

DATE: February 21, 1997

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 95-0817

APPEAL BOARD DECISION AND REVERSAL ORDER

Appearances

FOR GOVERNMENT

Earl C. Hill, Jr., Esq.

Department Counsel

FOR APPLICANT

Pro se

Administrative Judge Robert R. Gales issued a decision, dated August 22, 1996, in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Department Counsel appealed. For the reasons set forth below, the Board reverses the Administrative Judge's decision.

This Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992.

Department Counsel's appeal presents the following issues: (1) whether the Administrative Judge erred by failing to apply collateral estoppel to Applicant's arguments concerning his conviction on two state felony counts; (2) whether the Administrative Judge's ruling that Applicant's sexual misconduct was isolated is arbitrary, capricious, or contrary to law; (3) whether the Administrative Judge erred by failing to explain his deviation from pertinent Adjudication Policy factors; (4) whether the Administrative Judge erred by refusing to consider a Certified Results of Interview; (5) whether the Administrative Judge erred by considering only a portion of a Report of Investigation offered by Applicant; and (6) whether the Administrative Judge erred by finding for Applicant under Criterion H with respect to one of the allegations of sexual misconduct.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated November 24, 1995. The SOR was based on Criterion H (dishonest and/or criminal conduct), Criterion Q (sexual misconduct), and Criterion I (poor judgment, unreliability, or untrustworthiness).

Applicant submitted an answer to the SOR, in which he indicated "I elect to have a decision without a hearing." Department Counsel prepared a File of Relevant Material (FORM), a copy of which was sent to Applicant. Department Counsel objected to portions of Applicant's response to the FORM.

The Administrative Judge subsequently issued a written decision in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Department Counsel's appeal from that favorable decision.

Appeal Issues⁽¹⁾

1. Whether the Administrative Judge erred by failing to apply collateral estoppel to Applicant's arguments concerning his conviction on two state felony counts. The Administrative Judge found that "a critical analysis of the SOR does not reveal any allegation that Applicant had, in fact, committed any criminal conduct," but he then notes that Applicant pleaded guilty to two felony counts of engaging in lewd, lascivious, or indecent acts in 1993-1994 with Applicant's eldest stepdaughter, a minor teenager at the time. The Judge went on to discuss the record evidence and conclude, among other things, that: (a) Applicant pressed his stepdaughter's hand on his exposed penis, on one occasion, which was interpreted and charged as forced or enticed masturbation under count III; and (b) Applicant rubbed her chest/breast area when innocently applying lotion, conduct which was interpreted and charged as fondling under count II. With regard to count II, the Judge also found that "Applicant's motivation regarding the count II conduct (touching or rubbing his stepdaughter's breasts) was the innocent intent of a parent to apply lotion to a child's body, and was not performed in a lewd, lascivious, or indecent manner." On appeal, Department Counsel contends the Judge erred by not applying the doctrine of collateral estoppel to Applicant's arguments of innocence concerning his conviction on two state felony counts. For the reasons that follow, the Board finds Department Counsel's contention persuasive.

Once the Administrative Judge found that Applicant was convicted of two felony counts of engaging in sexual misconduct with Applicant's stepdaughter, the Judge should have applied the principle of comity and not analyzed the Applicant's conduct underlying the two felony counts. While he couched his discussion in terms of the Directive's factors under Section F.3 of and the Mitigating Factors under Criminal Conduct (extenuation, or circumstances indicating that the actual offense was less serious than the offense charged), the Judge's decision suggests that he did not accept as fact the conduct of the Applicant which supported an essential element of the crime in each count. Granting the Judge the benefit of any doubt that his consideration of the Applicant's count III conduct was mitigation, his comments on count II cannot be interpreted as mitigation. In count II the Judge found that the conduct there involved the "innocent" application of suntan lotion and that the Applicant had "not performed in a lewd, lascivious, or indecent manner." Thus, the Judge collaterally attacked the State Court's finding that the Applicant violated an essential element of the offense of fondling a child under 16 in a lewd, lascivious, or indecent manner, i.e., knowing commission of a lewd or lascivious act that the child saw or sensed. While the Administrative Judge has discretion in applying the mitigating and F.3 factors under the Directive, he erred, as a matter of law, in allowing the Applicant to recant his admission of criminal intent with respect to count II.

The Board has held that the doctrine of collateral estoppel applies in these proceedings and precludes applicants from contending they did not engage in the criminal acts for which they were convicted. *See* ISCR Case No. 94-1213 (June 7, 1996) at p. 4 ("Although Applicant had the right to offer evidence in extenuation or mitigation of his felony criminal conduct, he was not at liberty to seek to relitigate the issue of his guilt of the crime for which he was convicted."); DISCR Case No. 88-2271 (October 16, 1991) at p. 5 ("Applicant's conviction collaterally estops him from challenging, in these proceedings, the validity of his conviction or his guilt of the offenses for which he was convicted"); DISCR Case No. 88-2903 (February 13, 1990) at p. 4 (applicant convicted of felony in state court does not have right to relitigate issue of his guilt of that offense in industrial security clearance proceeding). The Board has recognized that there are some exceptions to this general rule. *See* ISCR Case No. 94-1213 (June 7, 1996) at pp. 3-4. One notable exception involves convictions where an Applicant plead *nolo contendere* instead of guilty, but none of those exceptions are present in this case.⁽²⁾ Moreover, the circumstances which resulted in the finding of reversible error by the Administrative Judge in ISCR Case No. 94-1213 are very similar to the ones involved here. Accordingly, it was arbitrary, capricious, and contrary to law for the Judge to conclude the Applicant's conduct related to count II was innocent or that he had not committed or performed in a lewd, lascivious, or indecent manner.

Applicant's guilty plea to the two felony counts constituted an admission that he engaged in the acts covered by the charges to which he pleaded guilty. *See* DISCR Case No. 93-0369 (October 26, 1994) at p. 3. The fact that the Administrative Judge felt "the record contains no meaningful direct evidence of what had occurred to lead to his charges and eventual plea" is legally irrelevant. By ignoring the plain legal significance of Applicant's conviction, especially

with regard to count II, and expressing dissatisfaction with the probative value of other information in the record, the Judge was impermissibly holding Department Counsel to a higher standard of proof than required under the Directive. *See* ISCR Case No. 94-1055 (May 8, 1996) at p. 3 ("Nothing in the Directive requires Department Counsel to prove its case against an applicant through any specific form of evidence."); DISCR Case No. 87-0390 (June 6, 1991) at pp. 3-4 (Administrative Judge erred by requiring Department Counsel to offer specific forms of proof in SOR allegations).

The Board cannot uphold the Administrative Judge's favorable findings and conclusions to the extent they are predicated on his analysis that goes behind Applicant's conviction on sexual misconduct with Applicant's eldest stepdaughter and seek to conclude Applicant did not engage in the conduct covered by those convictions.

2. Whether the Administrative Judge's ruling that Applicant's sexual misconduct was isolated is arbitrary, capricious, or contrary to law. The Administrative Judge characterized Applicant's sexual misconduct with his biological daughter and several years later with his eldest stepdaughter as being "isolated in nature." Department Counsel contends that conclusion is arbitrary, capricious, and contrary to law. Department Counsel's contention has merit.

The record evidence shows Applicant engaged in sexual misconduct with his then-minor biological daughter on several occasions over a period of two to three months in 1985, and in sexual misconduct with his minor eldest stepdaughter in 1993-1994. Given that record evidence, it was arbitrary and capricious for the Administrative Judge to characterize Applicant's sexual misconduct as being "isolated in nature." *See, e.g.*, ISCR Case No. 94-1213 (June 7, 1996) at p. 4 (arbitrary and capricious for Administrative Judge to view an applicant's conduct in a piecemeal fashion and conclude some of it was "isolated" conduct). The Judge's conclusion does not reflect a reasonable or plausible interpretation of the record evidence and cannot be affirmed on appeal.

3. Whether the Administrative Judge erred by failing to explain his deviation from pertinent Adjudication Policy factors. Department Counsel contends the Administrative Judge erred by applying Sexual Misconduct Mitigating Factor 2⁽³⁾ and Sexual Misconduct Mitigating Factor 4.⁽⁴⁾ Department Counsel argues the Judge's application of those factors was error because it involved an impermissible deviation from the plain meaning of those factors. Those arguments are persuasive.

An Administrative Judge must apply pertinent Adjudication Policy factors for and against clearance. *See, e.g.*, ISCR Case No. 95-0731 (September 13, 1996) at p. 4. The Adjudication Policy permits an adjudicator to deviate from the plain terms of the Adjudication Policy factors, but only under limited circumstances: "Common sense may occasionally necessitate deviations from this policy guidance, but such deviations should not be frequently made and must be carefully explained and documented." Accordingly, a Judge does not have unfettered discretion in applying Adjudication Policy factors. *See, e.g.*, ISCR Case No. 95-0578 (October 2, 1996) at p. 6 ("A Judge does not have unfettered discretion in deviating from the terms of pertinent Adjudication Policy factors.").

As discussed earlier in this decision, it was arbitrary and capricious for the Administrative Judge to characterize Applicant's sexual misconduct as being "isolated in nature." Moreover, Applicant's sexual misconduct with his eldest stepdaughter occurred during the period November 1993-June 1994, which was within three years of the close of the record below. Accordingly, the Judge had no reasonable basis for his application of Sexual Misconduct Mitigating Factor 2 without an explanation for deviating from its plain meaning.

The Administrative Judge recognized that Applicant was still on probation for his 1994 sexual misconduct convictions and was still undergoing required psychiatric treatment/mental health counseling for sex offender treatment. Yet despite this, the Judge applied Sexual Misconduct Mitigating Factor 4. Considering the record as a whole, the Judge could not reasonably apply Mitigating Factor 4 without a detailed explanation for doing so. *See* DISCR Case No. 94-0164 (January 19, 1995) at p. 4 ("Where the deviations are minor or trivial, a simple explanation may be sufficient. Where the deviations are major or substantial, a more detailed explanation should be provided."). The Judge's single reference to Sexual Misconduct Mitigating Factor 4 fails to satisfy the requirement that he explain deviations from it.

4. Whether the Administrative Judge erred by refusing to consider a Certified Results of Interview. Included in the FORM was a document prepared by a special agent of the Defense Investigative Service (DIS) on July 5, 1995 to summarize the agent's interview of Applicant on June 6, 1995 (FORM Item 5). The Administrative Judge ruled that the

document was "nothing more than a written, un-notarized, statement adverse to the Applicant on a controverted issue which may only be received and considered by me without affording an opportunity to cross-examine when justified by the circumstances only as specified in the Directive at Enclosure 3, Item 22. I am unaware of any such compliance with the provisions of the Directive. Accordingly, to maintain a fundamental fairness, I have chosen not to consider the document."

On appeal, Department Counsel contends the Administrative Judge erred by refusing to consider FORM Item 5. In support of this contention, Department Counsel argues: (a) Applicant did not object to FORM Item 5 and he commented favorably on its accuracy;⁽⁵⁾ (b) the Judge's refusal to consider FORM Item 5 violated his obligation under Directive, Section F.3. to consider all available information, both favorable and unfavorable; (c) FORM Item 5 is admissible under Rule 803(6) of the Federal Rules of Evidence; and (d) the Judge's reliance on Item 22 of the Additional Procedural Guidance was misplaced because FORM Item 5 does not consist of statements made against Applicant by third-parties. For the reasons that follow, the Board concludes the Judge erred by refusing to consider FORM Item 5.

When Applicant responded to the FORM he asserted "many critical pieces of information contained in the [FORM] runs (sic) the gamut from being patently untrue to extremely exaggerated." Furthermore, Applicant's response set forth his specific disagreements with and characterizations of various portions of the FORM as being "untruth's" or "extremely exaggerated." Nowhere in Applicant's energetic criticisms of various portions of the FORM does he challenge the completeness, accuracy, or truthfulness of FORM Item 5 or any portion of it.⁽⁶⁾

The Administrative Judge's analysis of FORM Item 5 was flawed because Item 22 of the Additional Procedural Guidance of the Directive is inapplicable here. Item 22 states that the Administrative Judge cannot consider a written or oral statement adverse to Applicant on a controverted issue unless the Applicant has an opportunity to cross-examine the person making the statement, except when certain national security considerations (not applicable here) apply. As Department Counsel points out, Item 22 is directed at statements made against an applicant by third parties. FORM Item 5, on the other hand, involved the Applicant's own admissions against interest made to an agent of the Defense Investigative Service. Item 22 assures an applicant that he will not suffer from an adverse statement made by someone who can make himself unavailable for cross-examination (with certain narrow exceptions). If there had been a hearing, we have no reason to assume the agent would have been unable to testify. FORM Item 5 is otherwise admissible under Rule 803(6) of the Federal Rules of Evidence. The Judge's action was a violation of his responsibility under Section F.3. of the Directive to consider all available information, both favorable and unfavorable.⁽⁷⁾

5. Whether the Administrative Judge erred by considering only a portion of a Report of Investigation offered by Applicant. In response to the FORM, Applicant submitted several documents, including a ROI dated July 6, 1995. After receiving Applicant's response to the FORM, Department Counsel objected to the admissibility of the ROI and argued, in the alternative, that the Administrative Judge should receive an entire copy of the ROI instead of the partial copy submitted by Applicant.⁽⁸⁾ The Judge ruled that Applicant's *pro se* status raised a question whether his submission of a partial copy of the ROI constituted a knowing and intelligent waiver of his rights against the admissibility of ROIs under Executive Order 10865 and the Directive.

On appeal, Department Counsel contends the Administrative Judge erred because: (a) the Applicant's submission of a partial copy of the ROI presented a misleading impression of the entire document that required admission of a complete copy to ensure fairness under the principles of Rule 106 of the Federal Rules of Evidence (FRE 106); and (b) the Judge's ruling constituted an abuse of discretion because it was inconsistent with his obligation under the Directive to develop a full and complete record.

Here, Applicant submitted a partial copy of an ROI for consideration by the Administrative Judge. However, no party has the right to insist that only portions of a document the party submits be considered by a Judge. When a party submits a partial copy of a document, that party assumes the risk that the other party will ask that a complete copy of the document be submitted for consideration by the Judge. The principle of fairness underlying FRE 106 is a very important one that benefits all parties in these proceedings, including the Government. Moreover, the Judge noted that the FRE only serves as a guide in these proceedings, but the last sentence of Item 20 is more specific - it directs that an ROI may be received into evidence "provided it is otherwise admissible under the Federal Rules of Evidence . . ." and it is

authenticated. The Judge should have excluded the ROI in its entirety, not admitting only that portion that favored Applicant. *Cf.* DISCR Case No. 89-1327 (January 23, 1991) at pp. 6-8 (Administrative Judge erred by not striking and disregarding testimony of an applicant's witness when claim of privilege precluded Department Counsel from cross-examining witness).

6. Whether the Administrative Judge erred by finding for Applicant under Criterion H with respect to one of the allegations of sexual misconduct. SOR ¶1.b. alleged that Applicant's sexual misconduct with his biological daughter in 1985 constituted criminal conduct under Criterion H. The Administrative Judge entered a formal finding for Applicant on that allegation because it did not cite any criminal statute and Applicant was not arrested or charged in connection with that conduct. Department Counsel contends the Judge's favorable finding on that SOR allegation is in error because: (a) it is contrary to common sense for the Judge to determine that Applicant's conduct was not criminal in the state where it occurred; and (b) the Judge should have taken administrative or official notice of the pertinent state criminal statute. In its brief, Department Counsel properly acknowledges that its position on this issue runs contrary to a prior Board ruling and asks that the Board reconsider its ruling in that case and reverse it. For the reasons that follow, the Board concludes Department Counsel has failed to demonstrate harmful error.

In ruling on SOR ¶1.b., the Administrative Judge erred by relying on the fact that Applicant had not been arrested or charged in connection with his 1985 sexual misconduct with his biological daughter. The Board has repeatedly held that an applicant can be shown to have engaged in criminal conduct even if the applicant was never charged or convicted. *See, e.g.*, ISCR Case No. 94-1213 (June 7, 1996) at pp. 4-5; DISCR Case No. 93-1186 (January 6, 1995) at p. 7. Accordingly, the fact that Applicant had not been arrested or charged in connection with his 1985 sexual misconduct is not dispositive of the issue.

Moreover, the Administrative Judge erred, in part, by relying on the fact that SOR ¶1.b. did not cite a specific criminal statute. An SOR is an administrative pleading that should not be held to the strict standards of a criminal indictment. *See, e.g.*, ISCR Case No. 94-1213 (January 16, 1996) at p. 6. Even a technically deficient SOR allegation is not fatal to the Government's case if an applicant is placed on reasonable notice of the nature of the conduct the Government meant to be covered by an SOR allegation and has a reasonable opportunity to respond to the allegation and present evidence to address it. *See, e.g.*, ISCR Case No. 94-0841 (February 8, 1996) at p. 3. However, when submitting the FORM, Department Counsel did not present any evidence (*e.g.*, copy of state criminal statute or state court decision holding that conduct in question was a common law crime in the jurisdiction where it occurred) to support SOR ¶1.b., nor did Department Counsel ask the Judge to take administrative or official notice of any such statute or state court decision.

Although the Administrative Judge gave erroneous legal reasons for entering a formal finding for Applicant with respect to SOR ¶1.b., Department Counsel has failed to demonstrate the Judge's error was harmful in nature. As Department Counsel concedes, the Board has ruled contrary to its position on this issue in the past. *See, e.g.*, DISCR Case No. 92-0711 (July 14, 1993) at p. 4. Nothing in Department Counsel's brief persuades the Board to overrule its previously ruling. Indeed, if the Board were to accept Department Counsel's arguments, it would require the Board to conclude that Administrative Judges must act as surrogate advocates for Department Counsel and fill in gaps in the Government's case. The Board declines to reach such a result.

Conclusion

Department Counsel has met its burden on appeal of demonstrating reversible error. Pursuant to its authority under Item 33 of the Additional Procedural Guidance, the Board reverses the Administrative Judge's August 22, 1996 decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

See dissent

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

DATE: February 21, 1997

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In Re:)

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-----) ISCR Case No. 95-0817

SSN: -----)

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Applicant for Security Clearance)

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DISSENT OF ADMINISTRATIVE JUDGE MICHAEL Y. RA'ANAN

I don't believe that reversal is justified here. This case should be remanded to the Administrative Judge to re-apply Mitigating Factor 4. There is documentation in the record from a Ph. D. asserting that he believes that Applicant has progressed quickly, is not a threat to the national security and will complete therapy this year. The Administrative Judge needs to apply the terms of Mitigating Factor 4 to all the pertinent information in this case and if he concludes that deviation is appropriate he needs to explain it properly. Even the Applicant's version of his conduct would make it difficult to deviate in his favor. Applicant acknowledges his "role-reversal" with his biological child (that is, treating her like his wife) and he "let" his step-child touch him twice, once for 10-15 seconds and once he "pressed her hand on it."

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

1. Applicant's reply brief sets forth various objections to and disagreements with Department Counsel's appeal brief. The Board notes that the statements in both briefs are not evidence and they have not be considered as evidence on appeal.
2. If Applicant wants to contest the validity of his state felony convictions, he must seek redress in the appropriate

judicial forums, not in these proceedings.

3. "Sexual misconduct was isolated, occurred more than 3 years ago, and there is clear indication that the individual has no intention of participating in such conduct in the future."
4. "The individual has successfully completed professional therapy, has been rehabilitated and diagnosed by competent medical authority that misconduct is not likely to recur."
5. This argument is not fully supported by the record. A careful reading of Applicant's response to the FORM shows he commented favorably on the accuracy of a specific paragraph of FORM Item 6, not on the document in its entirety.
6. For the first time on appeal, Applicant raises objections to FORM Item 5. Those objections are not timely and do not change the fact he did not raise them or any other objection to FORM Item 5 when he responded to the FORM.
7. Given the Board's resolution of this issue, there is no need to address or rule on Department Counsel's other arguments about FORM Item 5.
8. In the reply brief, Applicant expresses concern about the Administrative Judge's reference to Department Counsel's submission of an additional item for consideration. The case file reflects that Department Counsel submitted a "Department Counsel's Reply to Applicant's Response to File of Relevant Material" (Reply), which contained a complete copy of the text (without any of the six attachments listed at the end of the document) of the partial ROI that Applicant had submitted in response to the FORM. The Reply contains a certification that a copy of it was mailed to Applicant. Our reading of the case file and the Administrative Judge's August 22, 1996 decision persuades us the Judge was referring to the copy of the ROI submitted with Department Counsel's Reply.