

DATE: May 26, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-32254

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Raymond B. Rounds. Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated August 26, 2003, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline D (Sexual Behavior) and Guideline E (Personal Conduct). Administrative Judge Richard A. Cefola issued an unfavorable security clearance decision dated January 8, 2004.

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 the Administrative Judge erred by not concluding Applicant's conduct was extenuated or mitigated; and (2) whether the Administrative Judge should have granted Applicant a security clearance with a warning. 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. Whether the Administrative Judge erred by not concluding Applicant's conduct was extenuated or mitigated. Applicant contends the Administrative Judge should have concluded Applicant's conduct was extenuated or mitigated under Guideline D (Sexual Behavior) and Guideline E (Personal Conduct) because: (a) the Judge did not consider whether Applicant's conduct was merely a matter of personal sexual morality; (b) the Judge failed to take into account that Applicant's conduct was not as serious as various other kinds of sexual misconduct that raise security concerns; (c) there is no evidence Applicant engaged in other conduct indicative of questionable judgment, irresponsibility, or emotional instability; (d) the Judge failed to consider the passage of time since Applicant's conduct occurred; (e) the Judge failed to evaluate Applicant's conduct under the whole person concept; and (f) the Judge failed to consider whether Applicant is still vulnerable to coercion or pressure due to his past conduct. [\(1\)](#)

(a) The Board need not decide whether Applicant's conduct would be a matter of personal sexual morality if it had occurred under different circumstances than those involved in this case. In this case, Applicant admitted to using the computer of his then-employer to view sexually explicit adult sites (File of Relevant Aerial, Items 3 and 5). Applicant's argument about personal privacy is not persuasive to the extent that it seeks to equate behavior in the workplace with behavior occurring in the privacy of one's residence or similar circumstances. Absent credible evidence to the contrary, persons do not have a reasonable basis for expecting the same degree of privacy with respect to conduct in the workplace as they do with respect to conduct in their residence or similar circumstances. Moreover, as will be discussed later in this decision, it was not arbitrary or capricious for the Administrative Judge to conclude the record evidence indicates Applicant is vulnerable to coercion or pressure due to his past conduct. If an applicant is in a position of vulnerability to coercion or pressure as a result of his or her conduct, then that applicant is not in a strong position to claim his or her conduct is a purely personal matter that is of no security concern to the government. *Cf. AFG Local 1533 v. Cheney*, 944 F.2d 503, 506 n.6 (9th Cir. 1991) (noting security risk posed by possibility that federal employee

with security clearance who used illegal drugs could be threatened with disclosure of the illegal drug use); *McKeand v. Laird*, 490 F.2d 1262, 1263-1264 (9th Cir. 1973)(hearing examiner's finding that an individual was afraid that his private sexual activity would be disclosed provided a rational basis for an unfavorable security clearance decision).

(b) Applicant notes that his conduct (*i.e.*, viewing sexually explicit adult sites on his then-employer's computer) is not as serious as various other kinds of conduct. However, the Board has held that even if an applicant's conduct is not as serious as other kinds of conduct, that does not mean the Administrative Judge cannot consider and evaluate the security significance of the facts and circumstances surrounding the conduct that the applicant did engage in. *See, e.g.*, ISCR Case No. 00-0633 (October 24, 2003) at p. 10. Therefore, error by the Judge is not demonstrated by Applicant's ability to enumerate various examples of conduct that appear to be more serious than his conduct in this case.

(c) The Board construes Applicant's argument concerning the absence of evidence that he engaged in other conduct indicative of questionable judgment, irresponsibility, or emotional instability as raising the issue of whether the Administrative Judge erred by not applying Sexual Behavior Mitigating Condition 3. [\(2\)](#)

Administrative Judges are required to apply pertinent provisions of the Adjudicative Guidelines. *See* Directive, Section 6.3; Enclosure 2, Item E2.1; Additional Procedural Guidance, Item E3.1.25. If there are Adjudicative Guidelines that, on their face, appear to be applicable to the facts of a particular case, then the Judge must apply them or articulate a rational basis for not doing so. *See, e.g.*, ISCR Case No. 97-0825 (January 7, 1999) at p. 3. Given the record evidence in this case, the Judge's failure to apply Sexual Behavior Mitigating Condition 3 is unexplained and indicative of arbitrary and capricious action. However, the Judge's error is harmless because under the particular facts of this case, the Judge had a sufficient basis to find the Applicant still remains vulnerable to coercion, exploitation, or duress. The mere presence or absence of an Adjudicative Guidelines disqualifying or mitigating condition is not dispositive of a case. *See, e.g.*, ISCR Case No. 02-11810 (June 5, 2003) at p. 5. There is not a substantial likelihood that the Judge would have reached a different result if he had applied Sexual Behavior Mitigating Condition 3 in this case. *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine). Even though there is no evidence that Applicant engaged in other conduct indicative of questionable judgment, irresponsibility or emotional instability, the Judge articulated a sustainable basis for why the conduct Applicant did engage in raised security concerns that were not extenuated or mitigated.

(d) The passage of time since an applicant last engaged in conduct is a relevant factor that an Administrative Judge should take into account when evaluating the record evidence as a whole. *See* Directive, Section 6.3.2; Enclosure 2, Item E2.2.1.3. However, Applicant overstates the significance of the passage of time since he used his then-employer's computer to view sexually explicit adult sites. The Board need not decide whether that passage of time would be significant or decisive in this case because the Judge's decision is not based solely on Applicant's use of his then-employer's computer to view sexually explicit adult sites. Rather, the Judge's decision is also predicated on his finding that Applicant is vulnerable to coercion or pressure because of that past conduct. The Judge's finding on this aspect of the case is unaffected by the passage of time since Applicant engaged in the conduct with his then-employer's computer. Even dated conduct could be the source of an applicant's current vulnerability to coercion or influence.

(e) Applicant's whole person argument is predicated on his arguing for an alternate interpretation of the record evidence. Absent a showing that the Judge acted in a manner that is arbitrary, capricious, or contrary to law, the Board will not disturb the Judge's weighing of the record evidence. Applicant's strong disagreement with the Judge's weighing of the record evidence is not sufficient to persuade the Board that the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 01-07292 (January 29, 2004) at p. 4.

(f) The Board does not find persuasive Applicant's argument that the Administrative Judge failed to consider whether Applicant is still vulnerable to coercion or pressure due to his past conduct. Our reading of the decision below persuades us the Judge considered whether the record evidence shows that Applicant is currently vulnerable to coercion or pressure because of his past conduct. Applicant's argument is merely an attempt to argue for an alternate interpretation of the record evidence. Given the record evidence in this case, the Judge had a rational basis for his conclusion that Applicant is vulnerable to coercion or pressure. [\(3\)](#)

Applicant's argument on this point cites to the Concern portion of Guideline B (Foreign Influence) and Foreign

Influence Mitigating Condition 1. Those provisions of the Adjudicative Guidelines do not demonstrate the Administrative Judge erred in this case. The SOR did not allege that Applicant's conduct falls under Guideline B. Department Counsel did not present any information in the File of Relevant Material that would show or suggest Applicant's conduct falls under Guideline B. Nothing in the decision below indicates or suggests the Judge made any finding of fact or reached any conclusion adverse to Applicant that relies on Guideline B. The fact that Applicant's case raises no security concerns under Guideline B did not preclude the Judge from evaluating the security significance of Applicant's conduct under Guidelines D and E.

2. Whether the Administrative Judge should have granted Applicant a security clearance with a warning. Applicant asks that the Board reverse the Administrative Judge's decision, or in the alternative, recommend Applicant be granted a security clearance with a warning.

For the reasons discussed earlier in this decision, the Board concludes Applicant has failed to demonstrate harmful error. Therefore, reversal would not be appropriate.

As noted earlier in this decision, the Board does not review cases *de novo*. Accordingly, the Board construes Applicant's request for an alternative remedy as raising the issue of whether the Administrative Judge should have granted a security clearance with a warning. Because the Judge articulated a rational basis for his adverse conclusions about Applicant's security eligibility, it was not arbitrary, capricious, or contrary to law for the Judge to render an unfavorable security clearance decision.

Conclusion

Applicant has not demonstrated harmful error below. Therefore, the Board affirms the Administrative Judge's unfavorable security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. Applicant does not dispute the applicability of Guideline D (Sexual Behavior) to this case.
2. "There is no other evidence of questionable judgment, irresponsibility, or emotional instability" (Directive, Enclosure 2, Item E2.A4.1.3.3).
3. The Board cannot consider the additional evidence in this regard that Applicant has forwarded to the Board with his

appeal brief. *See* Directive, Additional Procedural Guidance, Item E3.1.29.