

DATE: September 26, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-29035

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

B. Daniel Lynch, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated May 26, 2004, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline J (Criminal Conduct), Guideline G (Alcohol Consumption), and Guideline D (Sexual Behavior). Administrative Judge Barry M. Sax issued a favorable security clearance decision, dated February 28, 2005.

Department Counsel appealed the Administrative Judge's favorable 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 the Administrative Judge erred by concluding Applicant's masturbating in his car was not sexual behavior within the meaning of Guideline D (Sexual Behavior); and (2) whether the Administrative Judge erred by analyzing Applicant's conduct in a piecemeal manner and reached conclusions that are arbitrary and capricious. For the reasons that follow, the Board reverses 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. Whether the Administrative Judge erred by concluding Applicant's masturbating in his car was not sexual behavior within the meaning of Guideline D (Sexual Behavior). The Administrative Judge found that Applicant masturbated in his car in a parking lot on approximately 20 occasions. The Judge concluded the facts and circumstances of Applicant's acts of masturbation did not fall under any of the Sexual Behavior Disqualifying Conditions, and "did not have the 'sexual' aspect that would bring it under Guideline D."

Department Counsel challenges the Administrative Judge's conclusions under Guideline D (Sexual Behavior). In support of that challenge, Department Counsel argues: (a) it was arbitrary and capricious for the Judge to conclude Applicant's acts of masturbating in his car in a parking lot were not sexual behavior within the scope of Guideline D (Sexual Behavior); (b) the record evidence does not provide a rational basis for the Judge's conclusion that none of the Sexual Behavior disqualifying conditions applied; (c) the record evidence supports application of all four of the Sexual Behavior disqualifying conditions; and (d) the Judge's conclusion that none of the Sexual Behavior disqualifying conditions is applicable runs contrary to the Judge's own factual findings. In response, Applicant argues: (i) the Judge had a rational basis for concluding Applicant's conduct was not sexual behavior within the scope of Guideline D, given the record evidence in this case; and (ii) it was not arbitrary, capricious, or contrary to law for the Judge to conclude none of the Sexual Behavior disqualifying conditions applied. For the reasons that follow, the Board finds merit in Department Counsel's challenge to the Judge's conclusion.

First, given the record evidence in this case, it was arbitrary and capricious for the Administrative Judge to conclude that Applicant's acts of masturbating in his car in a parking lot on approximately 20 occasions were not "sexual" in nature. That conclusion does not reflect a reasonable, common sense interpretation of the record evidence in this case.

Second, given the record evidence in this case, the Administrative Judge failed to articulate any rational basis for his conclusion that none of the Sexual Behavior disqualifying conditions applied. Department Counsel persuasively argues that the record evidence of the facts and circumstances of Applicant's masturbating in his car in a parking lot warranted application of Sexual Behavior Disqualifying Conditions 1 ⁽¹⁾

and 4. ⁽²⁾

Given the record evidence in this case, it was untenable for the Judge to decline to apply Sexual Behavior Disqualifying Conditions 1 and 4. However, considering the record as a whole, the Board does not have to agree with the Judge to conclude that Department Counsel has not demonstrated it was arbitrary or capricious for the Judge to decide that application of Sexual Behavior Disqualifying Condition 2 ⁽³⁾

and Sexual Behavior Disqualifying Condition 3 ⁽⁴⁾

was not warranted in this case. Department Counsel's ability to make plausible arguments for why the record evidence warranted application of Sexual Behavior Disqualifying Condition 2 and Sexual Behavior Disqualifying Condition 3 falls short of persuading the Board that the record evidence was sufficient to compel the Judge to conclude, as a matter of law that those two disqualifying conditions were applicable to Applicant's case.

Third, the Administrative Judge's failure to apply Sexual Behavior Disqualifying Conditions 1 and 4 was arbitrary and capricious action because it ran contrary to the Judge's own findings that: (1) Applicant's acts of masturbating in his car occurred in a public place; (2) Applicant's acts of masturbating in his car demonstrated "extremely poor judgment"; and (3) in April 2002, Applicant was cited and charged with disorderly conduct, lewd acts in a public place as a result of one of the masturbating incidents. It was arbitrary and capricious for the Judge to ignore the plain meaning and significance of his own findings about Applicant's acts of masturbating in his car.

It is untenable for Applicant to argue that there was "nothing public about the act" involved in the April 2002 incident. First, the Administrative Judge found that Applicant engaged in acts of masturbation in his car in a parking lot on approximately 20 occasions, not just the April 2002 incident. That finding of fact is supported by the record evidence. Second, the Judge found that Applicant: (a) "had been noticed parking in the same lot on several occasions in the past and had actually been questioned by a law enforcement officer, because his parking near a bank had been observed and caused suspicion," and (b) the April 2002 incident occurred "in the area of the base theater . . . using the shopping center parking lot." Those findings of fact are supported by the record evidence. Given those findings of fact by the Judge, Applicant cannot reasonably argue his acts of masturbating in his car in a parking lot were not "public" acts.

2. Whether the Administrative Judge erred by analyzing Applicant's conduct in a piecemeal manner and reached conclusions that are arbitrary and capricious. Department Counsel contends the Administrative Judge's decision involves a piecemeal analysis of Applicant's conduct because: (a) the Judge failed to give due consideration to Applicant's lack of candor about his sexual conduct; (b) the Judge analyzed each incident of Applicant's misconduct in isolation rather than consider the security significance of the totality of Applicant's misconduct; (c) the Judge erred by concluding Applicant's criminal conduct was mitigated under Criminal Conduct Mitigating Conditions 1 and 6; and (d) the totality of Applicant's criminal conduct raised serious questions about his security eligibility. In response, Applicant argues: (i) the Judge did not analyze Applicant's conduct in a piecemeal manner; (ii) the record evidence does not support Department Counsel's lack of candor argument; (iii) Department Counsel ignores the favorable evidence presented on behalf of Applicant; (iv) the record evidence supports the Judge's application of Criminal Conduct Mitigating Conditions 1 and 6; and (v) even if the Board were to conclude Department Counsel had identified any errors by the Judge, such errors should be deemed harmless.

Department Counsel's lack of candor argument is difficult follow. To the extent that Department Counsel's argument can be construed as asserting the Administrative Judge failed to consider record evidence that undercut Applicant's credibility, the Board does not find it persuasive. There is a rebuttable presumption that a Judge considers all the record evidence. unless the Judge specifically states otherwise. ⁽⁵⁾

Department Counsel has not rebutted or overcome that presumption in this case. To the extent that Department

Counsel's argument can be construed as asserting the Judge could not render a favorable decision in the absence of a favorable credibility determination, it is not persuasive. A credibility determination -- whether favorable or unfavorable -- is not a substitute for record evidence; nor is it a substitute for evaluating an applicant's security eligibility in light of the record evidence concerning an applicant's admitted or proven conduct and circumstances.⁽⁶⁾

Although Department Counsel has shown that the Judge committed various errors, Department Counsel has not shown that the Judge erred by using a favorable credibility determination as a substitute for record evidence. Finally, to the extent that Department Counsel's argument can be construed as asking the Board to reverse the Judge's favorable decision based on a finding of falsification not alleged in the SOR, the Board rejects it as untenable.⁽⁷⁾

Department Counsel has not set forth a persuasive argument showing that the Administrative Judge's application of Criminal Conduct Mitigating Condition 1⁽⁸⁾

was arbitrary, capricious, or contrary to law in light of the record evidence in this case.

Considering the record evidence as a whole and the Administrative Judge's own findings of fact, the Board concludes the Judge failed to articulate a rational basis for his conclusion that Criminal Conduct Mitigating Conditions 6⁽⁹⁾

was applicable. Having concluded that "Applicant's past conduct demonstrated considerable immaturity and lack of judgment in several areas of his life," the Judge failed to offer a satisfactory explanation⁽¹⁰⁾

for why he concluded Applicant demonstrated "clear evidence of successful rehabilitation" despite the Judge's conclusion that as of the hearing Applicant "came across as one of those individuals who have to be hit over the head, figuratively speaking of course, to get their attention and help them focus on what is important to their lives." Although it was reasonable for the Judge to consider the passage of time since Applicant's last act of misconduct, the Judge's conclusions about Applicant's immaturity, lack of judgment, and lack of insight into his misconduct (up to the time of the hearing itself) -- which are supported by the record evidence -- ran contrary to his conclusion that Applicant had shown "clear evidence of successful rehabilitation." A person who exhibits a lack of insight about the nature and seriousness of his or her misconduct is not a person who exhibits "clear evidence" of rehabilitation.

Applicant's arguments in support of the Administrative Judge's favorable conclusions help identify some flaws in Department Counsel's appeal arguments (discussed earlier in this decision). However, Applicant's arguments do not persuade the Board that the Judge's favorable security clearance decision is sustainable despite the errors identified by Department Counsel.

Conclusion

Department Counsel has identified errors that warrant reversal. Pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.3, the Board reverses the Administrative Judge's favorable security clearance decision.

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. "Sexual behavior of a criminal nature, whether or not the individual has been prosecuted" (Directive, Adjudicative Guidelines, Item E2.A4.1.2.1).
2. "Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment" (Directive, Adjudicative Guidelines, Item E2.A4.1.2.4).
3. "Compulsive or addictive sexual behavior when the person is unable to stop a pattern of self-destructive or high-risk behavior or that which is symptomatic of a personality disorder" (Directive, Adjudicative Guidelines, Item E2.A4.1.2.2).
4. "Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress" (Directive, Adjudicative Guidelines, Item E2.A4.1.2.3).
5. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2.
6. *See, e.g.*, ISCR Case No. 02-02195 (April 9, 2004) at pp. 6-7.
7. *See, e.g.*, ISCR Case No. 03-12882 (July 20, 2005) at p. 4 (citing earlier Board decisions and explaining why Board would not accept Department Counsel's argument that a Judge's decision should be reversed based on a claim of falsification not alleged in the SOR).
8. "The criminal behavior was not recent" (Directive, Adjudicative Guidelines, Item E2.A10.1.3.1).
9. "There is clear evidence of successful rehabilitation" (Directive, Adjudicative Guidelines, Item E2.A10.1.3.6).
10. As discussed earlier in this decision, arbitrary and capricious action is indicated by the failure of an Administrative Judge to articulate a satisfactory explanation for his or her conclusions, including a rational connection between the facts found and the choice made.