

DATE: October 17, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-02677

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

William S. Fields, Department Counsel

FOR APPLICANT

Steven N. White, Esq.

Administrative Judge Paul J. Mason issued a decision, dated March 25, 2002, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed. For the reasons set forth below, the Board sustains the decision of the Administrative Judge.

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

Applicant's appeal presents the following issues; (1) whether some of the Administrative Judge's findings of fact are erroneous; and (2) whether the Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant dated July 26, 2001. The SOR was based on Personal Conduct (Guideline E). Applicant submitted an answer to the SOR dated August 16, 2001 in which he requested a hearing. The hearing was held on November 28, 2001. On March 25, 2002, the Administrative Judge issued a decision in which he concluded it was not clearly consistent with the national interest to grant Applicant a security clearance. This case is before the Board on Applicant'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, 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 Issues

1. Whether certain of the Administrative Judge's findings of fact are erroneous. Applicant asserts the following with regard to certain of the Administrative Judge's findings of fact: (a) the Administrative Judge erred by finding Applicant misused company equipment or time when downloading files from the ARPANET using a File Transfer Protocol; (b) the record evidence does not support the Administrative Judge's finding concerning the number of hours Applicant improperly recorded on his time sheet as regular time and overtime hours and the Administrative Judge's finding concerning the number of hours Applicant improperly used company computers to access the Internet for personal reasons; and (c) the Administrative Judge erred by finding Applicant voluntarily signed an incriminating statement and by not accepting Applicant's repudiation of alleged inaccuracies in that statement. These assertions will be discussed in turn.

a. Misusing company equipment or time when downloading files. The SOR alleged Applicant was issued a Corrective Action Memorandum in August 1991 and suspended from work for one day without pay for misusing company materials, supplies and time by storing pornographic and obscene materials on company computers. The Administrative Judge found that in December 1990 a computer administrator at Applicant's employer discovered Applicant and another employee had used company computers and system accounts for personal purposes, to wit, accumulating and storing pornographic and obscene materials on company equipment. The Judge found that Applicant's storage of the material was unacceptable conduct, that he was misusing company materials and supplies, and that the activity took Applicant away from his employment-related duties. Applicant asserts: (i) it was Applicant's job to seek out and locate files on the ARPANET (a predecessor to the Internet) to see if they could be useful to the company; (ii) the technology of the ARPANET did not allow for precisely identifying and editing contents of a file before they were introduced into the company computer system, and (iii) the introduction of the inappropriate materials was therefore innocent and not indicative of wrongdoing by Applicant.

A review of the decision below reveals that the Judge based his findings on both the accumulation and storage of inappropriate materials. The fact that Applicant has a plausible explanation for how the materials were introduced initially into the company system does not undercut the Judge's broader finding that Applicant engaged in inappropriate conduct by holding onto and storing the materials.

b. Number of hours inappropriately recorded and number of hours where company computers were used for personal reasons. The SOR alleged that Applicant was involuntarily terminated from his position with his company in January 1999 for improperly recording 66 hours of regular time and overtime hours in 1998 and for improperly using company computers to access the Internet for personal reasons in 1998 for approximately 101 hours during regular time and overtime hours. Concerning both the 66-hour figure and the 101-hour figure, the Judge relied on the contents of an internal company investigation in finding the figures accurate. The Judge also cited a November 30, 1998 statement signed by the Applicant for the proposition that Applicant then acknowledged the accuracy of the 101-hour figure. On appeal, Applicant repeats his hearing assertions that the figures were inaccurate and exaggerated, owing to fundamental technical flaws and inaccuracies in the monitoring systems and methodology used to calculate the figures. Applicant claims there is no evidence in the record to refute this defense he raises, which is based in his view upon a logical understanding as to how the systems operate.

It was the Judge's duty to weigh the evidence in the internal company investigation against any contrary evidence in the record, which consisted of Applicant's claims that the method for obtaining the figures was flawed and the figures were inaccurate. After a review of the record evidence as a whole, the Board concludes that the Judge's finding regarding the number of hours of time card misrepresentation was reasonable. While the Judge was required to consider Applicant's testimony in light of the other evidence, he was not required to accept Applicant's questioning of the accuracy of details

of the investigation. In evaluating the Applicant's claim, which he asserts is unrefuted, three factors are significant: (1) Applicant did not raise an objection at the time of the investigation concerning perceived inaccuracies in computing the hours; (2) at the hearing, although he claimed that both of the hourly figures were exaggerated, he offered no alternative evidence indicating what the hourly figures should have been; and (3) there was no evidence corroborating Applicant's claims that the figures were inaccurate. It was not arbitrary or capricious for the Judge to rely upon the representations of the internal company investigation when making his findings of fact.

Concerning the 101-hour figure, the Judge erred in citing the Applicant's November 30, 1998 statement for the proposition that Applicant was earlier acknowledging the accuracy of that figure. In that statement Applicant makes no comment concerning the accuracy or inaccuracy of the 101-hour figure. However, that error is harmless given the fact that there is record evidence in the form of the company's investigation that supports the Judge's finding and an overall review of the Judge's decision convinces the Board that he was relying generally on the company's investigation in making his findings of fact. Applicant fails to demonstrate that the overall finding of the Administrative Judge concerning the number of hours of computer misuse was error.

c. Applicant's repudiation of his signed incriminating statement. At the hearing Applicant repudiated much of his November 30, 1998 statement, a statement that provided significant admissions of misconduct while he was working for his company. On appeal, Applicant claims that he was under extreme duress when he signed the statement, which was prepared by a company investigator. He argues that the statement is suspect because: (i) he did not have the benefit of counsel and was not provided any due process within the company; (ii) he was told he would be fired immediately if he didn't sign the statement; and (iii) he admitted to committing acts that were highly suspect and exaggerated in order to avoid immediate termination. In resolving this conflict in the record evidence, the Administrative Judge found Applicant's signed statement to be more credible than his hearing testimony. He indicated that it was difficult to understand why Applicant would sign a statement that contained so much false information. He also noted that Applicant had failed to provide any independent support as to why the November 1998 statement should not be believed.

The Applicant's hearing statements concerning the November 30, 1998 statement were evidence that the Judge was required to consider. However, the Judge was not required to accept Applicant's representations but instead was duty bound to evaluate that evidence in light of all the evidence of record. The Judge's weighing of the evidence in this instance also involved making a credibility determination concerning the Applicant's repudiation of the November 30, 1998 statement. While they are not immune from review on appeal, credibility determinations are entitled to deference by the Board. Considering these factors and the record evidence as a whole, the Board concludes that the Administrative Judge's finding that the contents of Applicant's November 30, 1998 statement were accurate is reasonable and sustainable.

2. Whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. On appeal, Applicant claims the following errors in the Administrative Judge's decision: (a) the Administrative Judge's adverse security clearance decision was error since Applicant has had no security violations and the instances of bad conduct at his company were unrelated to his handling of classified information; (b) Applicant's conduct and security record since 1998 have been unblemished and the Judge erred by giving no consideration to this more recent conduct; (c) Applicant's 1998 conduct is mitigated because Applicant was experiencing "burnout" as a result of lack of meaningful work, boredom and his company's refusal to allow him to transfer to another position; (d) the Administrative Judge erred by concluding Applicant's 1990 conduct was more serious than it really was; (e) the Administrative Judge erred by concluding Applicant's conduct in 1990 and 1998 formed a pattern; (f) the Administrative Judge failed to consider that the allegations made against Applicant were unsubstantiated; and (g) the Administrative Judge failed to analyze the case using the "whole person" concept. The Board interprets these arguments as raising the issue of whether the Judge's decision is arbitrary, capricious or contrary to law.

a. No security violations/misconduct unrelated to security concerns. On appeal, Applicant acknowledges some lack of judgment and dishonesty in the 1990 incident where he was found accessing sexually-related materials on company computer systems, and in the 1998 incident where he improperly recorded his absences and used the Internet on company time for personal reasons. However, Applicant denies that there is any nexus between these incidents and his security eligibility, especially since he has never committed a security violation and he has, in fact, received high praise

for his handling of classified information. Applicant's assertions lack merit.

Security clearance decisions are not an exact science, but rather are predictive judgments about a person's security suitability in light of that person's past conduct and present circumstances. *Department of Navy v. Egan*, 484 U.S. 518, 528-529 (1988). There is no presumption in favor of granting a security clearance and Applicant bears the ultimate burden of persuasion to show it is clearly consistent with the national interest to grant or continue a security clearance for him. See Directive, Enclosure 2, Item E2.2.2, and Additional Procedural Guidance, Item E3.1.15. The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snapp v. United States*, 444 U.S. 507, 511 n. 6 (1980). Security requirements include consideration of a person's judgment, reliability, and trustworthiness. *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961). Moreover, the Personal Conduct Guideline (Guideline E) under which this case was brought deals specifically with issues involving questionable judgment, untrustworthiness and dishonesty. The fact that Applicant has no security violations in his record and may, in fact, have demonstrated good performance in the handling of classified information did not preclude the Judge from making an adverse security clearance determination based on Applicant's inappropriate workplace behavior. The government need not wait until an applicant mishandles or fails to properly safeguard classified information before it can deny or revoke access to such information. *Adams v. Laird*, 420 F.2d 230, 239-39 (D.C. Cir. 1969), *cert. denied*, 397 U.S.1039 (1970).

b. Applicant's unblemished record since 1998. Applicant argues that his recent conduct over the past three years demonstrates that he has not engaged in any of the objectionable conduct that took place while he was with his former company, and that there is no evidence to suggest there is any current or future risk of violation of company rules or security procedures. He maintains that the Judge's decision fails to take into account this demonstrated rehabilitation and change in behavior and that the omission is harmful error.

Applicant's contention is not persuasive. There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. See, e.g., ISCR Case No. 99-9020 (June 4, 2001) at p. 2. Moreover, the Administrative Judge specifically addressed the issue of Applicant's favorable evidence in the form of job performance and his contributions in resolving security problems when evaluating the possibility of behavioral changes on the part of Applicant. The Judge concluded that Applicant's favorable evidence did little to enlighten about what, if any, behavioral changes Applicant has made after the 1998 conduct. This conclusion was reasonable. Good job performance and proper security practices are attributes that are expected of an individual. Evidence of these attributes can provide some evidence of rehabilitation but that evidence is not dispositive of the issue. The fact that Applicant can advance an alternate interpretation of the record evidence does not demonstrate the Judge erred. The record evidence also indicates that Applicant's job performance at his former company was good for many years prior to and in-between the incidents of misconduct. This evidence supports the Judge's ultimate conclusion that Applicant's favorable evidence fell short of establishing Applicant's ultimate burden of persuasion in the case.

c. Applicant's 1998 conduct was mitigated because he was experiencing "burnout." Applicant maintains his 1998 conduct in misrecording time records and accessing the Internet on his former company's computers during working hours resulted from burnout, boredom and frustration at being placed in a position where he had little work to do for long periods. On appeal, he essentially blames the company management for misusing him by keeping him in a position where he was underutilized without any regard to his own needs and wishes. Applicant claims this mitigates his conduct and places it "in proper perspective." The Administrative Judge did not specifically comment upon the Applicant's "burnout" theory in his decision, but instead focused on the serious nature of Applicant's extensive use of the Internet on company time and the brazenness of the manner in which Applicant improperly recorded his work time. Regarding the mitigation of the improper recording of work time, Applicant's argument fails to make a rational connection between the condition of being bored, underutilized or misused and the act of deliberate misrepresentation of hours worked on official company records. The Administrative Judge was not compelled to find such evidence mitigating of Applicant's intentional misconduct. While the type of idleness and boredom described by Applicant may be rationally connected to his extensive use of the Internet for unauthorized, personal reasons, the Judge did not err by not specifying such conduct as mitigating. Applicant has failed to demonstrate the Judge erred.

d. Administrative Judge erred by viewing Applicant's 1990 conduct as more serious than it really was. Applicant claims the Administrative Judge erred by viewing Applicant's involvement with sexually oriented materials in 1990 as a serious

violation, as opposed to a minor indiscretion and lack of good taste. He states that excessive weight was placed by the Judge on the entire 1990 incident when the Judge stated in his decision, "Inappropriately storing pornographic materials in company computers or in system accounts/discs is dishonest and unacceptable conduct and amounts to an overall neglect of duty for misusing company time." Applicant charges that the Administrative Judge's decision failed to consider the mitigating circumstances that these materials were initially obtained and viewed as part of his job responsibilities, that there was no clear company policy or rules with respect to the storage and handling of the materials, and the materials were promptly purged from the system once it became clear that continued storage on company computers was unacceptable.

Applicant fails to establish that the Judge's characterization of the 1990 misuse of company computer incident was error. Applicant's contention that the initial entry of sexually explicit materials into the company system was innocent and related to official duties is discussed earlier in this decision. The fact that the initial obtaining of the material may have been innocent does not detract from the Judge's conclusion that the subsequent accumulation and storage was dishonest and unacceptable conduct. Applicant's assertion that there was no clear company policy on the subject does little to lessen the severity of Applicant's actions. The Judge noted that the activity took Applicant away from his official duties. Underlying the Judge's conclusions is the basic notion that even in the absence of specific rules of prohibition a reasonable person would recognize that using company resources and company time to view and maintain sexually explicit materials was dishonest and unacceptable conduct. Applicant also considers mitigating the fact that he promptly stopped his conduct in December 1990 and removed the offending files when he was informed by management that it was improper. The Judge was not required to give such evidence much weight. The cessation of conduct involving dishonesty or questionable judgment upon discovery is of no great consequence.

When discussing the severity of the 1990 incident, Applicant states that a single photo found on a floppy disk was conceded not to be obscene and not pornographic. He then asserts that any presumption that the photos downloaded by Applicant were both obscene and pornographic is clearly speculative in the absence of any physical evidence. The Administrative Judge addressed this issue in his decision and stated that he was reasonably satisfied, based on the statement of witnesses included in the investigation, that the materials were pornographic or obscene. A review of the record evidence indicates that the Judge's finding was reasonable.

The evidence before the Administrative Judge included the company's conclusion that Applicant's 1990 actions were serious enough to justify suspending him for one day without pay. Applicant's characterization of his activity as a minor indiscretion is merely his interpretation of the record evidence. The arguments Applicant articulates fall short of establishing that the Judge committed error in his characterization of the incident or the weight he accorded it in his overall decision.

e. Administrative Judge erred by concluding Applicant's conduct in 1990 and 1998 constituted a pattern. Applicant contends that any connection between the events of 1990 and 1998 is extremely weak and does not constitute a pattern that can be the basis for finding a security risk. The Administrative Judge indicated very explicitly in his decision what he considered the common link between the two incidents, namely the fact that they both involved misuse of company time. This link was the basis of the Judge's conclusion that the 1990 conduct was not isolated and had similarities to the 1998 conduct such that the 1990 conduct still raised residual security concerns regarding Applicant's judgment and trustworthiness. The Board finds the Judge's conclusions on this point reasonable and supported by the record. Notwithstanding the considerable distance in time between the two periods of misconduct, Applicant's actions were sufficiently similar to justify the Administrative Judge's conclusion that they constituted a pattern.

f. Allegations made against Applicant were unsubstantiated. Applicant asserts that certain portions of the internal company investigation relating to both the 1990 and the 1998 incidents contained misconduct allegations against him that were unsubstantiated. Specifically, Applicant maintains that, with the exception of his possession one picture on one floppy disk, the allegations about his 1990 involvements with sexually explicit materials came from co-workers and was unsubstantiated. Regarding the 1998 misconduct, Applicant maintains that the Judge's decision placed too great a reliance on the unsubstantiated allegations of an unnamed co-worker about many of the details of his alleged wrongdoing. Because of the unsubstantiated nature of the allegations, Applicant argues that the Administrative Judge should have applied Personal Conduct Mitigating Condition 1 ⁽¹⁾ to Applicant's benefit in his decision.

A significant portion of the Administrative Judge's findings of fact are based on the internal company investigation which was introduced as evidence in the case in the form of a certified results of record review. (2) The investigation included internal company interviews with co-workers of the Applicant plus review of company records and computer material. Some of the evidence in the report came from multiple sources and was, in effect, corroborated. Other evidence was not corroborated. While lack of corroboration can be a factor in evaluating the reliability or weight of evidence, lack of corroboration does not automatically render a piece of evidence suspect, unreliable, or incredible. Applicant errs in equating uncorroborated evidence with unsubstantiated evidence. Evidence that lacks corroboration must be evaluated in terms of its intrinsic believability and in light of all the other evidence of record, including evidence that tends to support it as well as evidence that tends to detract from it.

The assigning of appropriate weight to the multiple pieces of evidence contained in the company report was the specific province of the Administrative Judge. The Board will not disturb that weighing process absent an indication that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. In this case, the internal company report contained sufficient indicia of reliability that the Administrative Judge could reasonably rely on it in making his findings of fact. His findings of fact are supported by the record. The Judge was not obligated to apply Personal Conduct Mitigating Condition 1. The Applicant has failed to meet his burden of establishing that the Judge erred.

g. The Administrative Judge did not apply a whole person analysis as required by the Directive. Most of Applicant's arguments in support of his contention that the Judge failed to apply a whole person analysis parallel arguments that he made elsewhere in his brief and which have been discussed in other parts of this decision. Three additional arguments proffered by Applicant that relate to whether the Judge applied a whole person analysis are: (i) Applicant's misconduct in 1991 paled in comparison to the conduct of other employees who were investigated; (ii) viewed in the context of Applicant's overall conduct and job performance, the 1990 and 1998 incidents were infrequent; and (iii) Applicant has demonstrated technical competence and his misconduct in 1990 and 1998 is "offset" by his outstanding and unblemished performance.

Applicant's first argument is premised on the notion that his conduct is ameliorated by the more substantial misconduct of others. At issue in this case is the security significance of Applicant's conduct, not the conduct of others. Therefore, the conduct of others and how management might have viewed that conduct in contrast to Applicant's conduct are not relevant factors for the Judge's consideration.

As the last two arguments are closely related, they may be discussed together. The Administrative Judge spent a significant part of his decision discussing Applicant's accomplishments and job performance history. Thus, it is untenable to argue that he did not consider evidence that was favorable to Applicant as well as derogatory evidence. When deciding this case it is clear that he weighed the two instances of misconduct in 1990 and 1998 against the favorable evidence of record. In the final analysis, the Judge concluded that Applicant's favorable attributes and mitigating evidence fell short of establishing his ultimate burden under the whole person concept. A review of the record leads the Board to conclude the Judge applied the whole person concept in a manner that is reasonable given the evidence in this case.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error that warrants remand or reversal. Accordingly, the Board sustains the March 25, 2002 decision of the Administrative Judge.

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. "The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability."
2. The certified results of record review was entered into the record as part of Government Exhibit 3. That exhibit also contained a stipulation of fact between parties indicating that the certified results was an accurate, verbatim transcription of company records regarding the investigation.