

DATE: April 3, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-12199

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Francisco Mendez, Esq., Department Counsel

FOR APPLICANT

Mark F. Riley, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 17, 2003, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline D (Sexual Behavior) and Guideline E (Personal Conduct), pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On January 29, 2004, after the hearing, Administrative Judge James A. Young granted Applicant's request for a security clearance. Department Counsel appealed the Judge's favorable decision ("Initial Decision").

On October 7, 2004, the Board remanded the case to the Administrative Judge for issuance of a new decision after correction of the errors identified on appeal. The Judge issued a favorable remand decision on January 3, 2005 ("First Remand Decision"). Department Counsel appealed the Judge's First Remand Decision.

On August 8, 2005, the Board remanded the case to the Administrative Judge again for issuance of a new decision after correction of the errors identified on the second appeal. The Judge issued a favorable remand decision on September 20, 2005 ("Second Remand Decision"). Department Counsel timely appealed the Second Remand Decision pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel has raised the following issues on appeal: (1) whether the Administrative Judge's findings of fact are not supported by the record evidence; (2) whether the Administrative Judge erred by resolving doubts regarding Applicant's security eligibility in favor of Applicant rather in favor of the national security; and (3) whether the Administrative Judge's conclusions under Guideline E (Personal Conduct) are arbitrary, capricious, or contrary to law. We affirm the Administrative Judge's Second Remand Decision.

I. Whether the Record Supports the Administrative Judge's Factual Findings

A. Facts

The Administrative Judge made the following pertinent findings of fact:

Applicant downloaded on his home computer more than 1,000 pornographic images of women. He downloaded the images of naked women with newsreader software. Some of the images downloaded contained children, but the children

were not engaged in sexually explicit activities, but were merely children and their families at nudist resorts and beaches.

During a November 2000 security interview, Applicant told a National Security Agency (NSA) investigator that he had downloaded on his personal computer nude images of female children, ranging in age from 4 to 17 years old, in non-suggestive poses and without any type of sexual activity shown. Applicant saved on his computer's hard drive images of the females looking about 15 years old and deleted the other images. In February or March 2000, Applicant deleted all the images of juvenile females from his computer because his wife was pregnant.

During the NSA security interview, Applicant used the phrase "child pornography" when describing the images of nude children that he downloaded. Because the images of children Applicant downloaded did not involve sexually explicit conduct, Applicant did not download or possess child pornography.

Applicant was embarrassed by his conduct and kept it from his wife. The last time that Applicant downloaded pictures of naked women and children was in 1999 or 2000. Because Applicant has told his wife, his family, his employer and his friends that he downloaded such images on his personal computer, his conduct can no longer be used to coerce or exploit him.

Because Applicant did not download child pornography on his personal computer at home, he did not falsify material facts in a sworn statement he gave to a Defense Security Service (DSS) investigator in February 2002.

B. Discussion

The Appeal Board's review of the Administrative Judge's finding of facts is limited to determining if they are supported by substantial evidence--such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record." Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620-21, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966)). In evaluating the Administrative Judge's finding, we are required to give deference to the Administrative Judge's credibility determinations. Directive ¶ E3.1.32.1.

Department Counsel contends the Administrative Judge's favorable findings of fact are not supported by the record evidence because: (a) the Judge failed to give proper weight to certain exhibits; and (b) the Judge failed to take into account Applicant's contradictory statements about his conduct. Department Counsel makes various arguments for why the Judge should have weighed the record evidence differently. In response, Applicant sets forth several arguments in support of the Judge's weighing of the record evidence.

The Board will not disturb an Administrative 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. The mere fact that there is conflicting record evidence is not dispositive. A Judge must weigh the conflicting record evidence and make pertinent findings of fact. We do not have to agree with the Judge's findings of fact to conclude Department Counsel has not met its burden of persuasion on appeal. The Judge's findings of fact in this case reflect a legally permissible interpretation of the record evidence.

II. Whether the Record Supports the Administrative Judge's Ultimate Conclusions.

An Administrative Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Appeal Board may reverse the Administrative Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. Our scope of review under this standard is narrow and we may not substitute our judgment for that of the Administrative Judge. We may not set aside an Administrative Judge's decision "that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency ..." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42. We review

matters of law *de novo*.

Department Counsel raises two challenges to the Administrative Judge's conclusions in this case: (a) Department Counsel asserts the Judge erred by resolving doubts regarding Applicant's security eligibility in favor of Applicant rather than in favor of the national security; and (b) Department Counsel contends the Judge's conclusions under Guideline E (Personal Conduct) are arbitrary, capricious, and contrary to law.

(a) Department Counsel's first claim of error is not well-founded. That claim of error focuses on language that appears in the Administrative Judge's Initial Decision and the First Remand Decision, but that does not appear in the Second Remand Decision. The Judge's Second Remand Decision is being currently appealed, not his Initial Decision or his First Remand Decision. The current appeal is not an appropriate vehicle for Department Counsel to challenge language that does not appear in the decision now being appealed to the Board.⁽¹⁾ Because the Judge's challenged language is not properly before the Board in this appeal, the Board will not address the merits of Department Counsel's argument concerning that language.

(b) In challenging the Administrative Judge's conclusions under Guideline E, Department Counsel: (i) incorporates by reference its appeal arguments from the second appeal (February 17, 2005 Appeal Brief at pp. 26-29); (ii) asserts the Judge admitted Exhibits 2d, 2g, and 2i as substantive evidence, but erred by giving them "practically nil" weight for the "same improper reasons the Judge had given for refusing to admit the exhibits as substantive evidence in the first place"; (iii) claims the Judge's analysis of Personal Conduct Disqualifying Condition 3 was arbitrary and capricious; and (d) argues the Judge's overall resolution of the security concerns raised under Guideline E was arbitrary and capricious.

(b)(i) Department Counsel's first contention is not persuasive because it assumes that evidence which is sufficient to satisfy its obligation to present evidence supporting a controverted SOR allegation requires the Administrative Judge to find against the applicant. Even if Department Counsel establishes a *prima facie* case, it does not follow that a Judge must find against the applicant.⁽²⁾ In this case, Department Counsel presented evidence sufficient to establish a *prima facie* case in support of the controverted SOR allegation. However, that *prima facie* case did not preclude the Judge from considering the evidence presented by Applicant to refute, rebut, or explain the evidence presented by Department Counsel. *See* Directive ¶E3.1.15. Moreover, the *prima facie* case presented by Department Counsel did not preclude the Judge from making findings and reaching conclusions favorable to Applicant.

Applicant's admissions to the NSA polygrapher were relevant and material evidence that the Administrative Judge had to consider. However, there is no legal rule that dictates whether the Judge should accept or reject Applicant's explanation and partial recantation of those admissions.⁽³⁾ Rather, the Judge had to consider the evidence as a whole (including his assessment of the credibility of Applicant's hearing testimony) and make findings of fact. The Board does not have to agree with the Judge to conclude it was legally permissible for him to accept Applicant's explanation and partial recantation of his admissions to the NSA polygrapher.

(b)(ii) Department Counsel's argument concerning Exhibits 2d, 2g, and 2i fails to take into account the important distinction between (1) the admissibility of evidence and (2) the weighing of evidence.⁽⁴⁾ The Board's earlier ruling that the Judge excluded Exhibits 2d, 2g, and 2i for legally erroneous reasons did not preclude the Judge from weighing of those three exhibits. Just because the Judge erred by using weighing considerations to improperly exclude the three exhibits from consideration as substantive evidence, it does not follow that the Judge erred by using those considerations to decide what weight should be given to the three exhibits. Even though the reasons the Judge gave for excluding the three exhibits were not proper reasons for excluding them under Federal Rule of Evidence 803(8),⁽⁵⁾ those reasons were legally permissible considerations when weighing them as substantive evidence.⁽⁶⁾ Furthermore, although the three exhibits were admissible and the Judge had to consider them as substantive evidence under Federal Rule of Evidence 803(8), it does not follow that the Judge was compelled to give full or great weight to those three exhibits.

(b)(iii) Department Counsel contends the Administrative Judge erred by concluding Applicant's conduct did not warrant application of Personal Conduct Disqualifying Condition 3 ("Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other

official representative in connection with a personnel security or trustworthiness determination"). The thrust of this contention is the Judge erred by finding Applicant did not engage in falsification as alleged in SOR paragraph 2.a.

Department Counsel makes an argument for a plausible, alternate interpretation of the record evidence. But, such an argument -- standing alone -- is not sufficient to demonstrate the Judge erred. As noted earlier, there is no rule of law that compels a Judge to accept or reject Applicant's explanation and partial recantation of his admissions to the NSA polygrapher. Since it was legally permissible for the Judge to accept Applicant's explanation and partial recantation of his admissions to the NSA polygrapher, it was legally permissible for the Judge to conclude Applicant's explanation and partial recantation of his admissions to the NSA polygrapher warranted a finding of no falsification as alleged in SOR paragraph 2.a.

Department Counsel also claims the Administrative Judge impermissibly used a credibility determination as a substitute for record evidence. This claim lacks merit. Department Counsel clearly disagrees with the Judge's acceptance of Applicant's hearing testimony. However, we do not read the Judge's decision as using his favorable credibility determination as a substitute for record evidence. Rather, the Judge used his favorable credibility determination to make findings of fact in the face of conflicting record evidence. We do not have to agree with the Judge's favorable credibility determination to conclude he did not use it in a legally impermissible manner. As discussed earlier in this decision, there is no rule of law that compels the Administrative Judge to accept or reject Applicant's explanation and partial retraction of his admissions to the NSA polygrapher. It was legally permissible for the Judge to rely on his favorable credibility determination as a basis to accept Applicant's explanation and partial retraction of his admissions to the NSA polygrapher.

(b)(iv) Department Counsel's last argument fails to demonstrate the Administrative Judge's conclusions under Guideline E are arbitrary, capricious, or contrary to law. It is not persuasive for Department Counsel to argue that even if the Judge properly concluded that Applicant did not view child pornography online the Judge should still have concluded Applicant had not mitigated the security concerns raised under Guideline E. If the Judge's findings that Applicant did not download child pornography and did not commit a falsification are sustainable, then Department Counsel's expression of disapproval over Applicant viewing legal pornography in the privacy of his home on his home computer does not provide a sufficient basis for concluding the Judge's decision is arbitrary, capricious, or contrary to law.

Order

The judgment of the Administrative Judge granting Applicant a clearance is **AFFIRMED**.

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Concurring Opinion of Chairman Emilio Jaksetic:

When considering whether an Administrative Judge's challenged findings of fact are supported by the record evidence, I do not have to decide whether I agree with the Judge's findings of fact. Rather, what I have to do is consider whether the record evidence, as a whole, provides a sufficient evidentiary basis for a reasonable trier of fact to make findings of fact

like those the Judge did make. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1. Although the Judge was faced with conflicting record evidence in this case, the Judge was faced with the task of making findings of fact about some rather basic questions: Did Applicant download child pornography on his home computer several years ago (as alleged in SOR paragraph 1.a)? Did Applicant falsify material facts about his conduct in a February 2002 written statement (as alleged in SOR paragraph 2.a)?

An Administrative Judge's responsibility to make pertinent findings of fact⁽⁷⁾ is not diminished by the presence of conflicting record evidence. A Judge is not always faced with record evidence that points all in one direction. Indeed, it is not unusual to see DOHA cases where the record evidence is susceptible to more than one plausible interpretation.⁽⁸⁾ Department Counsel makes a plausible argument for why the Judge should have weighed the evidence differently and should have made different findings of fact than he did. Applicant's counsel likewise makes a plausible argument for why the Judge's weighing of the record evidence was reasonable and why the Judge's findings of fact reflect a plausible interpretation of the record evidence. Because the Directive does not authorize the Board to engage in a *de novo* weighing of the record evidence, the Board should not disturb the Judge's challenged findings unless there has been a showing that the Judge chose an interpretation that does not reflect a reasonable interpretation of the record evidence as a whole. In view of the foregoing, I agree with my colleagues that Department Counsel has not satisfied its burden on appeal with respect to the Judge's challenged findings of fact.

I agree with my colleagues' discussion and resolution of Department Counsel's challenge to language that appeared in the Administrative Judge's Initial Decision and First Remand Decision but not in his Second Remand Decision.

Department Counsel met its burden of presenting a *prima facie* case in support of the controverted allegations.⁽⁹⁾ Applicant responded by presenting evidence to refute, rebut, or explain the evidence presented against him.⁽¹⁰⁾ The Administrative Judge had to consider the record evidence as a whole and decide whether Applicant's evidence was sufficient to refute, rebut, or explain the evidence presented against him. Department Counsel clearly disagrees with the Judge's conclusion that Applicant successfully met his burden of persuasion, but Department Counsel has failed to demonstrate the Judge's conclusion is arbitrary, capricious, or contrary to law. Accordingly, I concur with my colleagues' conclusion that it was legally permissible for the Judge to accept Applicant's explanation and partial recantation of his admissions to the NSA polygrapher. It is legally irrelevant whether I would have reached the same conclusion in this case if I were in the position of the Hearing Office Judge.

I also agree with my colleagues' discussion and resolution of the appeal issues concerning: (a) the Administrative Judge's weighing of Exhibits 2d, 2g, and 2i; (b) the application of Personal Conduct Disqualifying Condition 3; and (c) the Judge's use of his credibility determination.

Department Counsel's final argument seems to be asking the Board to reverse the Administrative Judge's decision on grounds not alleged in the SOR.⁽¹¹⁾ Since the Judge's findings of fact are sustainable, and since the Judge's favorable conclusions are not arbitrary or capricious in light of the Judge's findings of fact, it would be unwarranted for the Board to reverse the Judge's decision. Accordingly, I concur with my colleagues that Department Counsel has not shown that the Judge's favorable conclusions under Guideline E should be reversed.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

1. *See, e.g.*, ISCR Case No. 98-0066 at 4 (App. Bd. Feb. 9, 1999)("The Remand Decision supersedes the Judge's May 11, 1998 decision. Accordingly, the Board will not find the Judge erred based on a statement from his first decision that does not appear, expressly or impliedly, in the Remand Decision.")(citations omitted).

2. *See, e.g.*, ISCR Case No. 03-05007 at 3 (App. Bd. Sep. 16, 2004); ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9,

2004).

3. *See, e.g.*, DISCR Case No. 93-1234 at 6 (App. Bd. May 19, 1995)("Although Applicant was not precluded from seeking to explain or retract his earlier admissions about the security violations, the Judge was not bound, as a matter of law, to accept his explanations or retractions. At most, Applicant's explanations or retractions of his earlier admissions were evidence to be considered by the Judge in light of the record evidence as a whole and his assessment of Applicant's credibility. If the Judge found Applicant's explanations or retractions reasonable and credible, then he could have accepted them. Here, however, the Judge found those explanations or retractions not to be reasonable or credible. Nothing in the record evidence persuades us the Judge's choice in this matter was arbitrary, capricious, or contrary to law.").

4. *See, e.g.*, ISCR Case No. 02-02892 at 4 (App. Bd. Jun. 28, 2004)(noting the admissibility of evidence is separate and distinct from the weighing of admitted evidence).

5. *See* Appeal Board Decision and Remand Order (August 8, 2005) at 4-6.

6. *Cf.* Advisory Committee's Note to Federal Rule of Evidence 401 (noting the need for "avoiding confusion between questions of admissibility and questions of the sufficiency of the evidence").

7. *See* Directive, Additional Procedural Guidance, Item E3.1.25.

8. *See, e.g.*, ISCR Case No. 02-09892 at 5 (App. Bd. Jul. 15, 2004).

9. *See* Directive, Additional Procedural Guidance, Item E3.1.14.

10. *See* Directive, Additional Procedural Guidance, Item E3.1.15.

11. SOR paragraph 2.b alleges the conduct covered by SOR paragraph 1.a demonstrates poor judgment, unreliability, and unreliability under Guideline E (Personal Conduct). Since the gravamen of the SOR was that Applicant downloaded child pornography and later falsified material facts about that misconduct in a February 2002 written statement, the Judge's favorable findings as to those two allegations had the practical effect of leaving SOR paragraph 2.b devoid of any meaningful substance.