

DATE: March 7, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-25256

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

Joseph S. Sciscento, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On January 10, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline D (Sexual Behavior) and Guideline J (Criminal Conduct), of Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive). Applicant requested a hearing. On July 27, 2005, after the hearing, Administrative Judge Martin H. Mogul denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Administrative Judge failed to take into account Applicant's completion of counseling for his sexual behavior; whether the Administrative Judge failed to take into account record evidence showing that Applicant is not vulnerable to coercion or exploitation by blackmail; and whether the Administrative Judge conducted an appropriate whole person analysis.

The Administrative Judge found that in August 2002 Applicant, while in a spa with his wife and 14-year-old niece, fondled the niece. As a result of this, Applicant was charged with Gross or Open Lewdness with A Minor and pled guilty to the amended charge of Annoy a Minor. Applicant met all the requirements of his guilty plea including receipt of 8 hours of Anger Management/Impulse Control counseling and his case was dismissed. In preparation for the hearing Applicant consulted a psychologist. Applicant told the psychologist he had communicated with one woman on the internet about sex but never met her. Applicant's wife testified that Applicant had communicated over the internet with three women about sex and had met one on one occasion for a sexual encounter. Applicant himself testified that he had had two sexual encounters with the woman. The Judge concluded that Applicant's failure to be honest with the psychologist undermined the weight to be given the psychologist's (favorable) report and any mitigation which it might have documented. The Board concludes that the Judge's analysis represented a reasonable interpretation of the record evidence. Thus, the Administrative Judge did not err in denying Applicant a clearance.

Order

The decision of the Administrative Judge denying Applicant a clearance is **AFFIRMED**.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Concurring Opinion of Chairman Emilio Jaksetic:

For the reasons that follow, I conclude that the Administrative Judge's decision should be affirmed.

Applicant contends the Administrative Judge failed to take into account evidence favorable to him. This claim of error is not persuasive. There is a rebuttable presumption that a Judge considers all the record evidence unless the Judge specifically states otherwise. *See, e.g., Western Pacific Fisheries, Inc. v. SS President Grant*, 730 F.2d 1280, 1285 (9th Cir. 1984). That presumption is not rebutted or overcome merely because Applicant disagrees with the weight that the Judge gave to the record evidence, or because Applicant disagrees with the conclusions that the Judge drew from the record evidence. Apart from the rebuttable presumption, a reading of the decision below shows that the Judge considered the record evidence presented by Applicant, and explained why he did not give it much weight.

Applicant also cites two decisions by Hearing Office Administrative Judges in other cases, arguing that the positive results in those cases show that the Judge should have viewed Applicant's case more favorably. This contention is not persuasive. Although an appealing party may cite decisions by Hearing Office Judges as persuasive authority, such decisions are not legally binding precedents that must be followed by other Hearing Office Judges or the Board. *See* ISCR Case No. 01-22606 at 3-4 (App.Bd. Jun. 30, 2003)(discussing precedential value of decisions by Hearing Office Judges). Applicant's reliance on the favorable outcomes in other Hearing Office decisions falls far short of articulating a cogent reason why those decisions should be considered persuasive authority to be followed in this case. *Id.* at 4-5 (noting that a Hearing Office decision is not persuasive authority merely because the Judge ruled in a particular way or reached a particular result, and explaining that a party citing such a decision has the burden of persuasion to show that the decision should to be followed).

Applicant's argument concerning Sexual Behavior Mitigating Condition 4 ("The behavior no longer serves as a basis for coercion, exploitation, or duress") does not persuade me that the Administrative Judge erred. Applicant correctly notes that there is record evidence showing his wife, his immediate and second-level supervisors, and coworkers are aware of his sexual misconduct. However, there is record evidence supporting the Judge's finding that Applicant failed to provide honest and complete information to a psychologist who evaluated him.⁽¹⁾ And, as Department Counsel notes in its reply brief, there is record evidence showing that: (a) other members of Applicant's family are not aware of his sexual misconduct; and (b) Applicant's superiors and colleagues do not know about the specifics of Applicant's sexual misconduct. Given the mixed nature of the evidence concerning Applicant's disclosures about his sexual misconduct, the Judge was not compelled to reach a conclusion that Applicant presented evidence that was sufficient to warrant application of Sexual Behavior Mitigating Condition 4.

Finally, I do not find persuasive Applicant's contention that the Administrative Judge failed to consider his case in terms of the general factors of Directive, Section 6.3 and Adjudicative Guidelines, Item E2.2.1. The decision below reflects an evaluation of Applicant's case that reflects consideration of the record evidence in a manner that is consistent with the requirements of Section 6.3 and Item E2.2.1.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

1. On appeal, Applicant makes an argument for why his failure to disclose certain information to the evaluating psychologist should not be seen as deceptive or dishonest. That argument does not persuade me that it was arbitrary or capricious for the Judge to reach an unfavorable conclusion about Applicant's failure to disclose that information to the evaluating psychologist. The Judge's unfavorable conclusion reflects a reasonable interpretation of the evidence as a whole.