

DATE: September 9, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-15074

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Administrative Judge Elizabeth M. Matchinski issued a decision, dated June 4, 2003, in which she concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant 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.

Applicant's appeal presents the following issue: whether the Administrative Judge failed to apply the "whole person" concept in making her overall security clearance decision. For the reasons that follow, the Board affirms the Administrative Judge's decision.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated October 15, 2002. The SOR was based on Guideline D (Sexual Behavior) and on Guideline J (Criminal Conduct). The Judge made unfavorable formal findings against Applicant on both Guidelines and the subparagraphs within each. The case is before the Board on Applicant's appeal.

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 Issue

Whether the Administrative Judge failed to apply the "whole person" concept in making her overall security clearance decision. On appeal, Applicant does not challenge the Administrative Judge's findings of fact about his sexual misconduct with his minor daughter, and his felony conviction for illegal sexual contact with a victim under the age of 16. However, Applicant contends that the Judge's decision does not discuss the good deeds that he introduced into evidence: 20 years of honorable Naval service; five good conduct awards; several flag officer commendation letters, and a Navy Achievement Medal. He also describes his post-hearing progress, including the recent approval of overnight visits in the household where his daughter is present, and asserts that his victim has forgiven him for his misconduct. We construe Applicant's argument to be that the Judge failed to apply the "whole person" concept in making her decision. ⁽¹⁾

Preliminarily, the Appeal Board is not permitted to consider Applicant's post-hearing progress or other new evidence. *See* Directive, Additional Procedural Guidance, Item E3.1.29.

Although an Administrative Judge must consider all record evidence, the Judge is not required to specifically discuss each and every piece of record evidence. Error is not demonstrated merely because Applicant can cite to portions of the record evidence that were not specifically discussed by the Judge. *See* ISCR Case No. 98-0809 (August 19, 1999) at p. 6. There is a rebuttable presumption that the Judge considered all of the record evidence unless otherwise stated. *See* ISCR Case No. 01-22566 (June 26, 2003) at p. 3. Additionally, the presence of favorable evidence does not compel a Judge to issue a favorable decision. The Judge must weigh the record evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. The fact that the Judge did not find evidence favorable to Applicant to be of sufficient weight to warrant a favorable security clearance decision does not mean that the Judge failed to consider that evidence.

The Judge specifically considered Applicant's Naval service. In page 2 of her Decision, the Judge found that Applicant retired in 1998 with an honorable discharge from a successful military career after 20 years of dedicated service to his country. Although the Judge did not specifically refer to Applicant's commendations and awards while in the Navy, her finding persuades the Board that the Judge considered the evidence Applicant submitted concerning his Navy career. But the existence of such favorable evidence does not preclude an adverse security decision. *See* ISCR Case No. 01-01642 (June 14, 2002) at p. 6. The Judge considered other favorable and unfavorable evidence, including Applicant's candid approach toward his problem and mixed evidence on the progress of his rehabilitation.

As noted earlier, Applicant has not challenged the Judge's findings of fact. Given those unchallenged findings of fact, there is a reasonable basis for the Judge to conclude that Applicant failed to meet the heavy burden of persuasion to demonstrate that granting him a security clearance would be clearly consistent with the national interest.

Conclusion

Applicant has failed to meet his burden of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's adverse security decision for the reasons stated herein.

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: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. Directive, Enclosure 2, Item E2.2.3 requires the Judge to make a security clearance decision based on an evaluation of the "whole person."