is receiving medication and therapy for it." Finally, the Judge concluded "Based on the state of the record, the conflicting reports, especially given the lack of expert testimony at the hearing, I am unable to find that Applicant is currently suffering from an emotional, mental or psychiatric disorder that makes her ineligible to hold a security clearance."

Department Counsel contends the Administrative Judge erred in his evaluation of the expert evidence concerning Applicant's mental condition. In support of this contention, Department Counsel argues:

(a) the Judge erred by discounting a 1998 psychological evaluation of Applicant's mental condition (Government Exhibit 4) and a November 2001 evaluation of Applicant's mental condition (Government Exhibit 5); and

(b) the Judge erred by giving undue weight to the March 2002 letter concerning Applicant's mental condition submitted by Applicant's treating psychologist (Applicant Exhibit B), and to the undated report by a clinical and forensic psychologist (Applicant Exhibit A).

The Board will not disturb a Judge's weighing of the record evidence unless there has been a showing that the Judge acted in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 00-0621 (January 30, 2002) at p. 3.

As the Board reads the Administrative Judge's decision, the Judge's discounting of Government Exhibit 4 and Government Exhibit 5 involved his giving those two exhibits little weight, if any at all.

(a) It was not arbitrary or capricious for the Administrative Judge to take into account the age of Government Exhibit 4. However, the age of Government Exhibit 4, standing alone, is not sufficient to allow the Judge to discount it. The question is not merely the age of Government Exhibit 4, but rather what weight it is entitled to in light of the record evidence as a whole. Although a Judge may consider the passage of time when weighing an evaluation of an applicant's mental condition, the Judge also must consider whether there is other record evidence that supports, undercuts, or otherwise sheds light of the meaning or significance of that evaluation. To focus exclusively on the age of the evaluation constitutes a piecemeal evaluation of the record evidence that runs contrary to the Judge's obligation to consider the record evidence as a whole.

It was arbitrary and capricious for the Judge to discount Government Exhibit 4 because it does not give a diagnosis under the DSM. Nothing in the Directive indicates or suggests that a diagnosis by a mental health professional can only be based on the DSM. Moreover, whether reliance on the DSM to make a psychological or psychiatric diagnosis is a generally accepted practice among mental health professionals is not: (i) a matter that is susceptible to administrative or official notice, or (ii) a matter of commonsense determination.⁽³⁾ Furthermore, there is no basis in the record evidence for the Judge to conclude the absence of a DSM diagnosis in Government Exhibit 4 constitutes a "failure" by the psychologist preparing that document. There is no record evidence indicating whether the psychologist preparing the report was asked or required to refer to or rely on the DSM in evaluating Applicant for a state court, or whether reference to or reliance on the DSM is generally expected of psychologists preparing such evaluations for a state court.

Moreover, it is untenable for the Administrative Judge to conclude that the absence of a DSM diagnosis "does not allow other practitioners, or myself, to evaluate [Government Exhibit 4] properly." Neither the mental health professional who prepared Applicant Exhibit A nor the one who prepared Applicant Exhibit B referred to, or commented on, the adequacy of Government Exhibit 4. The only evidence presented by Applicant regarding the reliability of Government

Exhibit 4 was lay testimony that sought to impugn the integrity and professionalism of the psychologist who prepared that exhibit. A review of Government Exhibit 4 shows that it provides substantial information concerning the basis for the psychologist's evaluation,⁽⁴⁾ including: dates of clinical interviews of Applicant; dates of psychological testing of Applicant; the names of psychological tests used; a lengthy list of documentary material reviewed by the psychologist; a detailed list of persons the psychologist spoke with; a list of four individuals the psychologist indicated did not return his calls; a detailed discussion of many of the conversations the psychologist had with collateral contacts; a list of specific observations the psychologist characterized as "salient"; a summary of the psychologist's opinions; and a list of recommendations for the state court. On its face, Government Exhibit 4 provides a significant amount of information to enable the Judge to evaluate it in light of the record evidence as a whole. Indeed, of the four evaluations of Applicant in the record, Government Exhibit 4 is the longest and most detailed. The Judge's statement that he could not evaluate Government Exhibit 4 properly because it did not have a DSM diagnosis is arbitrary and capricious, and reflects an unreasonable interpretation of the record evidence.

It was arbitrary and capricious for the Administrative Judge to discount Government Exhibit 5 because "the report is vague and not specific in stating exactly what personality disorder the Applicant is suffering from." The Judge's conclusion ignores the specific diagnoses set forth in Government Exhibit 5 and fails to take into consideration relevant passages in the DSM-IV that indicate those diagnoses are legitimate ones under the DSM-IV.⁽⁵⁾ Specifically, Government Exhibit 5 contains an Axis I diagnosis ["(DSM-IV 296.90) Depressive Disorder, Not Otherwise Specified] and an Axis II diagnosis ["(DSM-IV 301.9) Personality Disorder, Not Otherwise Specified, with Histrionic, Compulsive, and Narcissistic Traits"]. According to the DSM-IV, a mental health professional may be justified in using the "Not Otherwise Specified" category in a variety of situations.⁽⁶⁾ Furthermore, the DSM-IV lists Depressive Disorder, Not Otherwise Specified and Personality Disorder, Not Otherwise Specified as particular diagnoses that may be made.⁽⁷⁾ Moreover, the Judge's conclusion that Government Exhibit 5 is faulty because it does not list or designate a specific personality disorder ignores the simple fact that Government Exhibit 5 contains two separate diagnoses, one pertaining to personality disorders and one pertaining to depressive disorder. By focusing on the personality disorder aspect, the Judge failed to take into account his obligation to consider the significance of the depressive disorder diagnosis set forth in Government Exhibit 5.⁽⁸⁾ Finally, the DSM-IV specifically states that the diagnosis of Personality Disorder Not Otherwise Specified "is for disorders of personality functioning *that do not meet criteria for any specific Personality Disorder*" (emphasis added).⁽⁹⁾ In short, the absence of a diagnosis of a specific personality disorder in Government Exhibit 5 is not a defect or failing in the evaluation of Applicant, but rather is a clinical diagnosis that is consistent with relevant passages in the DSM-IV.⁽¹⁰⁾ For all these reasons, the Judge's dismissal of Government Exhibit 5 as vague and lacking in specificity was arbitrary, capricious, and contrary to his obligation under the Directive to consider the record evidence as a whole.

(b) Department Counsel contends the Administrative Judge gave undue weight to Applicant Exhibit B. In support of this contention, Department Counsel argues: (i) most of Applicant Exhibit B focuses on attacking the SOR and Government Exhibit 5 rather than providing a diagnosis of Applicant; (ii) Applicant Exhibit B indicates Applicant is receiving medication and therapy for depression; and (iii) Applicant Exhibit B does not indicate Applicant has her depression under control.

It is not clear from the decision below what particular weight the Administrative Judge gave to Applicant Exhibit B. At one point, the Judge summarizes the contents of Applicant Exhibit B without indicating what weight he gave to it or what conclusions he drew from it (Decision at p. 5). Later in the decision, the Judge refers to Applicant Exhibit B as supporting an adverse conclusion he reached concerning Government Exhibit 5, and as indicating that "Applicant is depressed, but that she is receiving medication and therapy for it" (Decision at p. 8). Reading the decision as a whole, it appears that the Judge relied on Applicant Exhibit B, at least in part, to support his conclusion that "I am unable to find that the Applicant is currently suffering from an emotional, mental or psychiatric disorder that makes her ineligible to hold a security clearance" (Decision at p. 8).

As discussed earlier in this decision, it was arbitrary and capricious for the Administrative Judge to discount Government Exhibit 5 because it did not state a specific personality disorder that Applicant was suffering from. To the extent that Applicant Exhibit B indicates that Applicant suffers from depression, it does not contradict or refute Government Exhibit 5's diagnosis of depressive disorder, not otherwise specified. Finally, the weight that can

reasonably be given to Applicant Exhibit B is reduced to the extent that it relies on: (a) unadorned speculation about the possibility that unidentified CEOs at a defense contractor have "narcissistic tendencies"; and (b) argument about the appropriateness of the SOR charging Applicant with criminal conduct under Guideline J that is not based on any professional expertise of Applicant's psychologist.

Although Department Counsel's appeal brief suggests the Administrative Judge gave undue weight to the Applicant Exhibit A, Department Counsel does not make any specific argument as to why it believes the Judge gave undue weight to Applicant Exhibit A.

2. Whether the Administrative Judge's findings of fact are supported by sufficient record evidence. Department Counsel challenges the Administrative Judge's finding that Applicant does not currently suffer from an emotional, mental, or personality disorder. Department Counsel argues that finding is: (a) arbitrary and capricious; and (b) not supported by the record evidence as a whole.

The Board is remanding the case to the Administrative Judge to issue a new decision after correction of the errors identified earlier in this decision. Correction of those errors could affect the Judge's findings and conclusions about the various evaluations (Government Exhibits 4 and 5; Applicant Exhibits A and B). Furthermore, the Judge's findings and conclusions about those evaluations will be crucial to his findings and conclusions as to whether Applicant suffers from an emotional, mental, or personality disorder. Because the Judge's findings and conclusions relevant to this issue could be affected on remand, it would be premature to address this issue.

3. Whether the Administrative Judge failed to adhere to pertinent provisions of the Directive. Department Counsel contends the Administrative Judge erred by applying Emotional, Mental, and Personality Disorders Mitigating Conditions 1 and 2. Because a Judge must apply pertinent provisions of the Adjudicative Guidelines (Directive, Section 6.3 and Additional Procedural Guidance, Item E3.1.25), this claim of error raises the issue of whether the Judge failed to adhere to pertinent provisions of the Directive. *See* Directive, Additional Procedural Guidance, Item E3.1.32.2.

The Board is remanding the case to the Administrative Judge to issue a new decision after correction of the errors identified earlier in this decision. Correction of those errors could affect the Judge's findings and conclusions about the various evaluations (Government Exhibits 4 and 5; Applicant Exhibits A and B). Furthermore, the Judge's findings and conclusions about those evaluations will be crucial to his consideration of which Emotional, Mental, and Personality Disorders Disqualifying and Mitigating Conditions might be applicable in this case. Accordingly, it would be premature to address this issue.

Conclusion

Department Counsel has demonstrated error below that warrants remand. Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.2, the Board remands the case with the following instructions: The Judge must issue a new decision, consistent with the requirements of Additional Procedural Guidance, Items E3.1.35 and E3.1.25 that adequately explains his findings and conclusions in light of the record evidence as a whole. The Judge's new decision should consider all of the four expert exhibits using a uniform analytical framework.

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. Indeed, predictive judgments about applicants are required by provisions of the Directive such as Section 6.3 and Enclosure 2, Item E2.2.1.
2. The Board takes administrative or official notice that DSM is an abbreviation commonly used to refer to either the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV)* (American Psychiatric Association, 1994) or the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision: DSM-IV-TR* (DSM-IV-TR) (American Psychiatric Association, 2000).
3. What is generally accepted practice among experts will depend a great deal on the history, traditions, and customary practices of their particular profession or area of expertise.
4. Although Government Exhibit 4 is not simply an evaluation of Applicant, it includes the psychologist's conclusions about Applicant's mental condition.
5. As discussed earlier in this decision, nothing in the Directive indicates or suggests that a diagnosis by a mental health professional must be based on the DSM. However, if a mental health professional cites or otherwise relies on the DSM to make a diagnosis, then an Administrative Judge should consider whether that diagnosis is consistent with relevant passages of the DSM.
6. DSM-IV at p. 4. *See also* DSM-IV-TR at p. 4.
7. DSM-IV at pp. 350 and 673. *See also* DSM-IV-TR at pp. 381-382 and 729.
8. This failure by the Administrative Judge is significant since Applicant's own psychologist indicated that Applicant is receiving treatment for depression. *See* Applicant Exhibit A.
9. DSM-IV at p. 673. *See also* DSM-IV-TR at p. 729.
10. When Applicant Exhibit B attacked the sufficiency of the diagnosis in Government Exhibit 5 for being "being unable to find even one clear personality disorder," it ignored relevant passages of the DSM (which was relied on by the experts preparing Government Exhibit 5), failed to articulate a specific professional or expert basis for that criticism, or both. Accordingly, it was arbitrary and capricious for the Administrative Judge to rely on that criticism in Applicant Exhibit B as a basis for discounting Government Exhibit 5.