

DATE: August 27, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-03107

APPEAL BOARD DECISION AND REMAND ORDER

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

Louis D. Victorino, Esq.

Administrative Judge Barry M. Sax issued a decision, dated February 15, 2002, in which he concluded 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, dated January 2, 1992, as amended.

Department Counsel's appeal presents the following issue: whether the Administrative Judge erred by failing to evaluate Applicant's conduct under Guideline E separately and independently of the Judge's analysis under Guideline M. The Board remands the case to the Administrative Judge for further processing consistent with the rulings and instructions set forth in this Decision and Remand Order.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR), dated April 25, 2001. The SOR was based on Guideline E (Personal Conduct) and Guideline M (Misuse of Information Technology Systems).

Applicant submitted an answer to the SOR, in which he indicated "I request an Administrative Determination of this matter." A File of Relevant Material (FORM) was prepared, and a copy of the FORM was provided to Applicant. After Applicant's response to the FORM was received, the case was assigned to the Administrative Judge for determination.

The Administrative Judge issued a written decision, dated February 15, 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 security clearance 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, e.g.*, 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 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 Issue

The Administrative Judge concluded that Applicant's use of a company computer did not fall under Guideline M (Misuse of Information Technology Systems) or Guideline E (Personal Conduct), and that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

On appeal, Department Counsel argues: (1) the Administrative Judge erred by failing to evaluate Applicant's conduct under Guideline E independently of his conclusions under Guideline M; and (2) the Board should reverse the Judge's favorable decision because Applicant's conduct demonstrated poor judgment under Guideline E.

In response, Applicant makes several arguments: (1) the Administrative Judge did evaluate Applicant's conduct under Guideline E; (2) even if the Board concludes that the Judge failed to evaluate Applicant's conduct under Guideline E, there was no error because the Judge was not required to do so; (3) even if the Board concludes the Judge erred by not conducting an independent evaluation of Applicant's conduct under Guideline E, such an error was harmless; and (4) if the Board concludes that the Judge committed harmful error, then the proper disposition would be to remand the case to the Judge, not a reversal.

(1) Applicant's argument that the Administrative Judge did evaluate Applicant's conduct under Guideline E does not persuade the Board that the Department Counsel's first appeal contention lacks merit. Applicant correctly notes that the Judge's decision contains several references concerning Guideline E. Given those references in the Judge's decision, it cannot be said that the Judge simply ignored Guideline E when evaluating Applicant's conduct. However, Department Counsel is not arguing that the Judge ignored Guideline E, but rather that the Judge failed to conduct "an independent and separate analysis" of Applicant's conduct under Guideline E. Applicant correctly notes that Department Counsel's brief does not "explain, define, or establish any parameters concerning what constitutes 'an independent and separate analysis.'" However, the Board need not define, or establish parameters for, "an independent and separate analysis" to decide this appeal.

The Administrative Judge specifically concluded that "SOR 2.a. [the allegation under Guideline E] fails because it is based on the validity of SOR 1.a. - SOR 1.d." Clearly, the Judge was basing his analysis of Applicant's conduct under Guideline E on the Judge's conclusions under Guideline M. The Judge's perfunctory dismissal of Guideline E based on his conclusions under Guideline M was arbitrary, capricious, and contrary to law because: (a) it failed to articulate a rational basis for the Judge's conclusion; (b) it had the practical effect of subordinating Guideline E to Guideline M without any explanation for doing so; and (c) as discussed later in this decision, the Judge had an obligation to evaluate Applicant's conduct under Guideline E.

(2) As a fallback position, Applicant argues that the Administrative Judge was not required to evaluate Applicant's conduct under Guideline E. In support of this position, Applicant argues: (a) Guideline E is more general than Guideline M, and it is a general legal principle that a specific rule controls over a general rule; (b) acceptance of Department Counsel's position would render Guideline M "a meaningless redundancy"; (c) prior Board decisions relied on by Department Counsel are distinguishable; and (d) Department Counsel did not attempt to prove any fact that would have independent probative weight under Guideline E.

Applicant's first and second arguments can be discussed together. Those arguments are not persuasive for several reasons.

First, an SOR is an administrative pleading that should not be held to stringent legal standards. *See, e.g.*, ISCR Case No. 99-0710 (March 19, 2001) at pp. 2-3; ISCR Case No. 99-0554 (July 24, 2000) at pp. 4-5. Nothing in Executive Order 10865 or the Directive indicates or suggests any legal principle that limits what Guidelines can or should be alleged in an SOR. As long as there is some rational basis for alleging an applicant's conduct under a given Guideline, there is nothing in Executive Order or the Directive that precludes the government from alleging the same conduct under more than one Guideline. Furthermore, an Administrative Judge must "make a written clearance decision in a timely manner setting forth pertinent findings of fact, policies, and conclusions *as to the allegations in the SOR . . .*" Directive, Additional Procedural Guidance, Item E3.1.25 (italics added). In the SOR, Applicant's conduct was alleged under Guideline E. Therefore, the Judge was obligated to address Applicant's conduct under Guideline E, regardless of what particular conclusions the Judge might draw about Applicant's conduct under that Guideline. ⁽¹⁾

Second, Applicant's arguments run afoul of the "whole person" concept. *See* Directive, Section 6.3 and Enclosure 2, Items E2.2.1 and E2.2.3. The requirement that an applicant's security eligibility must be evaluated under the "whole person" concept militates against construing an SOR in a restrictive, hypertechnical manner.

Third, Applicant's arguments also are undercut by the following language in the Directive (Enclosure 2, Item E2.2.4): "Although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or emotionally unstable behavior." Stated otherwise, the fact that an applicant's conduct is alleged in the SOR under specific Guidelines (in addition to Guideline E) does not preclude an Administrative Judge from considering whether an applicant's overall conduct demonstrates questionable judgment or unreliability under Guideline E. A Judge's failure to evaluate an applicant's conduct alleged under Guideline E, based on a conclusion that the conduct is not sufficient to warrant adverse conclusions under other Guidelines alleged in the SOR, is arbitrary and capricious under Item E2.2.4.

Fourth, if an Administrative Judge were to conclude that an applicant's conduct does not have security significance under a given Guideline alleged in the SOR, all the Judge has to do is articulate a rational basis for reaching such a conclusion. The requirement that a Judge must consider an applicant's conduct under the specific Guidelines alleged in the SOR does not compel the Judge to reach any particular conclusion, favorable or unfavorable, about that conduct.

Applicant's third argument tries to distinguish prior Board decisions relied on by Department Counsel. Specifically, Applicant focuses on language in Board decisions that state: (a) it is "legally permissible" for an Administrative Judge to consider an applicant's conduct under more than one Guideline; or (b) a Judge "may consider" an applicant's conduct under more than one Guideline. Applicant argues such language shows a Judge may, but is not required to, consider or evaluate conduct under more than one Guideline. Applicant's argument is not a frivolous one, but it is not persuasive. Based on the reasons stated earlier in this decision, the Board concludes the following: (a) a Judge *must* consider and evaluate an applicant's conduct under any and all Guidelines under which it has been alleged in the SOR; (b) the requirement that a Judge must consider an applicant's conduct under the specific Guidelines alleged in the SOR does not compel the Judge to reach any particular conclusion, favorable or unfavorable, about that conduct; (c) although it is legally permissible for a Judge to conclude that conduct alleged under more than one Guideline has independent security significance under different Guidelines, a Judge is not compelled to reach such a conclusion merely because conduct has been alleged under different Guidelines; and (d) whatever conclusions a Judge reaches concerning conduct that has been alleged under different Guidelines must be reasonable ones. ⁽²⁾

The Board also rejects Applicant's last argument: that Department Counsel did not seek to prove any fact that might have probative value under Guideline E. Department Counsel presented evidence in the FORM that was sufficient to require the Administrative Judge to consider whether Applicant's conduct demonstrated poor judgment under Guideline E, independent of any conclusions the Judge might have drawn about Applicant's conduct under Guideline M.

(3) As a second fallback position, Applicant argues that if the Board concludes the Administrative Judge erred by not

conducting an independent evaluation of Applicant's conduct under Guideline E, the Board should conclude the error is harmless.⁽³⁾ In support of this position, Applicant argues that some Board decisions relied on by Department Counsel are distinguishable because they "involved egregious misuse of company computers to a degree not present [in this case]." Although Applicant's conduct was not as egregious as the conduct involved in other cases, that does not relieve the Judge from considering the security significance of Applicant's conduct. *See, e.g.*, ISCR Case No. 99-0254 (February 16, 2000) at p. 3 ("Even if an applicant has not engaged in other conduct that has more serious negative security significance, the Judge still has the obligation to evaluate the security significance of the conduct the applicant did engage in."). Furthermore, as discussed earlier in this decision, the Judge's perfunctory dismissal of Guideline E was arbitrary, capricious, and contrary to law.

(4) Department Counsel asks the Board to reverse the Administrative Judge's decision. As a third fallback position, Applicant asks the Board to remand the case if it concludes the Judge committed harmful error.

The Board rejects Applicant's argument that Department Counsel has not challenged the merits of the Administrative Judge's conclusions under Guideline E. Although Department Counsel's brief specifically lists a single appeal issue -- whether the Judge erred by failing to conduct an independent and separate analysis of Applicant's conduct under Guideline E -- it also contains brief arguments about the security significance of Applicant's conduct under Guideline E that, for all practical purposes, challenge the Judge's favorable formal finding under Guideline E. However, Department Counsel has failed to develop a persuasive argument why the Board should reverse the Judge's decision, given the record evidence in this case. Accordingly, the Board concludes that a remand for correction of identified error is warranted.

Conclusions

Department Counsel has met its burden of demonstrating harmful error that warrants remand. Pursuant to Item E3.1.33.2 of the Directive's Additional Procedural Guidance, the Board remands the case to the Administrative Judge with instructions to issue a new decision after correcting the error identified in this Decision and Remand Order, consistent with the Judge's obligations under Directive, Additional Procedural Guidance, Items E3.1.35 and E3.1.25.

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. Of course, in doing so "the Judge must draw reasonable inferences and reach reasonable conclusions that take into account the totality of the record evidence, evaluate the facts and circumstances of an applicant's case in a manner

consistent with the 'whole person' analysis required by the Directive, and consider the totality of an applicant's conduct and circumstances under the 'clearly consistent with the national interest' standard." ISCR Case No. 99-0228 (March 12, 2001) at p. 5.

2. *See* footnote 1 of this decision.

3. In support of this position, Applicant refers to a survey available on the Internet. That survey is not part of the record evidence below. As such, it constitutes new evidence, which the Board cannot consider. *See* Directive, Additional Procedural Guidance, Item E3.1.29.