

DATE: July 16, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-22240

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

R. John Westberry, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued the Applicant a Statement of Reasons (SOR), dated August 18, 2003, which stated the reasons why DOHA proposed to deny or revoke Applicant's access to classified information. The SOR was based upon Guidelines J (Criminal Conduct) and E (Personal Conduct). Administrative Judge Henry Lazzaro issued an unfavorable security clearance decision, dated February 27, 2004.

Applicant appealed the Administrative Judge's unfavorable decision. The 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 issues: whether the Administrative Judge erred by concluding that the Guideline J and E allegations had not been refuted, extenuated, or mitigated. 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

Whether the Administrative Judge erred by concluding that the Guideline J (Criminal Conduct) and E (Personal Conduct) allegations had not been mitigated. On appeal, Applicant does not dispute the Judge's findings of fact with respect to Applicant's prior criminal conduct. Rather, Applicant contends that the security concerns raised by that conduct should have been mitigated under Criminal Conduct Mitigating Conditions 1, ⁽¹⁾

2, ⁽²⁾

4, ⁽³⁾

and 6, ⁽⁴⁾

and Personal Conduct Mitigating Condition 1. ⁽⁵⁾

In support of that contention, Applicant specifically argues: (1) that the December 2001 charge for Violation of Probation--Applicant's most recent allegation of misconduct--should not have been considered as part of his history of criminal activity because the charge had been dismissed, (2) his multiple instances of criminal activity constitute "an isolated incident" because Applicant has never committed any other criminal acts besides those alleged in the SOR, (3) his criminal conduct was the result of a "misperceived" relationship and is, therefore, not likely to reoccur, and (4) Applicant's completion of probation and counseling, his outstanding work performance, his character references, and his record of handling classified information without adverse incident, establish that he has been successfully rehabilitated and that his prior criminal conduct is not pertinent to a determination of his judgment, trustworthiness, or reliability. For the reasons set forth below, we conclude the Applicant has not demonstrated that the Judge erred.

The application of Adjudicative Guidelines disqualifying and mitigating conditions does not turn simply on a finding that one or more of them applies to the particular facts of a case. Rather, the application of a disqualifying or mitigating condition requires the exercise of sound discretion in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 01-14740 (January 15, 2003) at p. 7 (discussing various considerations that must be taken into account by an adjudicator when applying Adjudicative Guidelines disqualifying or mitigating conditions). Accordingly, the Judge could reasonably consider whether the evidence Applicant offered in mitigation was sufficient to overcome the security concerns raised by the recency and seriousness of Applicant's disqualifying conduct, and the manner in which he chose to deal with it. *See* ISCR Case No. 02-23073 (March 30, 2004) at p. 4. Although the Judge said Applicant failed to present evidence in mitigation, a review of the decision indicates that the Judge considered such evidence as Applicant's outstanding work performance, his laudatory character references, his participation in counseling and his probationary status, but nevertheless concluded that such evidence was insufficient to overcome the security concerns raised by: (1) the length, seriousness, and recency of Applicant's criminal conduct, (2) the fact that the last incident of criminal conduct had occurred after the Applicant had completed court-mandated psychological treatment, and (3) Applicant failure to follow through on the specific recommendations of the psychologist who evaluated him at his employer's insistence. Given the record evidence in this case, the Judge's conclusions about the Applicant's security suitability were not unreasonable. Therefore, his decision was not arbitrary, capricious or contrary to law.

Applicant's argument that his December 2001 charge for Violation of Probation should not have been considered as part of his criminal history because it was dismissed, is without merit. A Judge can find an applicant has engaged in criminal conduct even if the criminal charges against the applicant were dropped. *See* ISCR Case No. 01-12429 (January 15, 2003) at p. 5, n.4; ISCR Case No. 01-12452 (January 27, 2003). In this case, the Judge found that Applicant had committed the criminal acts alleged in the December 2001 charge, but that the charge had been dismissed on a technicality--the improper extension of Applicant's probation at a prior hearing. [\(6\)](#)

That finding was not challenged on appeal.

Similarly, Applicant's argument that his multiple instances of criminal activity constitute "an isolated incident" because Applicant has never committed any other criminal acts besides those alleged in the SOR is without merit. In his decision, the Judge found that Applicant had engaged in repeated acts of stalking his victim for more than two years and had not complied with court orders to have no contact with the victim. [\(7\)](#)

That finding was not challenged on appeal. Given the Judge's finding that Applicant committed multiple, serious criminal acts, over a significant period of time, the Judge's conclusion that those acts were not an isolated incident is sustainable.

Applicant's argument that the evidence shows that the conduct in question is not likely to reoccur is not persuasive. Given the Judge's finding that Applicant committed multiple, recent, serious criminal acts, over a significant period of time, that one of those acts had occurred after the Applicant had completed court-mandated psychological treatment, and that Applicant had failed to follow through on the specific recommendations of the psychologist who evaluated him, the Judge's conclusion that Applicant had failed to meet his burden of establishing that such disqualifying conduct was not likely to reoccur is sustainable.

Finally, the federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *See Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). 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. *See Department of the Navy v. Egan*, 484 U.S. 518, 528-529 (1988). The federal government need not wait until an applicant actually mishandles or fails to properly handle or safeguard classified information before it can deny or revoke access to such information. *See Adams v. Laird*, 420 F. 2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). Direct or objective evidence of nexus is not required before the government can deny or revoke access to classified information. *See Gayer v. Schlesinger*, 490 F. 2d 740, 750 (D.C. Cir. 1973). All that is required is proof of facts or circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. *See, e.g.*, ISCR Case No. 99-0296 (April 18, 2000) at p. 5. Moreover, an applicant with good or exemplary job performance may engage in conduct that has negative

security implications. *See, e.g.*, ISCR Case No. 99-0123 (January 11, 2000) at p. 3. The Guidelines set forth in the Directive address a variety of examples of off-duty conduct and circumstances which are of security concern to the government and mandate a whole person analysis to determine an applicant's security eligibility. A whole person analysis, by its very language, is not confined to the workplace. *See* ISCR Case No. 03-11231 (June 4, 2004) at p. 3. The favorable evidence cited by Applicant did not compel the Administrative Judge to make a favorable security decision. The Judge had to consider the record evidence as a whole and consider whether the favorable evidence outweighed the unfavorable evidence or vice versa. *See, e.g.*, ISCR Case No. 99-0296 (April 18, 2000) at p. 6. Considering Applicant's burden of persuasion and the record as a whole, the Board finds that the Judge's adverse security clearance decision is sustainable.

Conclusion

Applicant has failed to demonstrate outcome determinative error below. Therefore, the Board affirms the Administrative Judge's adverse security clearance decision.

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

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. "The criminal behavior was not recent" (Directive, Enclosure 2, E2.A10.1.3.1).
2. "The crime was an isolated incident" (Directive, Enclosure 2, E2.A10.1.3.2).
3. "The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur" (Directive, Enclosure 2, E2.A10.1.3.4).
4. "There is clear evidence of successful rehabilitation" (Directive, Enclosure 2, E2.A10.1.3.6).
5. "The information was unsubstantiated or not pertinent to a determination of judgement, trustworthiness, or reliability" (Directive, Enclosure 2, E2.A5.1.3.1).
6. Decision at p. 4.
7. Decision at pp. 3, 4 and 6.