

DATE: January 14, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-09850

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Alan V. Edmunds, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated March 8, 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) and Guideline E (Personal Conduct). Administrative Judge Barry M. Sax issued an unfavorable security clearance decision, dated October 25, 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 had a rational basis for concluding Applicant's 2002 conviction for child molestation raised security concerns; and (2) in the alternative, whether the Administrative Judge erred by concluding Applicant had not demonstrated mitigation sufficient to warrant a favorable security clearance decision. 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 had a rational basis for concluding Applicant's 2002 conviction for child molestation raised security concerns. Applicant does not challenge the Administrative Judge's findings of fact about: (a) his acts of sexual molestation; (b) his conviction in August 2002 for child molesting; (c) his being sentenced to three years probation and ordered to attend counseling, register as a sex offender and serve 90 days in jail; and (d) his still being on probation until 2005. However, Applicant asserts the Administrative Judge's decision should not be upheld because: (i) there has been no showing that Applicant ever violated security while he has had a security clearance; and (ii) there has been no showing that his conviction threatens or jeopardizes the security of classified information. This claim of error lacks merit.

The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. The federal government is not required to wait until an applicant mishandles classified information before it can make an unfavorable security clearance decision. All that is required is proof of conduct or circumstances that demonstrate an applicant does not possess the high degree of judgment, reliability, or trustworthiness required of persons granted access to classified information. *See, e.g.*, ISCR Case No. 01-25941 (May 7, 2004) at p. 5. Applicant's acts of child molestation raise serious questions about his judgment, reliability, and trustworthiness and provide a rational basis for the Administrative Judge's expressed doubts about granting or continuing a security clearance for Applicant.

The Board rejects Applicant's argument that the Administrative Judge should have made a favorable security clearance decision because Applicant's un rebutted testimony shows he poses no security risk. Nothing in the Directive or any generally applicable principle of law compels a Judge to accept the testimony of any witness in an uncritical manner, without regard to the Judge's assessment of the witness's credibility or without regard to other record evidence. *See, e.g.*, ISCR Case No. 02-09907 (March 17, 2004) at p. 5. Furthermore, the Judge was not bound to accept Applicant's opinion

about the security significance of his conduct. *See, e.g.*, ISCR Case No. 02-23336 (May 10, 2004) at p. 5. Acceptance of Applicant's argument would result in the untenable situation that the federal government would be precluded from denying or revoking access to classified information unless the applicant in question conceded that he or she posed a security risk, and no Judge would be able to deny or revoke access to classified information without the consent or acquiescence of the applicant in question. Nothing in Executive Order 10865 or the Directive places the decision of a security clearance case in the hands of an applicant.

2. In the alternative, whether the Administrative Judge erred by concluding Applicant had not demonstrated mitigation sufficient to warrant a favorable security clearance decision. Applicant contends, in the alternative, that the Administrative Judge should have concluded his child molestation was mitigated sufficiently to warrant a favorable security clearance decision because: (a) he has been truthful, embarrassed and remorseful about his sexual molestation; (b) he has complied with the terms and conditions of his probation; and (c) he has shown maturity and rehabilitation.

The Administrative Judge properly noted that Applicant had the burden of presenting evidence to rebut, explain, extenuate, or mitigate his misconduct sufficiently to warrant a favorable security clearance decision. *See* Directive, Additional Procedural Guidance, Item E3.1.15. Considering the record evidence as a whole, including the evidence that Applicant is still on probation, it was not arbitrary, capricious, or contrary to law for the Judge to conclude Applicant had failed to meet his burden of persuasion.

Conclusion

The Board affirms the Administrative Judge's decision because Applicant has not demonstrated error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board