

DATE: December 2, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-07075

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Esq., Department Counsel

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

FOR APPLICANT

Eric F. Adams, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated June 14, 2004, 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 Roger C. Wesley 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 it was arbitrary and capricious for the Administrative Judge to conclude Applicant had mitigated his vulnerability to coercion; (2) whether the Administrative Judge's decision is arbitrary and capricious because the Judge did not explain how Applicant mitigated SOR paragraph 2.a; (3) whether the Administrative Judge's decision is arbitrary and capricious because the Judge did not explain how Sexual Behavior Disqualifying Condition 1 had been mitigated; (4) whether the Administrative Judge's decision is arbitrary and capricious for not discussing the significance of Sexual Behavior Disqualifying Condition 4; (5) whether it was arbitrary and capricious for the Administrative Judge to conclude Applicant had mitigated Sexual Behavior Disqualifying Condition 2; and (6) whether the Administrative Judge failed to consider the evidence as a whole and, instead, evaluated it in a piecemeal manner. 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

The Administrative Judge found that Applicant had engaged in acts of sexual harassment involving different women in 1982, 1983, 1985, 2000, and 2001 -- with one of the 1983 incidents resulting in the victim contacting police and the police warning Applicant to not have further contact with the victim, and the other incidents resulting in Applicant being terminated by four different employers. The Judge concluded that Applicant's sexual misconduct raised security concerns under Guideline D (Sexual Behavior) and Guideline E (Personal Conduct), but further concluded that Applicant had presented credible evidence sufficient to mitigate those security concerns. [\(1\)](#)

On appeal, Department Counsel challenges the Administrative Judge's favorable conclusions and the Judge's favorable security clearance decision on various grounds. Applicant contends the Judge's decision should be affirmed because Department Counsel's claims of error lack merit and because Department Counsel merely seeks to re-litigate the case on appeal.

1. Whether it was arbitrary and capricious for the Administrative Judge to conclude Applicant had mitigated his vulnerability to coercion. The Administrative Judge concluded that the facts and circumstances of Applicant's history of sexual misconduct warranted application of Sexual Behavior Disqualifying Condition 3 [\(2\)](#) and Personal Conduct

Disqualifying Condition 4, ⁽³⁾ but that Applicant had presented credible evidence that was sufficient to warrant application of Sexual Behavior Mitigating Condition 4⁽⁴⁾ and Personal Conduct Mitigating Condition 5.⁽⁵⁾ Department Counsel asserts it was arbitrary and capricious for the Judge to conclude that Applicant had presented sufficient evidence to mitigate his vulnerability to coercion.

Department Counsel makes a strong argument for an alternate interpretation of the record evidence on this point, but fails to demonstrate the Administrative Judge's conclusion was arbitrary and capricious. The presence of conflicting record evidence does not preclude the Judge from making findings of fact or render the Judge's finding of facts erroneous.⁽⁶⁾ Furthermore, Department Counsel argues for a different weighing of the record evidence, but the Judge has some latitude in weighing the record evidence and a party's strong disagreement with how the evidence was weighed is not sufficient to demonstrate the Judge erred.⁽⁷⁾

As to Sexual Behavior Mitigating Condition 4, the Administrative Judge articulated reasons sufficient to discern a plausible basis for his decision to apply this mitigating condition. It was not arbitrary or capricious for the Judge to conclude Applicant had shown he was less likely to have a recurrence, and therefore he is not likely to commit a future act of sexual harassment that could make him vulnerable to coercion, exploitation, or duress, based on the Judge's cumulative findings and conclusions that Applicant has not had a sexual harassment incident since 2001, that Applicant's wife is aware of his history of sexual harassment, that Applicant has worked with a girl's softball team without incident, that Applicant is in a work situation that reduces the likelihood of further acts of sexual harassment, and that Applicant is undergoing counseling. The Board does not have to agree with the Judge's weighing of the record evidence or the Judge's conclusion about Sexual Behavior Mitigating Condition 4 to decide that Department Counsel has not demonstrated that the Judge's challenged conclusion is arbitrary and capricious. For the same reasons, the Judge's decision to apply Personal Conduct Mitigating Condition 5 has not been shown to be arbitrary and capricious.

2. Whether the Administrative Judge's decision is arbitrary and capricious because the Judge did not explain how Applicant mitigated SOR paragraph 2.a. SOR paragraph 2.a alleged Applicant's acts of sexual misconduct (alleged under SOR paragraphs 1.a through 1.f) demonstrated questionable judgment, untrustworthiness and unreliability under Guideline E (Personal Conduct). Department Counsel contends the Judge erred by failing to explain how he concluded Applicant had mitigated the security concerns raised under Guideline E.

Administrative Judges have broad latitude and discretion in how they write their decisions, subject to the requirements of the Directive and basic concepts of due process. Nothing in the Directive or general principles of due process requires that a decision be of any particular length, or that a Judge devote a specific amount of discussion concerning any particular aspect of a case. All that is required is a decision that sets forth pertinent findings, conclusions, and discussion that are sufficient to satisfy the requirements of the Directive and due process, and allows the parties and the Board to be able to discern what the Judge is finding or concluding.⁽⁸⁾ A Judge's decision need not be perfect to be legally sufficient.

In this case, the Administrative Judge's discussion of Applicant's case under Guideline E (Personal Conduct) was not as detailed as his discussion of the case under Guideline D (Sexual Behavior). However, reading the decision below in its entirety, the Board concludes that the Judge's discussion of his findings and conclusions under Guideline D provides the parties and the Board with a legally sufficient basis to discern the basis for his favorable conclusions under Guideline E. Accordingly, no useful purpose would be served by remanding the case with instructions that the Judge elaborate on his discussion of the case under Guideline E.

3. Whether the Administrative Judge's decision is arbitrary and capricious because the Judge did not explain how Sexual Behavior Disqualifying Condition 1 had been mitigated. The Administrative Judge concluded that Applicant's 1983 incident warranted application of Sexual Behavior Disqualifying Condition 1.⁽⁹⁾ Department Counsel contends the Judge's decision is arbitrary and capricious because it does not explain how Sexual Behavior Disqualifying Condition 1 had been mitigated. In support of this contention, Department Counsel argues that the 1983 incident could not be mitigated under Sexual Behavior Mitigating Condition 1⁽¹⁰⁾ or Sexual Behavior Mitigating Condition 2.⁽¹¹⁾

Department Counsel's argument concerning Sexual Behavior Disqualifying Condition 1 is a variation of an argument

that the Board has repeatedly rejected in the past. The mere presence or absence of specific Adjudicative Guidelines disqualifying or mitigating conditions is not dispositive of a case. ⁽¹²⁾ The inapplicability of certain Adjudicative Guidelines mitigating conditions does not preclude a Judge from considering whether an applicant has demonstrated extenuation or mitigation of conduct under the general factors of Directive, Section 6.3 and Adjudicative Guidelines, Item E2.2.1. ⁽¹³⁾ Therefore, the Judge's decision to not apply Sexual Behavior Mitigating Conditions 1 and 2 did not preclude the Judge, as a matter of law, from deciding whether the security concerns raised by application of Sexual Behavior Disqualifying Condition 1 had been extenuated or mitigated on other grounds supported by the record evidence.

The Administrative Judge made findings and reached conclusions that provide a discernable basis -- under the general factors of Section 6.3 and Adjudicative Guidelines, Item E2.2.1 -- for his conclusion that the 1983 incident fell under Sexual Behavior Disqualifying Condition 1, but was mitigated (*i.e.*, passage of time since 1983 incident without any recurrence of *criminal* sexual misconduct). Applicant's subsequent acts of sexual harassment were improper, but there is no record evidence that they involved criminal sexual misconduct. Therefore, the Judge was not required to conclude that the record evidence of subsequent incidents of sexual harassment added any security significance to the criminality of the 1983 incident. Nor was the Judge precluded, as a matter of law, from considering whether the absence of record evidence of subsequent criminal

sexual misconduct was extenuating or mitigating of the criminality of the 1983 incident. The Board does not have to agree with the Judge's analysis or conclusions to decide Department Counsel has not demonstrated error with this claim.

4. Whether the Administrative Judge's decision is arbitrary and capricious for not discussing the significance of Sexual Behavior Disqualifying Condition 4. The Administrative Judge concluded that Applicant's conduct fell under Sexual Behavior Disqualifying Condition 4. ⁽¹⁴⁾ On appeal, Department Counsel asserts that the Judge "failed to discuss the implications of this disqualifying condition, and failed to show how it could be mitigated."

Department Counsel's perfunctory claim of error is not persuasive. The Administrative Judge concluded Sexual Behavior Disqualifying Condition 4 applied, and Department Counsel fails to articulate or suggest any argument or reason why the Judge needed to discuss this disqualifying condition in more detail. As discussed earlier in this decision, a Judge has broad latitude and discretion in writing a decision to decide an applicant's case. Department Counsel's dissatisfaction with the Judge's choice to not discuss Sexual Behavior Disqualifying Condition 4 in more detail is insufficient to demonstrate the Judge's decision is legally deficient. Furthermore, Department Counsel fails to articulate or suggest any argument or reason as to how the Judge erred by concluding this disqualifying condition was mitigated.

5. Whether it was arbitrary and capricious for the Administrative Judge to conclude Applicant had mitigated Sexual Behavior Disqualifying Condition 2. The Administrative Judge concluded that Applicant's acts of sexual harassment warranted application of Sexual Behavior Disqualifying Condition 2. ⁽¹⁵⁾ On appeal, Department Counsel contends it was arbitrary and capricious for the Judge to conclude Applicant had mitigated this disqualifying condition.

Department Counsel's arguments concerning Sexual Behavior Disqualifying Condition 2 set forth a forceful position in favor of a different weighing of the record evidence than that done by the Administrative Judge. But, Department Counsel's ability to advocate such a position in support of its interpretation of the record evidence is not sufficient to persuade the Board that, as a matter of law or logic, the Judge weighed the evidence in an arbitrary and capricious manner, or that the Judge reached an arbitrary or capricious conclusion about Sexual Behavior Disqualifying Condition 2. The Board does not have to agree with the Judge's weighing of the evidence or the Judge's favorable conclusions to decide this claim does not demonstrate the Judge acted in a manner that is arbitrary, capricious, or contrary to law.

6. Whether the Administrative Judge failed to consider the evidence as a whole and, instead, evaluated it in a piecemeal manner. Department Counsel correctly asserts that the Administrative Judge had to evaluate Applicant's case in light of the record evidence as a whole, instead of a piecemeal analysis of the evidence. However, although Department Counsel strongly disagrees with the Judge's analysis, Department Counsel does not show that the Judge engaged in a piecemeal analysis of the record evidence. Rather, the practical effect of Department Counsel's argument is to ask the Board to reweigh the evidence, reach its own conclusions, and reverse the Judge's decision.

The Board does not have to agree with the Administrative Judge's findings and conclusions to decide that Department Counsel has not demonstrated that the Judge engaged in a piecemeal analysis of the record evidence in this case.

Conclusion

Because there has not been a showing of error below, the Board affirms the Administrative Judge's 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. In the decision below, the Administrative Judge stated that unfavorable conclusions were warranted with respect to Guideline D and Guideline E (Decision at pp. 6-7). Because that single sentence runs contrary to the overall tenor of the Judge's findings and conclusions and the Judge's favorable formal findings, the Board concludes that sentence contains a typographical error. Furthermore, the Formal Findings section of the decision erroneously refers to SOR paragraph 2.a as pertaining to Guideline D (Sexual Behavior) instead of Guideline E (Personal Conduct). The Board deems both of these to be harmless typographical errors.

2. "Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress" (Directive, Adjudicative Guidelines, Item E2.A4.1.2.3).

3. "Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail" (Directive, Adjudicative Guidelines, Item E2.A.5.1.2.4).

4. "The behavior no longer serves as a basis for coercion, exploitation, or duress" (Directive, Adjudicative Guidelines, Item E2.A4.1.3.4).

5. "The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress" (Directive, Adjudicative Guidelines, Item E2.A5.1.3.5). The decision below cites to Directive, Adjudicative Guidelines, Item E2.A5.1.3.4, which -- on its face -- does not apply to this case. However, reading the citation to Item E2.A5.1.3.4 in context, the Board concludes the citation in the decision below was a typographical error and that the Judge was referring to Item E2.A5.1.3.5.

6. *See, e.g.*, ISCR Case No. 02-09892 (July 15, 2004) at p. 5.

7. *See, e.g.*, ISCR Case No. 02-02892 (June 28, 2004) at pp. 4-5.
8. *See, e.g.*, ISCR Case No. 98-0809 (August 19, 1999) at pp. 2-3.
9. "Sexual behavior of a criminal nature, whether or not the individual has been prosecuted" (Directive, Adjudicative Guidelines, Item E2.A4.1.2.1).
10. "The behavior occurred during or prior to adolescence and there is no evidence of subsequent conduct of a similar nature" (Directive, Adjudicative Guidelines, Item E2.A4.1.3.1).
11. "The behavior was not recent and there is no evidence of subsequent conduct of a similar nature" (Directive, Adjudicative Guidelines, Item E2.A4.1.3.2).
12. *See, e.g.*, ISCR Case No. 03-11448 (August 10, 2004) at pp. 3-4.
13. *See, e.g.*, ISCR Case No. 02-05110 (March 22, 2004) at p. 5 n.7 (citing other Board decisions).
14. "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).
15. "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).