

DATE: December 6, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-22167

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Nichole Noel, Esq., Department Counsel

FOR APPLICANT

David Swimmer, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On January 31, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline J (Criminal Conduct), Guideline D (Sexual Behavior), and Guideline E (Personal Conduct), pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 21, 2006, after the hearing, Administrative Judge Kathryn Moen Braeman granted Applicant's request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law because she substituted credibility determinations for record evidence and because she failed to apply Guideline E (Personal Conduct) Disqualifying Condition (PCDC) 3. We reverse the Administrative Judge's decision to grant the clearance.

Whether the Record Supports the Administrative Judge's Factual Findings

A. Facts

The Administrative Judge found that Applicant is a 61-year-old employee of a defense contractor. He has held a secret clearance since 1977.

In 1995 Applicant was arrested for patronizing a prostitute. He entered a plea of guilty and received a suspended sentence. The Administrative Judge found that Applicant had stopped to speak with an apparent prostitute on behalf of another person.

In 2001 Applicant was again arrested for patronizing a prostitute. He pled guilty to Peace Disturbance and paid a fine. The Administrative Judge noted that the police report for this incident states that Applicant offered an undercover policewoman \$20.00 in exchange for a sexual act. The Judge also noted that Applicant disputed this statement, claiming that he saw some women "waving at people" and that he walked over to them to satisfy his curiosity, at which point he was placed under arrest.

Applicant called as a witness in his hearing a licensed psychologist, who testified that, based on the tests he performed,

Applicant has no behavioral or psychological impairment. In a footnote, the Administrative Judge found that the psychologist "only has an informal knowledge of security requirements" and that the psychologist concluded "that Applicant was truthful to him when he [stated] that he was involved in a 'sting' on both occasions of his arrests as he had no interest in looking for sexual contact with a woman." It is not clear why she placed these findings in a footnote, but, due to the importance which they play in her ultimate decision, we will accord them equal weight with those contained in the body of her opinion.

B. Discussion

The Appeal Board's review of the Administrative Judge's finding of facts is limited to determining if they are supported by substantial evidence--such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record." Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620-21, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966). In evaluating the Administrative Judge's finding, we are required to give deference to the Administrative Judge's credibility determinations. Directive ¶ E3.1.32.1

Because the Administrative Judge's findings of fact and credibility determinations are closely tied to her ultimate conclusions, we will discuss them together in the succeeding paragraphs.

Whether the Record Supports the Administrative Judge's Ultimate Conclusions

An Administrative Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Appeal Board may reverse the Administrative Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. Our scope of review under this standard is narrow and we may not substitute our judgment for that of the Administrative Judge. We may not set aside an Administrative Judge's decision "that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency ..." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 42. We review matters of law *de novo*.

Department Counsel asserts that the Administrative Judge did not provide any explanation or cite any particular record evidence to support her conclusion that Applicant had mitigated security concerns under one or more of the guidelines; however, we do not have to agree with this assertion to determine whether the Administrative Judge's ultimate security clearance decision was arbitrary and capricious. Moreover, even though the Judge erroneously did not discuss the applicability of PCDC 3, she made a favorable finding for Applicant under SOR paragraph 3 and accepted Applicant's story that he did not offer money for sex prior to his 2001 arrest. We construe the Judge's decision as finding that Applicant did not falsify his 2004 statement. The Board will treat the Judge's error in failing to specifically discuss Personal Conduct Disqualifying Condition 3⁽¹⁾ as harmless error.

The Administrative Judge's ultimate decision was based in large measure on her conclusion that Applicant "credibly established that sexual activity was not his intent" in his interactions with apparent prostitutes prior to each of the two arrests. Decision at 5. In both instances the Judge considered Applicant's testimony about his intent, bolstered by his expert witness. Additionally, the Judge's decision to accept the credibility of Applicant's testimony that he did not offer money for sex or ask for a date in the 2001 incident, and to reject the police report to the contrary, is predicated, in part, on the fact that the state accepted Applicant's guilty plea to disturbing the peace rather than prosecuting him for patronizing a prostitute. Decision at 5. However, without an acquittal, it is speculative to conclude that Applicant did not commit the crime for which he was arrested merely because the state dropped the charges or accepted a guilty plea to lesser charges. *See* ISCR Case No. 03-0074 at 6-7 (App. Bd. Nov. 15, 2005). Thus, the Judge still had to reasonably consider whether the underlying conduct demonstrated that Applicant had patronized prostitutes. Another factor that appears to have affected the Judge's decision to accept Applicant's testimony is the unsworn nature of the police report that described Applicant's offer of money for sex. The Judge admitted the report and had a duty to reasonably evaluate what weight to give to that report, but reports such as this are not inherently less trustworthy just because they are

unsworn. See ISCR Case No. 03-06770 at 3-4 (App. Bd. Sep. 9, 2004). Thus, the issue is whether the findings of fact and conclusions drawn by the Judge were reasonable considering the evidence.

In evaluating the Administrative Judge's findings concerning Applicant's sexual intent at the time of his arrests, and his intent to falsify his 2004 statement that he did not offer money for sex, we are required to give deference to the Judge's credibility determinations. Directive E3.1.32.1. However, that deference does not immunize credibility determinations from review. *See, e.g.*, ISCR Case No. 99-0710 at 4 (App. Bd. Mar. 19, 2001). As the Supreme Court noted in *Anderson v. City of Bessemer*, 470 U.S. 564, 575, 105 S.Ct. 1504, 84 L.Ed. 2d. 518 (1985): "[T]he trial judge may [not] insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable fact finder would not credit it. Where such factors are present, the courts of appeals may well find clear error even in a finding purportedly based on a credibility determination."

Accordingly, whether to accept an applicant's explanation about a matter cannot simply turn on a Judge's assessment of the applicant's demeanor when the applicant testifies. Thus, the Board must consider whether Judge's acceptance of an applicant's explanation for his or her conduct is consistent with a reasonable interpretation of the record evidence as a whole. *See, e.g.*, ISCR Case No. 04-00789 at 6 (App. Bd. June 28, 2006).

The Administrative Judge's written opinion is fairly conclusory. For example, she does not explicitly address why she discounts the police report, which is detailed and internally consistent, on the question of whether, in the 2001 incident, Applicant offered the undercover policewoman money in exchange for sex. Nor does the Judge explicitly address the inconsistency between Applicant's stating that he acted on behalf of someone else in attempting to obtain the name of a prostitute in 1995 versus his 2004 statement which made no mention of that. There is an inconsistency between the Administrative Judge's conclusion that the Department Counsel had "established" a security concern with respect to Applicant's 2004 statement to a security investigator that he had not offered money for sex and her finding that Applicant's story that he did not intend to patronize a prostitute is credible.

More significantly, the Administrative Judge does not discuss the extent to which Applicant's version of the events is inherently implausible. After all, a reasonable person might fail to be persuaded that not once but twice Applicant engaged in discussions with apparent prostitutes without any intent to gratify his own sexual desires, yet was arrested and convicted nonetheless. Here the Administrative Judge's acceptance of Applicant's explanations is not consistent with a reasonable interpretation of the record evidence as a whole and constitutes error.

There is also merit to Department Counsel's argument that the Administrative Judge improperly relied on the psychologist's opinion that Applicant was being truthful in relating his version of the events. The psychologist testified that, following his interviews and testing of Applicant, he concluded that Applicant was being truthful in his statements about the two incidents.

The Department Counsel argues that reliance on the expert's credibility assessment was improper, insofar as the expert "formed his opinion about Applicant's credibility without conducting any outside validation. [His] only source of information was the Applicant, the person who has a vested interest in receiving a positive [evaluation]." However, we conclude that there is a more fundamental problem with his testimony. Expert opinion as to witness credibility is generally inadmissible in judicial proceedings subject to the Federal Rules of Evidence. *See, for example, United States v. Schaffer*, 523 U.S. 303, 317 (1998); *Nimely v. City of New York*, 414 F.2d 381, 398 (2d Cir 2005)("[E]xpert opinions that constitute evaluations of witness credibility, even when such evaluations are rooted in scientific or technical expertise, are inadmissible . . ."); *United States v. Solomonson*, 908 F2d 358, 362 (8th Cir. 1990); *Morris v. Burnett*, 319 F3d 1254, 1276 (10th Cir. 2003). The reason for this rule is that evaluation of witness credibility is the exclusive provenance of the finder of fact. *See Nimely* at 397.

Although the Federal Rules of Evidence do not strictly apply in hearings conducted in accordance with the Directive, they do serve as a guide. Directive ¶ E3.1.19. Because factual findings are the responsibility of the Administrative Judge, we conclude that it was improper for her to rely on this aspect of the expert's testimony. In doing so, she appeared to substitute the expert's opinion for her own duty to identify and analyze those facts which support her

credibility determination. This does not mean that the Administrative Judge should discount the expert's testimony *in toto*, insofar as the expert did testify as to his personal observations of Applicant's demeanor. Nor does it mean that an expert is precluded from testifying as to his or her opinion as to a witness's character for truthfulness. However, we conclude that the Judge's deferral to the expert witness on the issue of Applicant's credibility with respect to the arrests was arbitrary, capricious, and contrary to law. In totality, the record does not contain sufficient credible evidence to permit the Judge to make a finding of fact supporting Applicant's credibility that satisfies the substantial evidence test. See ISCR Case No. 02-02892 at 5-6 (App. Bd. June 28, 2004). Moreover, Applicant has the ultimate burden of persuasion on obtaining a favorable clearance decision. Directive ¶ E3.1.15.

When an appealing party demonstrates factual or legal error, the Board must consider whether: (a) the error is harmful or harmless; (b) the non-appealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternative grounds; and (c) if the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded. See ISCR Case No. 04-07714 at 7 (App. Bd. Oct 19, 2006). For the reasons explained above, Department Counsel has demonstrated harmful error.

The Board is not convinced that the Administrative Judge's decision in this case can be sustained on alternative grounds. The Administrative Judge did properly consider mitigating conditions for conduct that was a security concern under Guidelines J and D that are unrelated to her mitigation of Applicant's conduct based on his denial of sexual intent or his denial of money for sex in the 2001 incident. However, the issue of whether we could either affirm the Judge's decision to mitigate Applicant's conduct based on other mitigation or remand this matter to the Judge to determine whether affirmation based on other mitigation would be appropriate, is moot due to the material errors identified under Guideline E. False statements to security investigators reflect adversely on Applicant's judgment, reliability and trustworthiness, independent of whether Applicant could have obtained a favorable decision under one or more other Guidelines. See ISCR Case No. 02-30369 at 7 (App. Bd. Oct. 27, 2006).

Considering the record evidence as a whole, it is unlikely that a favorable clearance decision would be sustainable and that the identified errors could be remedied by remand. See ISCR Case No. 04-07714 at 7 (App. Bd. Oct 19, 2006) and ISCR Case No. 03-22861 at 3 (App. Bd. June 2, 2006). Viewed cumulatively, the Judge's errors warrant reversal. See ISCR Case No. 03-10380 at 7 (App. Bd. July 28, 2006).

Order

The judgment of the Administrative Judge granting Applicant a clearance is REVERSED.

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

I agree with the analysis provided by my colleagues that the expert opinion as to Applicant's truthfulness usurped the Administrative Judge's fact finding responsibilities and that it should have been discounted. The remaining evidence consists in large measure of Applicant's own testimony at the hearing, which is not plausible on its face and which is not totally consistent with his 2004 statement. This evidence, in my opinion, cannot reasonably sustain Applicant's burden of persuasion, in view of the applicable standard that a favorable clearance decision must be "*clearly consistent* with the

national interest." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988); Executive Order 10865 § 2 (February 20, 1960, as amended) (emphasis added).

Signed: James E. Moody

James E. Moody

Administrative Judge

Member, Appeal Board

1. The Judge did conclude that the Government established security concerns under Personal Conduct Disqualifying Condition 5 due to a pattern of dishonesty or rules violations in his assertion to DSS that he did not offer money for sex in 2001. That inconsistency will be addressed later in this decision.