

DATE: February 27, 1997

In Re:

SSN: -----

Applicant for Security Clearance )

ISCR Case No. 95-0912

**APPEAL BOARD DECISION AND REVERSAL ORDER**

Appearances

FOR GOVERNMENT

Carla Conover, Esq.

Department Counsel

FOR APPLICANT

*Pro se*

Administrative Judge Elizabeth M. Matchinski issued a decision, dated September 18, 1996, in which she 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, as amended.

Department Counsel's appeal presents the following issues: (1) whether the Administrative Judge made factual findings that are not supported by substantial evidence; (2) whether the Administrative Judge deviated from the Adjudicative Guidelines without adequate explanation; and (3) whether the Administrative Judge's favorable security clearance decision is arbitrary, capricious, or contrary to law.

**Procedural History**

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated January 22, 1996 to Applicant. The SOR was based on Criterion D (Sexual behavior) and Criterion G (Alcohol consumption).

A hearing was held on July 23, 1996. The Administrative Judge subsequently issued a written decision in which she 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<sup>(1)</sup>**

1. Whether the Administrative Judge made factual findings that are not supported by substantial evidence. Department Counsel contends the Administrative Judge made certain factual findings that are not supported by substantial evidence.

Specifically, Department Counsel challenges the following factual findings: (a) Applicant intends to continue monthly counseling after December 1996; and (b) Applicant's friends at work are aware of his sexual exhibitionism.

On appeal, 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 32.a. Whether there is sufficient record evidence to support a Judge's factual findings is a question of law, not a question of fact. *See, e.g.*, DOHA Case No. 95-0904 (November 15, 1996) at p. 3.

(a) The record shows that health care professionals are of the opinion that Applicant has a condition that involves a relapse rate of approximately 15% even after completion of treatment,<sup>(2)</sup> that he needs to continue counseling and treatment for a few more years,<sup>(3)</sup> and that if he stopped receiving therapy he would be at risk for relapse.<sup>(4)</sup> The record shows that Applicant was cited in January 1995 for violating probation because he failed to follow through with court-ordered counseling.<sup>(5)</sup> Moreover, Applicant testified: "I expect to still stay in weekly sessions until December [1996], and then we might go until a month later; something like that. You can't stay dependent forever."<sup>(6)</sup> Applicant also said: "There is nothing that can make me stay in treatment, can make me continue to take my medication; it's just nothing there to make me do that. So, if you need guarantees, there isn't any available; just that I finally became sick and tired of being sick and tired, and I'm going to make things work in my life for the rest -- well, as long as I can."<sup>(7)</sup>

In view of the foregoing, the Board concludes there is insufficient evidence to support the Administrative Judge's finding that Applicant intends to continue monthly counseling.

(b) There is conflicting record evidence on whether Applicant's friends at work are aware of his sexual exhibitionism. When faced with conflicting record evidence, the Administrative Judge must consider and weigh such evidence and make factual findings. Considering the record evidence as a whole, the Board concludes the Judge's finding on this point is not arbitrary, capricious, or contrary to law. There is sufficient record evidence to support the Judge's finding despite the contrary evidence cited by Department Counsel on appeal.

## 2. Whether the Administrative Judge deviated from the Adjudicative Guidelines without adequate explanation.

Department Counsel contends the Administrative Judge impermissibly deviated from the Adjudicative Guidelines. In support of this contention, Department Counsel argues: (a) the record evidence does not support the Judge's application of Emotional, Mental, and Personality Disorders Mitigating Guideline 2; (b) the Judge failed to address Criminal Conduct Mitigating Guideline 3; and (c) the Judge failed to apply Emotional, Mental, and Personality Disorders Disqualifying Guideline 2.

(a) The Administrative Judge found that the record evidence did not support application of Sexual Behavior Mitigating Guideline 1,<sup>(8)</sup> Sexual Behavior Mitigating Guideline 2,<sup>(9)</sup> or Criminal Conduct Mitigating Guideline 2.<sup>(10)</sup> The Judge noted that Criminal Conduct Mitigating Guideline 5 required "clear evidence of rehabilitation" and that Applicant was still on probation. The Judge then decided that the Adjudicative Guidelines for Emotional, Mental, and Personality Disorders were pertinent because Applicant's sexual misconduct was attributable to an underlying mood disorder rather than a criminal predisposition. Analyzing Applicant's conduct under the Emotional, Mental, and Personality Disorders Adjudicative Guidelines, the Judge concluded Mitigating Guidelines 1<sup>(11)</sup> and 3<sup>(12)</sup> were not applicable, but that Applicant satisfied Mitigating Guideline 2<sup>(13)</sup> despite his need for ongoing treatment. The Judge cited Applicant's record of cooperation with his treatment regimen and his intention to remain in therapy to support her application of Mitigating Guideline 2.

The Adjudicative Guidelines explicitly authorize an adjudicator to consider the guidelines pertaining to Criminal Conduct and Emotional, Mental, and Personality Disorders in analyzing the security concerns raised by sexual misconduct. *See* Directive, Enclosure 2 at page 2-10, footnote.<sup>(14)</sup> However, Department Counsel persuasively argues that the Administrative Judge's application of Emotional Mental, and Personality Disorders Mitigating Guideline 2 was in error. As discussed earlier, there is not sufficient record evidence to support the Judge's finding that Applicant intends

to remain in therapy. Moreover, there is record evidence that Applicant has been less than fully compliant with the court-ordered requirement that he undergo counseling. Since two key findings used by the Judge to support her application of Mitigating Guideline 2 cannot be sustained, her reasoning for applying that Mitigating Guideline cannot be upheld on appeal.

(b) Department Counsel also argues the Administrative Judge improperly conflated Sexual Behavior Mitigating Guideline 3<sup>(15)</sup> and Emotional, Mental, and Personality Disorders Mitigating Guideline 2.<sup>(16)</sup> As discussed earlier, the Judge's application of Emotional, Mental, and Personality Disorders Mitigating Guideline 2 is not sustainable in this case. Therefore, it is unnecessary for the Board to decide whether that Mitigating Guideline could be applied in this case instead of Sexual Behavior Mitigating Guideline 3.

(c) Department Counsel argues the Administrative Judge should have applied Emotional, Mental, and Personality Disorders Disqualifying Guideline 2<sup>(17)</sup> because of evidence that Applicant refused to follow treatment recommendations in late 1994-early 1995. That argument is persuasive.

An Administrative Judge must apply pertinent Adjudicative Guidelines. *See* Directive, Section F.3. Where there is evidence that supports application of a particular Adjudicative Guideline, the Judge must apply it or provide an adequate explanation why a deviation from that Guideline is warranted under the particular facts of the case. *See, e.g.*, ISCR Case No. 95-0560 (August 16, 1996) at p. 3; ISCR Case No. 94-0964 (January 29, 1996) at pp. 5-6. Here, the Judge did neither with respect to Emotional, Mental, and Personality Disorders Disqualifying Guideline 2. Accordingly, the Judge erred by not applying Disqualifying Guideline 2 in this case.

3. Whether the Administrative Judge's favorable security clearance decision is arbitrary, capricious, or contrary to law. Department Counsel contends the Administrative Judge's favorable security clearance decision is arbitrary, capricious, or contrary to law because it is not supported by the record evidence. In support of this contention, Department Counsel argues: (a) the record evidence does not support a conclusion that Applicant has been cooperative with treatment or that his treatment has been successfully completed; (b) the record evidence does not support the Judge's finding that Applicant intends to continue in therapy for the period of time that health care professionals have indicated he needs to; and (c) the Judge's favorable decision is not sustainable under the Adjudicative Guidelines.

As discussed above, the record evidence does not support the Administrative Judge's finding that Applicant intends to remain in therapy for the period of time recommended by health care professionals. Moreover, as discussed above, the Judge committed some errors with respect to her application of the Adjudicative Guidelines in this case. Considering the record as a whole, the Judge's errors warrant reversal.

## CONCLUSION

Department Counsel has met its burden of demonstrating error below that warrants reversal. Accordingly, pursuant to Item 33.c. of the Additional Procedural Guidance, the Appeal Board reverses the Administrative Judge's September 18, 1996 decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

See dissent

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

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Applicant for Security Clearance

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ISCR Case No. 95-0912

**DISSENT OF ADMINISTRATIVE JUDGE MICHAEL Y. RA'ANAN**

Much of the basis for reversal in this case is found in the Administrative Judge's understanding that the Applicant intends to continue therapy on a monthly basis. The majority does not find such a meaning in the Applicant's testimony. To be sure, the testimony in question is neither clear nor eloquent. However, the Administrative Judge was there when the Applicant testified and I can believe that she understood the Applicant's intention in a way that the transcript reflects poorly, if at all. The Applicant now argues that her understanding is correct, while Department Counsel argues that the Administrative Judge erred. If I was certain that the Administrative Judge's understanding was incorrect, I would probably join the majority. I am not certain that the Administrative Judge is wrong, though.

If the Administrative Judge's understanding of the Applicant's intention is correct than her application of a key mitigating factor is justified and the majority's decision to reverse is in error.

Also, the Applicant's recent history is one of compliance with treatment recommendations. The majority concludes that a disqualifying factor ought to be applied because of a two year old failure to comply with treatment recommendations. I am persuaded that that event is no longer pertinent to an analysis of Applicant's situation.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

1. The Administrative Judge's favorable findings and conclusions under Criterion G are not at issue on appeal.
2. Hearing Transcript at pp. 56-57, 94.
3. Hearing Transcript at pp. 67, 90, 93; Government Exhibit 4.

4. Hearing Transcript at pp. 64, 71-72, 90, 93, 105-06; Government Exhibit 4.
5. Government Exhibits 1, 4, 7.
6. Hearing Transcript at p. 120.
7. Hearing Transcript at p. 143.
8. "[T]he behavior occurred during or prior to adolescence and there is no evidence of subsequent conduct of a similar nature."
9. "[T]he behavior was not recent and there is no evidence of subsequent conduct of a similar nature."
10. "[T]he crime was an isolated incident."
11. "[T]here is no indication of a current problem."
12. "[T]he past emotional instability was a temporary condition (e.g., one caused by a death, illness, or marital breakup), the situation has been resolved, and the individual is no longer emotionally unstable."
13. "[R]ecent diagnosis by a credentialed mental health professional that an individual's previous emotional, mental, or personality disorder is cured or in remission and has a low probability of recurrence or exacerbation."
14. When doing so, the Administrative Judge must consider all pertinent guidelines, not just isolated ones.
15. "[T]here is no other evidence of questionable judgment, irresponsibility, or emotional instability."
16. *See* footnote 13.
17. "[I]nformation that suggests that an individual has failed to follow appropriate medical advice relating to treatment of a diagnosed disorder, e.g. failure to take prescribed medication."