

DATE: March 22, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-05110

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Juan J. Rivera, Esq., Department Counsel

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

Neal A. Connors, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated November 29, 2002 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline E (Personal Conduct), Guideline J (Criminal Conduct), and Guideline D (Sexual Behavior). Administrative Judge Kathryn Moen Braeman issued an unfavorable security clearance decision dated August 21, 2003.

Applicant appealed the Administrative Judge's unfavorable decision. The Board has jurisdiction under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

The following issues have been raised on appeal: (1) whether DOHA failed to provide adequate notice to Applicant that it was basing its intent to deny his clearance on Guideline I (Emotional, Mental, and Personality Disorders); (2) whether the Administrative Judge arbitrarily required Applicant to provide evidence of his having received therapy or some form of counseling; and (3) whether the Administrative Judge erred in concluding that Applicant had failed to provide sufficient evidence of his criminal rehabilitation. For the reasons that follow, the Board affirms the Administrative Judge's 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. 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 the rulings or conclusions of an Administrative Judge are challenged, the Board must consider whether they are: (1) arbitrary or capricious; or (2) contrary to law. Directive, Additional Procedural Guidance, Item E3.1.32.3. In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's

decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See, e.g.*, ISCR Case No. 97-0435 (July 14, 1998) at p. 3 (citing Supreme Court decision). In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. Compliance with state or local law is not required because security clearance adjudications are conducted by the Department of Defense pursuant to federal law. *See* U.S. Constitution, Article VI, clause 2 (Supremacy Clause). *See, e.g.*, ISCR Case No. 00-0423 (June 8, 2001) at p. 3 (citing Supreme Court decisions).

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, and whether the Judge's findings reflect a reasonable interpretation of the record evidence as a whole. Although a Judge's credibility determination is not immune from review, the party challenging a Judge's credibility determination has a heavy burden on appeal.

When an appeal issue 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).

If an appealing party demonstrates factual or legal error, then the Board must consider the following questions:

Is the error harmful or harmless? *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine);

Has the nonappealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds? *See, e.g.*, ISCR Case No. 99-0454 (October 17, 2000) at p. 6 (citing federal cases); and

If the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded? (Directive, Additional Procedural Guidance, Items E3.1.33.2 and E3.1.33.3).

Appeal Issues [\(1\)](#)

The Administrative Judge found that over a period of six months in 1996-1997 Applicant knowingly entered the property of his neighbor for a lewd purpose and looked into the bedroom window of the neighbor's teenage daughter where he observed her in various stages of undress. The Judge also found that, at one point, Applicant engaged in deception of the girl's family and the girl by pretending to want to help them catch the perpetrator after they became aware of the problem. The Administrative Judge found that Applicant was eventually apprehended and convicted of a misdemeanor for his actions. The Judge acknowledged that some evidence in mitigation was relevant to the case but because Applicant had not sought therapy or counseling, the mitigating evidence present in the case was insufficient to overcome the government's security concerns.

1. Whether DOHA failed to provide adequate notice to Applicant that it was basing its intent to deny his clearance on Guideline I (Emotional, Mental, and Personality Disorders). Applicant contends that DOHA failed to provide adequate notice to him in the November 29, 2002 SOR of its intent to deny or revoke his access to classified information based on Guideline I (Emotional, Mental, and Personality Disorders) because it failed to notify him that whether or not there was evidence of successful rehabilitation, therapy, counseling or evaluation would be a basis for determining whether Applicant should retain his security clearance. Applicant's argument lacks merit. DOHA is required to provide an applicant with a written SOR that is as detailed and comprehensive as the national security permits. *See* Directive, Additional Procedural Guidance, Item E3.1.3. Although an SOR is an administrative pleading that is not held to the

strict requirements of a criminal indictment, an applicant is entitled to receive adequate notice of the allegations against him. *See, e.g.*, ISCR Case No. 01-17539 (May 2, 2003) at p. 5 n. 5. In this case, Applicant was provided with an SOR which placed him on reasonable notice that his illicit sexual behavior was a matter of security concern.

Applicant also argues that the Administrative Judge erred by relying on Guideline I (Emotional, Mental, and Personality Disorders) even though Guideline I was not alleged in the SOR. That argument lacks merit.

Although the decision below does not appear to rely on Guideline I (Emotional, Mental, and Personality Disorders), it cites (twice) the following language from a footnote to Guideline D which reads as follows: "The adjudicator should also consider guidelines pertaining to criminal conduct (Guideline J) and emotional, mental, and personality disorders (Guideline I) in determining how to resolve the security concerns raised by sexual behavior." That footnote can be found at Directive, Enclosure 2, Attachment 4.⁽²⁾ The SOR issued to Applicant placed him on notice that DOHA proposed to deny or revoke access to classified information based, in part, on Guideline D (Sexual Behavior). Although an SOR must place an applicant on reasonable notice of the allegations against the applicant, it need not cite or quote every provision of the Directive that could be pertinent to the adjudication of the applicant's case.⁽³⁾ The footnote to Guideline D is not nullified or rendered inoperative just because it is not cited or quoted in an SOR with allegations based on Guideline D. Given the footnote to Guideline D, Applicant was on sufficient notice that the conduct alleged in the SOR under Guideline D might be evaluated under Guideline I.

2. Whether the Administrative Judge arbitrarily required Applicant to provide evidence of his having received therapy or some form of counseling. Applicant argues that the Administrative Judge placed undue emphasis on the fact that he had not sought therapy and that the weight she accorded this aspect of the case was arbitrary because: (a) there was no evidence of record that Applicant suffered from any mental or psychological condition; and (b) he had successfully completed court ordered supervision (of ninety days duration with no evidence of what the supervision entailed) prior to the criminal charge being dismissed. Resolution of this appeal issue requires a discussion of Applicant's burden of persuasion under the Directive and the requirements of a security clearance decision.

If there is admitted or proven conduct that raises security concerns, then an applicant has the burden of presenting evidence sufficient to warrant a favorable security clearance decision. *See* Directive, Additional Procedural Guidance, Item E3.1.15. Under the Directive, security clearance decisions are not reduced to mechanical, formula adjudication; nor are they left to the unfettered discretion of security clearance adjudicators. Rather, in deciding whether an applicant has met that burden of persuasion, an Administrative Judge must:

- (a) consider the record evidence as a whole⁽⁴⁾;
- (b) make findings of fact that reflect a reasonable sense interpretation of the record evidence as a whole⁽⁵⁾;
- (c) assess the particular facts and circumstances of an applicant's case under the general factors of Directive, Section 6.3 and Enclosure 2, Item E2.2.1;
- (d) apply Adjudicative Guidelines disqualifying and mitigating conditions that are appropriate to the facts and circumstances of the case⁽⁶⁾;
- (e) exercise sound judgment in the evaluation of the pertinent factors⁽⁷⁾;
- (f) draw reasonable inferences and conclusions about the security concerns raised by an applicant's conduct and circumstances that take into account the totality of the record evidence, both favorable and unfavorable⁽⁸⁾; and
- (g) make a reasoned decision as to whether an applicant has met his or her burden of demonstrating that it is clearly consistent with the national interest to grant or continue a security clearance for the applicant.⁽⁹⁾

Given the record evidence in this case, the Administrative Judge reasonably concluded that Applicant had the burden of persuasion as to obtaining a favorable security clearance decision. The Judge had to consider the record evidence as a

whole (both favorable and unfavorable), evaluate the facts and circumstances of Applicant's past conduct and current circumstances in light of pertinent provisions of the Directive, and decide whether Applicant had met his burden of persuasion under Directive, Additional Procedural Guidance, Item E3.1.15. In deciding whether Applicant had met his burden of persuasion under Item E3.1.15, the Judge reasonably could consider whether Applicant presented evidence that was indicative of extenuation, mitigation, changed circumstances, or reform and rehabilitation.

Applicant's appeal arguments raise a serious issue, but they fail to demonstrate the Administrative Judge erred. The Board has held that a Judge cannot create a new mitigating condition (beyond those listed in the Directive) and make compliance with that judicially-created mitigating condition a prerequisite for a favorable security clearance decision. *See, e.g.*, ISCR Case No. 98-0066 (August 28, 1998) at pp. 2-3. However, the Directive explicitly requires a Judge to take into consideration the "[a]bsence or presence of rehabilitation" (Directive, Section 6.3.5) and "[t]he presence or absence of rehabilitation and other pertinent behavioral changes" (Directive, Enclosure 2, Item E2.2.1.6). Because an applicant has the burden of persuasion under Directive, Additional Procedural Guidance, Item E3.1.15, and because Section 6.3.5 and Item E2.2.1.6 specifically refer to the presence or absence of rehabilitation, it is not arbitrary, capricious, or contrary to law for a Judge to take into consideration the presence or absence of evidence supportive of an applicant's claim of reform and rehabilitation. ⁽¹⁰⁾

Administrative Judges cannot impose their own notions of the specific kinds of treatment, counseling or other rehabilitation that an applicant must demonstrate in order to meet the applicant's burden of persuasion under Directive, Additional Procedural Guidance, Item E3.1.15. However, in assessing whether an applicant has met his or her burden under Item E3.1.15, Judges can consider whether an applicant has presented any evidence of treatment, counseling, or other form of rehabilitative action that is reasonably related to the kind of conduct or circumstances that form the basis for the particular security concerns in the case before them. While the presence or absence of such evidence is not dispositive, ⁽¹¹⁾ it is not arbitrary, capricious, or contrary to the Directive for the Judge to consider the presence or absence of such evidence.

The fact that Applicant had not already been diagnosed with an emotional or mental health issue did not preclude the Judge from taking into account the lack of seeking therapy in this case. Given the aberrational nature of Applicant's conduct, the fact that it was repeated over a period of several months, and the fact that Applicant actively deceived the victim and the victim's family by pretending to help them prevent further incidents while, in fact, he was the perpetrator, the Judge's concerns about the possibility of an undiagnosed and unresolved emotional or mental health problem were reasonable. ⁽¹²⁾ The fact that Applicant had completed court-ordered supervision was a factor that the Administrative Judge was required to consider in her evaluation of the case, but it did not require her to conclude that Applicant had been successfully rehabilitated and it does not detract from her conclusion that the evidence of rehabilitation fell short of overcoming the security concerns raised by the overall facts and circumstances of Applicant's criminal sexual misconduct.

3. Whether the Administrative Judge erred in concluding that Applicant failed to provide sufficient evidence of rehabilitation. Applicant points to favorable evidence of record, including the facts that his criminal activity occurred six years ago and there have been no subsequent arrests, his completion of supervision and the dismissal of the criminal charge, his successful marriage of 26 years, his successful military career, his long history of holding a security clearance, his favorable performance evaluations and favorable recommendations from co-workers and superiors, and his standing in the community. Relying on that favorable evidence, Applicant asserts the Administrative Judge erroneously concluded that he had failed to provide sufficient evidence in mitigation. Applicant concedes that the Judge acknowledged the passage of time since the incidents and the fact that there was no evidence of subsequent misconduct. However, Applicant argues that the Judge erroneously discounted that favorable evidence and that she disregarded or ignored the mitigating evidence he presented.

There is a rebuttable presumption that the Administrative Judge has considered all the evidence presented. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. In this case, the Judge cited the factors that Applicant acknowledges are in the decision, and there is no indication that the Judge did not consider other favorable evidence presented by the Applicant. An Administrative Judge is not required to cite every piece of evidence that he or she relies upon in reaching a decision. A reading of the Administrative Judge's decision in this case, which includes a discussion of favorable evidence presented by Applicant, convinces the Board that the Judge considered mitigating evidence and did not simply

ignore it.

The fact that the mitigating evidence presented by Applicant did not lead the Judge to the decision desired by Applicant does not establish error. The Judge must weigh the record evidence as a whole and decide whether the unfavorable evidence outweighs the favorable evidence or *vice versa*, and whether under the totality of the facts and circumstances of an applicant's case the applicant has met his or her burden of persuasion under Directive, Additional Procedural Guidance, Item E3.1.15. Applicant had failed to demonstrate the Judge acted in a manner that is arbitrary, capricious, or contrary to law when she weighed the record evidence as a whole and concluded Applicant had not satisfied his burden of persuasion under Item E3.1.15.

Conclusion

Applicant has failed to demonstrate error below. Accordingly, the Administrative Judge's security clearance decision is affirmed.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

1. The Administrative Judge entered a formal finding in favor of Applicant with respect to SOR paragraph 1.a. That favorable formal finding is not at issue on appeal.
2. Although the decision below uses the language of the Guideline D footnote twice, the decision below does not identify the source of that language as being the Directive.
3. The silence of an SOR concerning pertinent provisions of the Directive (*e.g.*, Directive, Section 6.3; Enclosure 2, Item E2.2.2; Adjudicative Guidelines disqualifying and mitigating conditions) does not render those provisions irrelevant or legally inapplicable to the adjudication of an applicant's case.
4. Directive, Section 6.3 and Enclosure 2, Item E2.2.1.
5. Directive, Additional Procedural Guidance, Item E3.1.25 and Item E3.1.32.1.
6. Directive, Section 6.3 and Additional Procedural Guidance, Item E3.1.25.
7. *See, e.g.*, ISCR Case No. 01-27371 (February 19, 2003) at pp. 3-4. If no specific Adjudicative Guidelines

disqualifying or mitigating condition applies to the particular facts and circumstances of an applicant's case, the Administrative Judge must still evaluate the applicant's conduct and circumstances under the general factors of Directive, Section 6.3 and Enclosure 2, Item E2.2.1. *See, e.g.*, ISCR Case No. 97-0765 (December 1, 1998) at p. 6 (Judge can analyze case under general factors of Directive, Section F.3 if an Adjudicative Guidelines mitigating condition does not apply); DOHA Case No. 91-0418 (September 22, 1995) at p. 6 (where Adjudication Policy is silent on subject of time periods, the Judge can consider that aspect of the case under recency factor of Section F.3); DISCR Case No. 93-0933 (May 31, 1994) at p. 4 ("Apart from considering pertinent Adjudication Policy factors, the Administrative Judge must consider the record as a whole and evaluate Applicant's security eligibility in light of the Directive's Section F.3 factors."). In the cited Board decisions, the Adjudication Policy was the predecessor to the current Adjudicative Guidelines, and the Section F.3. was the predecessor to Section 6.3 and Item E2.2.1.

8. Directive, Enclosure 2, Item E2.2.1. *See, e.g.*, ISCR Case No. 00-0489 (January 10, 2002) at p. 13; ISCR Case No. 98-0743 (October 15, 1999) at pp. 2-3.

9. The parameters of an applicant's burden of persuasion as to obtaining a favorable security clearance decision are set by Executive Order 10865 and the Directive. Under Executive Order 10865, Section 2 and the Directive (Section 4.2 and Additional Procedural Guidance, Item E3.1.25), a favorable security clearance should not be made unless there is a determination that it would be clearly consistent with the national interest to grant or continue access to classified information for a particular applicant.

10. In general, an Administrative Judge should not make findings or draw conclusions based on the absence of record evidence; however, that general proposition does not preclude a Judge from considering whether a party with the burden of proof on an issue has presented evidence to satisfy that burden of proof. *See, e.g.*, ISCR Case No. 99-0597 (December 13, 2000) at p. 7 n. 9. Also, there can be situations where a Judge reasonably may consider the absence of corroborating evidence. *See, e.g.*, ISCR Case No. 01-22566 (June 26, 2003) at p. 3.

11. The Board has held that Administrative Judges should not require a party in these proceedings to present a particular form of evidence in support of its case. *See, e.g.*, ISCR Case No. 98-0066 (August 28, 1998) at p. 2 ("However, Applicant's failure to present the best possible evidence of extenuation or mitigation does not relieve the Judge of his obligation to consider whether Applicant presented evidence of reform and rehabilitation sufficient to warrant a favorable decision."); ISCR Case No. 94-1055 (May 8, 1996) at p. 3 ("Nothing in the Directive requires Department Counsel to prove its case against an applicant through any specific form of evidence.").

12. Applicant asserts on appeal that his criminal activity was a "one-time" incident and that the Administrative Judge characterized it as such in her decision. Neither assertion is supported by the record.