

DATE: August 3, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-24475

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT

Peter J. Jankell, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated June 2, 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 D (Sexual Behavior). Administrative Judge Carol G. Ricciardello issued an unfavorable security clearance decision, dated April 4, 2005.

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 Applicant's two misdemeanor convictions do not constitute a pattern of criminal conduct sufficient to raise security concerns under Guideline J (Criminal Conduct); (2) whether Applicant's two misdemeanor convictions for offenses that are not classified as sex offenses under state law constitute sexual behavior that raises security concerns under Guideline D (Sexual Behavior); and (3) whether the Administrative Judge erred by concluding Applicant had not demonstrated mitigation of his misconduct 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 Applicant's two misdemeanor convictions do not constitute a pattern of criminal conduct sufficient to raise security concerns under Guideline J (Criminal Conduct). Applicant does not challenge the Administrative Judge's findings that: (a) Applicant was convicted in 1997 of misdemeanor sexual battery; and (b) Applicant was convicted in 2003 of a misdemeanor charge of intentionally making an obscene display of private parts in a public place. However, Applicant contends the Judge erred by concluding his misdemeanor convictions raise security concerns under Guideline J (Criminal Conduct). In support of this contention, Applicant argues: (i) the two misdemeanor convictions, which occurred six years apart, involved petty offenses that did not result in any jail time; (ii) the two misdemeanor convictions do not constitute a history or pattern of criminal activity within the meaning of Guideline J; and (iii) the two misdemeanor convictions did not warrant the Judge's application of Criminal Conduct Disqualifying Condition 2. For the reasons that follow, the Board concludes Applicant's claim of error is not persuasive.

Applicant's two convictions involved criminal conduct even though he was not sentenced to any jail time. Nothing in the language of Guideline J indicates or suggests that it covers only criminal conduct that results in jail time.

To resolve this appeal, the Board need not decide whether Applicant's two convictions (and the conduct underlying those convictions) demonstrate a pattern of criminal conduct. The Concern portion of Guideline J reads: "A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness." Applicant's two convictions provided a sufficient basis for the Administrative Judge to conclude Applicant had a history of criminal conduct under Guideline J. Furthermore, nothing in the language of Guideline J indicates or suggests that it does not cover misdemeanor convictions. A Judge can base an unfavorable security clearance decision on misdemeanor criminal

conduct. ⁽¹⁾

Applicant's argument concerning Criminal Conduct Disqualifying Condition 2-⁽²⁾ lacks merit. It is reasonable for the Administrative Judge to conclude Applicant's two misdemeanor convictions constitute "multiple lesser offenses" within the meaning of Criminal Conduct Disqualifying Condition 2.

2. Whether Applicant's two misdemeanor convictions for offenses that are not classified as sex offenses under state law constitute sexual behavior that raises security concerns under Guideline D (Sexual Behavior). Applicant also contends his two misdemeanor convictions do not constitute sexual behavior that raises security concerns under Guideline D (Sexual Behavior). In support of this contention, Applicant argues: (a) his two misdemeanor convictions do not require him to register as a sex offender under state law, or preclude him from having contact with any persons or class of persons; and (b) his two misdemeanor convictions did not warrant the Administrative Judge's application of Sexual Behavior Disqualifying Conditions 1, 3 and 4. For the reasons that follow, the Board concludes Applicant's claim of error is largely not persuasive.

Given the record evidence of Applicant's conduct that resulted in the two misdemeanor convictions, the Administrative Judge had ample reason for concluding Applicant engaged in sexual misconduct that falls under Guideline D. For purposes of Guideline D, it is irrelevant whether state law requires a person convicted of offenses involving sexual misconduct to register as a sex offender.

Applicant's argument concerning the Administrative Judge's application of Sexual Behavior Disqualifying Condition 1 ⁽³⁾ lacks merit. Applicant's sexual misconduct falls squarely under the plain language of Disqualifying Condition 1. The disposition of the criminal charges against Applicant is irrelevant to the application of Disqualifying Condition 1.

Applicant's argument concerning the Administrative Judge's application of Sexual Behavior Disqualifying Condition 3 ⁽⁴⁾ does not demonstrate harmful error. Applicant's argument sets forth a persuasive rationale for why he is not vulnerable to blackmail over his past sexual misconduct. The Judge failed to articulate a discernible basis for her conclusion that Sexual Behavior Disqualifying Condition 3 applied to the facts of Applicant's case. However, this error is harmless because the Judge's other findings and conclusions are sufficient to support her adverse conclusions under Guideline D.

Applicant's argument concerning the Administrative Judge's application of Sexual Behavior Disqualifying Condition 4 ⁽⁵⁾ is not persuasive. Given the record evidence in this case, the Judge had a rational basis for concluding that Disqualifying Condition 4 applied.

3. Whether the Administrative Judge erred by concluding Applicant had not demonstrated mitigation of his misconduct sufficient to warrant a favorable security clearance decision. The Administrative Judge concluded that Applicant had not presented evidence sufficient to mitigate the security concerns by his sexual misconduct that resulted in two misdemeanor convictions. Applicant challenges that conclusion on appeal, arguing: (a) the Judge should have applied Criminal Conduct Mitigating Condition 6; and (b) the Judge erred by concluding that Applicant demonstrated only a short period of success in his probation program. For the reasons that follow, the Board concludes Applicant has not demonstrated the Judge erred.

Applicant had the burden of presenting evidence to demonstrate reform, rehabilitation, or changed circumstances sufficient to warrant a favorable security clearance decision. ⁽⁶⁾ That burden of persuasion included the burden of presenting evidence sufficient to warrant the application of Adjudicative Guidelines mitigating conditions. ⁽⁷⁾ Considering the record as a whole, the Administrative Judge was not required, as a matter of law or logic, to conclude that Applicant had presented evidence that satisfied the language of Criminal Conduct Mitigating Condition 6 ("There is clear evidence of successful rehabilitation"). The Judge correctly noted the record evidence showed that, as of June 2004, Applicant still was on probation. To the extent there is record evidence that Applicant was complying with the terms of his probation up to June 2004, the Judge was not required to conclude that Applicant's compliance with his probation to that point in time was sufficient to constitute "clear evidence of successful rehabilitation."

If a party bearing the burden of proof on a particular issue does not offer evidence to meet that burden of proof, it is not arbitrary, capricious, or contrary to law for the Administrative Judge to decline to find the party satisfied its burden of proof. As noted in the preceding paragraph, Applicant had the burden of presenting evidence of demonstrating reform, rehabilitation, or changed circumstances sufficient to warrant a favorable security clearance decision. Applicant received a copy of the File of Relevant Material and was given the opportunity to submit evidence for the Judge to consider in his case. When Applicant responded to the File of Relevant Material, he offered no evidence concerning his probation or his compliance with the terms of his probation. The Judge was not required to give Applicant the benefit of the doubt as to whether he successfully completed his probation. ⁽⁸⁾

Conclusion

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

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. *See, e.g.*, ISCR Case No. 02-00500 (January 16, 2004) at p. 4.

2. "A single serious crime or multiple lesser offenses" (Directive, Adjudicative Guidelines, Item E2.A10.1.2.2).

3. "Sexual behavior of a criminal nature, whether or not the individual has been prosecuted" (Directive, Adjudicative Guidelines, Item E2.A4.1.2.1).

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. "Sexual behavior of a public nature and/or which reflects lack of discretion or judgment" (Directive, Adjudicative Guidelines, Item E2.A4.1.2.4).

6. *See* Directive, Additional Procedural Guidance, Item E3.1.15.

7. *See, e.g.*, ISCR Case No. 02-02892 (June 28, 2004) at p. 6.

8. To the extent Applicant's claim is construed as making a factual assertion that he successfully completed his probation, it constitutes a proffer of new evidence on appeal, which the Board cannot consider. *See* Directive,

Additional Procedural Guidance, Item E3.1.29.