

DATE: January 13, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-02407

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Marc E. Curry, Esq., Department Counsel

William S Fields, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Kirk T. Mosley, Esq.

Administrative Judge Richard A. Cefola issued a decision, dated August 2, 2002, 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.

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 were both supported by record evidence and reasonable in light of contrary evidence; 2. Whether the Administrative Judge's credibility determination regarding Applicant is sustainable in light of the record evidence; and 3. Whether the Administrative Judge's analysis of Applicant's provision of alcohol to minors was unsustainable piecemeal analysis. For the reasons that follow, the Board reverses the Judge's favorable decision.

Procedural History

The Defense Office of Hearings and Appeals issue a Statement of Reasons (SOR) to Applicant, dated February 14, 2002. The SOR was based on Guideline J (Criminal Conduct), Guideline D (Sexual Behavior), and Guideline E (Personal Conduct). Applicant requested a hearing which was held on July 10, 2002. Subsequently the Administrative Judge issued a favorable decision, dated August 2, 2002. The case is before the Board on the Department Counsel's appeal of that 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

1. Whether the Administrative Judge's findings of fact were both supported by record evidence and reasonable in light of contrary evidence. Department Counsel challenges three aspects of the factual findings from the Administrative Judge's decision: 1) The Judge's finding that charges were dismissed with prejudice as regards two minor children Applicant was accused of raping; 2) The Judge's failure to discuss his evaluation of the investigative record evidence regarding the rape accusations and 3) The Judge's adoption of Applicant's explanation as to why one of the victims' parents had motive to falsely accuse him without any corroborating evidence.

Department Counsel's first argument is persuasive. The record clearly shows that charges were dismissed with prejudice in the case of only one child accuser (who refused to testify against Applicant). Charges were dismissed without prejudice in the other case where the child accuser was unavailable. Department Counsel correctly points out that the Judge could not reasonably draw inferences favorable to Applicant from the decision to drop charges without prejudice due to the unavailability of a key witness.

Department Counsel's second challenge is also persuasive. There is considerable record evidence of police and medical investigation regarding the two children. The Judge found that the rapes never took place as the charges were ultimately dismissed without ever discussing the evidence contained in the police and medical reports. The Judge's findings cannot be sustained. In accordance with the Directive, an Administrative Judge's findings should be acceptable to a reasonable mind in light of all the contrary record evidence. Here, the Judge's finding is unsustainable, given the substantial volume of record evidence that is not significantly rebutted other than by Applicant's denials.

Department Counsel's third argument is also persuasive. Applicant said that he believed that the mother of the second of the alleged victims was interested in collecting from a victim's fund (which, Applicant heard had paid money to his first alleged victim). The Judge incorporated into his finding of fact the notion that the mother of the second child had heard about the prior payment and then caused charges to be brought against Applicant. Department Counsel argues that Applicant's belief is speculation without any corroboration which is an insufficient basis for the Judge's finding of fact. The Board agrees. Applicant's speculation about the mental processes or motivation of another person is not the kind of evidence that "a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record."

Department Counsel has successfully demonstrated harmful errors in the Administrative Judge's findings of fact.

2. Whether the Administrative Judge's credibility determination regarding Applicant is sustainable in light of the record evidence. On appeal Department Counsel challenges the Administrative Judge's favorable credibility determination for Applicant. An Administrative Judge's credibility determination is entitled to deference on appeal. However, it is susceptible to challenge. Department Counsel raises three problems with the favorable credibility determination: 1) The Judge relied to an unreasonable extent on the assessment of Applicant's truthfulness made by Applicant's supervisor; 2) The Judge relied on his erroneous finding that both rape charges against Applicant were dismissed with prejudice; and 3) The Judge ignored an inconsistency in Applicant's statements.

Department Counsel's first argument is persuasive. The Administrative Judge specifically cites the supervisor in support of his credibility determination. Yet, the supervisor acknowledged that he had little interaction with Applicant outside

the workplace. The Judge gave the supervisor's view more weight than it was entitled to, given his minimal interaction with Applicant outside the workplace and given the significant amount of contrary evidence in the record that detracted from Applicant's credibility.

Department Counsel's second argument is also persuasive. Had the Judge correctly assessed the standing of the rape charges against Applicant, he would have had to factor that into his credibility assessment of Applicant. An accurate assessment of the procedural posture of the rape charges and a consideration of the evidence of why the charges were dismissed would have been a significant obstacle to a favorable credibility determination. Instead the Judge appears to have taken his mistaken assessment of the legal standing of the rape charges (viewing both charges as having been dismissed with prejudice) as validation of Applicant's credibility.

Department Counsel's third argument is entitled to little weight. Applicant denied in 2000 ever tickling the children on the buttocks but in 1994 he first denied it and then said he might have but could not remember. To the extent that there is an inconsistency between the two statements, it is minor and it does not significantly detract from the Applicant's credibility.

Department Counsel has established two significant problems with the Administrative Judge's favorable credibility determination for Applicant. Taken together those problems constitute error and make the Judge's credibility determination unsustainable.

3. Whether the Administrative Judge's analysis of Applicant's provision of alcohol to minors was unsustainable piecemeal analysis. In addition to the child rape issues discussed above, Applicant had a conviction for furnishing alcohol to minors. Department Counsel alleges that the Administrative Judge's conclusion that this matter was mitigated constituted piecemeal analysis. The Board agrees. The Judge's analysis of Applicant's conviction does not appear to consider the conviction in the context of the unfavorable record evidence regarding child rape. The Judge's analysis does not appear to consider the possibility that Applicant has a systemic problem or pattern of behavior regarding illegal and corrupt conduct with minors. Department Counsel has demonstrated harmful error in the Judge's analysis.

Conclusion

Department Counsel has demonstrated multiple harmful errors in the Administrative Judge's August 2, 2002 decision. The decision is reversed.

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

I concur with my colleagues' conclusions that: (a) the Administrative Judge erred by finding both criminal cases against Applicant were dismissed with prejudice; and (b) the Judge could not reasonably draw favorable inferences from the fact that one of the criminal cases against Applicant was dropped with prejudice. Apart from the record evidence that shows one of the criminal cases against Applicant was dropped for reasons that do not pertain to Applicant's guilt or

innocence of the charges against him, the Judge erred by inferring that dismissal with prejudice indicates the Applicant was not guilty of the dismissed criminal charges. The Judge erred for three reasons. First, as Department Counsel correctly notes, a Judge should not make assumptions about the reasons why criminal charges are dropped. *See, e.g.*, ISCR Case No. 96-0360 (September 25, 1997) at p. 4 ("Absent record evidence of the specific reasons why the criminal charges were not pursued, a Judge cannot legitimately make assumptions or draw inferences about the reasoning state authorities used to drop the criminal charges."). Second, under applicable state law, dismissal of criminal charges with prejudice is not tantamount to exoneration of the defendant. *See State v. Taylor*, 589 P.2d 1250, 1253 (Wash. App. 1979)(where guilt or innocence of a defendant was not presented to a trier of fact, the dismissal of criminal charges with prejudice is not tantamount to a judgment of not guilty). Third, dismissal of criminal charges does not preclude Department Counsel from presenting evidence to prove an applicant engaged in the conduct covered by the dismissed criminal charges. *See ISCR Case No. 99-0119* (September 13, 1999) at p. 2 (Department Counsel can present evidence to prove that an applicant engaged in criminal conduct even if the criminal charges against the applicant were dismissed or the applicant was acquitted of criminal charges). In this case, Department Counsel presented such evidence. Accordingly, even if both criminal cases against Applicant had been dismissed with prejudice, the Judge could not rely on that alone to draw favorable inferences.

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. Furthermore, there is no requirement that a Judge specifically discuss every piece of record evidence. However, if an appealing party can point to significant record evidence that runs contrary to a Judge's findings of fact, then the failure of the Judge to discuss that contrary evidence at all would raise a serious question whether the appealing party has successfully rebutted the presumption that the Judge considered all the record evidence. In this case, Department Counsel points to significant record evidence that runs contrary to the Judge's findings, evidence that he simply did not discuss. Standing alone, this showing by Department Counsel may not be sufficient to demonstrate error. However, when viewed in light of the other errors by the Judge, Department Counsel's showing on this aspect of the case suggests the Judge acted in an arbitrary and capricious manner.

I concur with my colleagues' conclusion that the Administrative Judge erred by relying on Applicant's testimony about the motivation of the mother of one of the alleged victims. Applicant's speculation about the thoughts or mental processes of another person is not the kind of evidence that "a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." Directive, Additional Procedural Guidance, Item E3.1.32.1.

I disagree with my colleagues' discussion of the Administrative Judge's reliance on the testimony of Applicant's supervisor. Even though Applicant's supervisor had little interaction with him outside the workplace, the supervisor had sufficient interaction with Applicant to form an opinion about his character, judgment, and reliability. Notwithstanding the Judge's other errors, there is not a sufficient basis for me to conclude the Judge's reliance on the testimony of Applicant's supervisor was arbitrary or capricious.

I agree with my colleagues' conclusion that the Administrative Judge erred by drawing favorable inferences about Applicant's credibility based on his erroneous finding that the criminal charges were dismissed with prejudice. However, I disagree with my colleagues' discussion of this issue. The Judge's reasoning in this case was erroneous. But, apart from the Judge's erroneous reasoning concerning the effect of the dismissal of criminal charges on Applicant's credibility, I am not sure why the procedural posture of criminal charges would militate against a favorable credibility determination. I am not sure that inferences about an applicant's credibility reasonably can be drawn from (a) the fact that criminal charges are pending against an applicant, (b) the fact that criminal charges against an applicant were dropped or dismissed for unknown reasons, or (c) the fact that criminal charges against an applicant were dropped or dismissed for reasons that do not pertain to an applicant's guilt or innocence. Although it is possible that such kinds of facts, *in conjunction with other relevant evidence*, might have probative value toward assessing an applicant's credibility, I doubt that such facts alone are sufficient to justify drawing inferences about an applicant's credibility.

I agree with my colleagues' conclusion that Department Counsel's third argument against the Administrative Judge's credibility determination is not persuasive.

Department Counsel's claim that the Administrative Judge improperly engaged in a piecemeal analysis of Applicant's

case has mixed merit. Because separate pieces of evidence may have greater meaning and significance when viewed collectively than when viewed individually -- *see United States v. Carson*, 702 F.2d 351, 362 (2d Cir. 1983)(even though the defendant urges an exculpatory explanation for each strand of evidence, the court must view the evidence as a whole and not in isolated pieces; each incident may gain significance from the others), *cert. denied*, 462 U.S. 1108 (1983) -- it is plausible for Department Counsel to argue that record evidence of Applicant providing alcohol to teenagers under the legal age for drinking had some probative value with respect to the question of whether Applicant had engaged in sexual abuse of minor children. However, merely because such record evidence has probative value, it does not necessarily follow that the Judge's findings and conclusions about the incident where Applicant provided alcohol to teenagers reflected a piecemeal analysis.

Considering the totality of the Administrative Judge's errors in light of the record evidence as a whole, I concur with my colleagues' determination to reverse the Administrative Judge's favorable security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board