

DATE: September 25, 1997

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 96-0360.a1

## APPEAL BOARD DECISION AND REVERSAL ORDER

### APPEARANCES

#### FOR GOVERNMENT

Matthew E. Malone, Esq., Department Counsel

#### FOR APPLICANT

Rudolf A. Carrico, Jr., Esq.

Administrative Judge Kathryn Moen Braeman issued a decision, dated February 27, 1997, 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's findings and conclusions concerning Statement of Reasons ¶1.e. are supported by the record evidence; (2) whether the Administrative Judge erred by applying Criminal Conduct Mitigating Guidelines 3 and 4; (3) whether the Administrative Judge erred by relying on inadmissible evidence to apply Criminal Conduct Mitigating Guideline 5; and (4) whether the Administrative Judge's favorable decision is arbitrary, capricious, or contrary to law.

### **Procedural History**

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated September 24, 1996. The SOR was based on Criterion J (Criminal Conduct).

A hearing was held on January 3, 1997. 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**

1. Whether the Administrative Judge's findings and conclusions concerning Statement of Reasons ¶1.e. are supported by the record evidence. SOR ¶1.e. alleged that Applicant made threats against state police officers and a state court judge, and had threatened to blow up a courthouse. After a detailed discussion of the record evidence, the Administrative Judge concluded Applicant did not make a "real threat." On appeal, Department Counsel contends the Administrative Judge's findings and conclusions about SOR ¶1.e. are not supported by the record evidence. For the reasons that follow, the Board finds Department Counsel's contention persuasive.

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 find 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. In doing so, the Board must not only consider whether there is record evidence supporting the Judge's findings, but also whether there is record evidence that fairly detracts from those findings. *See, e.g.*, ISCR Case No. 94-0729 (January 18, 1996) at p. 4. Under this standard, the Judge's findings and conclusions about SOR ¶1.e. are not sustainable.

The Administrative Judge relied, in part, on credibility determinations to make her findings and conclusions about SOR ¶1.e. Specifically, the Judge found Applicant's then-wife (now ex-wife) was not credible,<sup>(1)</sup> but Applicant was credible.<sup>(2)</sup> Even if the Judge had a rational basis for finding the ex-wife's credibility was poor,<sup>(3)</sup> such a conclusion is irrelevant to *other* record evidence that Applicant made the threats alleged in SOR ¶1.e. As will be discussed later in this decision, there is record evidence supporting SOR ¶1.e. that is independent from the allegations made by Applicant's ex-wife.

Although the Board must give deference to a Judge's credibility determinations, those determinations are not immune from review. *See, e.g.*, DOHA Case No. 96-0316 (February 24, 1997) at p. 3. *See also NLRB v. Cook Family Foods, Ltd.*, 47 F.3d 809, 816 (6th Cir. 1995) ("Even in credibility matters, '[a] reviewing court does not act . . . as a mere rubber stamp for the administrative agency . . ."). As the Supreme Court has noted:

"[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 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 court of appeals may well find clear error even in a finding purportedly based on a credibility determination." *Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985).

On occasion, the Board has found a Judge's credibility determination to be unsustainable. *See, e.g.*, ISCR Case No. 95-0178 (March 29, 1996) at p. 3. Considering the record as a whole, the Administrative Judge's favorable assessment of Applicant's credibility is not supported by the record evidence.

The Administrative Judge's favorable assessment of Applicant's credibility appears to ignore record evidence that clearly detracts from it and does not reflect a reasonable interpretation of the record evidence. For example, the Judge found, based on the record evidence, that Applicant engaged in indecent exposure in the presence of a teenage girl in 1983. Yet, the Judge overlooked Applicant's inconsistent statements about that incident. *Compare* Government Exhibit 3 (in which Applicant falsely implied nothing happened with the teenage girl) *with* Government Exhibit 4 (in which Applicant admitted masturbating when teenage girl was in car). Also, the Judge noted Applicant's admission to the Defense Investigative Service that he used a "full Nelson" on his then-wife on one occasion (Government Exhibit 14), yet ignored Applicant's denial of doing that in his answer to the SOR and at the hearing (Transcript at p. 211).

In addition, the Administrative Judge gave some irrelevant reasons for her finding that Applicant did not make a real threat, including the following: Applicant did not remember the precise statements he made to his then-wife; Applicant did not listen to the illegal tape recording made by his then-wife; and a state judge reduced Applicant's bail. Whether Applicant remembers his precise statements or listened to the tape recording is irrelevant to whether he made threats. Because bail decisions are not adjudications on the merits of a defendant's innocence or guilt of pending criminal charges, the reduction of bail in Applicant's case is irrelevant to the issue of whether he made threats. It is arbitrary and capricious for the Judge to rely on such irrelevant reasons to find that Applicant did not make a real threat. Similarly, the Judge's reliance on the fact that the state authorities dismissed the criminal charges against Applicant was misplaced. Absent record evidence of the specific reasons why the criminal charges were not pursued, a Judge cannot legitimately make assumptions or draw inferences about the reasoning state authorities used to drop the criminal charges. *See, e.g.*, DISCR Case No. 87-0390 (September 21, 1989) at pp. 6-7 ("The Examiner acted in an arbitrary and capricious manner and contrary to law when he speculated as to the mental processes of state prosecutors with respect to the decision to drop charges against Applicant. The Examiner also acted in an arbitrary and capricious manner when he inferred that the decision of the state prosecutors to dismiss the criminal charges against Applicant somehow was probative of

Applicant's innocence.").

Moreover, the Administrative Judge's finding that Applicant did not make a real threat ignores the concession of Applicant's counsel that Applicant was not disputing that he made threatening statements (Transcript at p. 68), the testimony of the facility security officer that Applicant admitted to her that he made threats (Transcript at pp. 146-147), and the record evidence that Applicant had problems controlling his anger and engaged in acts of violence against his ex-wife in 1992, 1993 and 1994. Viewed in its totality, the record does not support the Judge's finding that Applicant did not make real threats.

2. Whether the Administrative Judge erred by applying Criminal Conduct Mitigating Guidelines 3 and 4. The Administrative Judge applied Criminal Conduct Mitigating Guidelines 3 <sup>(4)</sup> and 4 <sup>(5)</sup>. Department Counsel contends the Judge erred in applying those Mitigating Guidelines because the record evidence does not support their application in this case. The Board finds this contention persuasive.

The record evidence shows Applicant has a history of failing to deal properly with stress, as well as a history of resorting to domestic violence arising out of his failure to control his anger. The record evidence does not support the Administrative Judge's conclusion that Applicant was "pressured" to engage in acts of domestic violence. There is nothing in the record that indicates Applicant was "pressured" into getting physical or violent with his ex-wife. Applicant's actions were voluntary and within his control. If Applicant was unwilling or unable to control his anger, such a failure of self-control does not constitute "pressure" that falls under Mitigating Guideline 3.

Moreover, the record evidence does not provide a sufficient basis for the Administrative Judge's finding that Applicant's domestic violence was unique to his ex-wife and not likely to be repeated if Applicant became angry with a future girlfriend or future wife. In addition, the record evidence shows Applicant has the tendency of blaming his ex-wife for triggering his acts of domestic violence. Where an applicant is unwilling or unable to accept responsibility for his or her own actions, such a failure is evidence that detracts from a finding of reform and rehabilitation. *See, e.g.*, ISCR Case 96-0710 (June 20, 1997) at p. 4 ("... Applicant's desire to shift blame for his actions to other persons... is not indicative of a person accepting responsibility for his own wrongdoing."); ISCR Case No. 94-1081 (May 3, 1996) at pp. 3-4 (Board concluded that the Judge's finding of rehabilitation was not sustainable where record showed, *inter alia*, that applicant "has a pattern of blaming other people for his problems instead of accepting responsibility for them"). Given Applicant's overall history of domestic violence and his desire to blame his ex-wife for his acts of domestic violence, a much stronger showing of rehabilitation is needed before the Judge could reasonably conclude Applicant has reformed. *See* ISCR Case No. 94-0964 (July 3, 1996) at p. 6 ("The more serious or long-term an applicant's conduct is, the stronger the evidence of rehabilitation needs to be for the Judge to find the applicant has overcome the negative security implications of that conduct.")(citing earlier Board decisions). Considering the record as a whole, the Judge's reliance on Mitigating Guideline 4 is not sustainable.

3. Whether the Administrative Judge erred by relying on inadmissible evidence to apply Criminal Conduct Mitigating Guideline 5. The Administrative Judge relied on Applicant Exhibit K and the favorable character evidence in support of her application of Criminal Conduct Mitigating Guideline 5. <sup>(6)</sup> Department Counsel argues the Judge erred because: (a) Applicant Exhibit K was inadmissible and should not have been admitted into evidence over Department Counsel's objections; and (b) the record evidence does not support the Judge's finding that Applicant provided clear evidence of rehabilitation. These arguments have mixed merit.

Department Counsel's first argument lacks merit. Although Department Counsel recognizes the Directive does not call for strict application of the Federal Rules of Evidence, Department Counsel's argument fails to take into account that the Directive also states that "technical rules of evidence may be relaxed, except as otherwise provided herein, to permit the development of a full and complete record." *See* Directive, Additional Procedural Guidance, Item 19. Moreover, Department Counsel's argument about the unavailability of Additional Procedural Guidance, Item 20 to Applicant is irrelevant. Finally, the specific criticisms Department Counsel levels against Applicant Exhibit K go to its weight, not to its admissibility. The Administrative Judge did not abuse her discretion or act contrary to law by admitting Applicant Exhibit K into evidence over Department Counsel's objections.

Department Counsel's second argument is persuasive. As discussed earlier in this decision, the Administrative Judge's

application of Criminal Conduct Mitigating Guideline 4 is not sustainable because it was predicated on an unsustainable finding that Applicant was reformed and not likely to repeat his past misconduct. Applicant Exhibit K is too sparse, conclusory and vague to warrant the great weight the Judge placed upon it in light of all the contrary record evidence and is insufficient to establish a finding of rehabilitation pursuant to Mitigating Guideline 5. *See* Directive, Additional Procedural Guidance, Item 32.a. *See also* ISCR Case No. 95-0795 (May 16, 1997) at p. 2 (noting Board will not disturb Judge's weighing of the evidence, unless there is a showing the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law).

4. Whether the Administrative Judge's favorable decision is arbitrary, capricious, or contrary to law. Department Counsel contends the Administrative Judge's favorable decision should be reversed because: (a) it is not supported by the record evidence; (b) it is based on an unsustainable finding of rehabilitation; and (c) it contains the legal errors identified by Department Counsel.

As discussed earlier, Department Counsel has met its burden of demonstrating several errors by the Administrative Judge with respect to her findings and conclusions, as well as her application of pertinent Adjudicative Guidelines. The totality of the Judge's errors fatally undercut her favorable decision and render it arbitrary, capricious, and contrary to relevant provisions of the Directive, including Section F.3. and the Adjudicative Guidelines. Considering the record as a whole, it was arbitrary, capricious, and contrary to pertinent provisions of the Directive for the Judge to conclude it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

### **Conclusion**

Department Counsel has met its burden on appeal of demonstrating harmful error that warrants reversal. Pursuant to Item 33.c. of the Directive's Additional Procedural Guidance, the Board reverses the Administrative Judge's February 27, 1997 decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

1. Since Applicant's ex-wife was not a witness at the hearing, the Administrative Judge based her negative assessment of the ex-wife's credibility on her conduct with respect to certain matters or events.

2. The Board rejects Department Counsel's argument that impeachment is limited to actual witnesses at a DOHA hearing. Department Counsel cites no authority for its untenable argument. Either party can seek to impeach the testimony of a witness, or any written statement or other documentary evidence that is admitted into evidence during the

proceedings below.

3. At the hearing, the Administrative Judge specifically commented that the credibility of Applicant's ex-wife was not relevant to SOR ¶1.e. (Transcript at p. 68). The Judge's reversal of position on that point suggests arbitrary and capricious action on her part. *Cf.* ISCR Case 96-0869 (September 11, 1997) at p. 3 ("Although a Judge may reconsider and change a ruling made during a hearing, a Judge cannot do so at whim or without explanation. . . . [T]he Judge must articulate in his or her decision clear and cogent reasons for changing the earlier ruling. Without an adequate explanation, the Judge's reversal of a ruling has the earmarks of arbitrary and capricious action.")

4. "[T]he person was pressured or coerced into committing the act and those pressures are no longer present in that person's life."

5. "[T]he person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur."

6. "[T]here is clear evidence of successful rehabilitation."