

DATE: August 12, 1997

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 96-0547

APPEAL BOARD DECISION

Appearances

FOR GOVERNMENT

William S. Fields, Esq.

Department Counsel

FOR APPLICANT

Eric F. Adams, Esq.

Administrative Judge John R. Erck issued a decision, dated March 26, 1997, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed that adverse decision. For the reasons set forth below, the Board affirms 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.

Applicant's appeal presents the issue of whether the Administrative Judge's conclusions were arbitrary, capricious or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated August 28, 1996. The SOR was predicated upon Criterion D (Sexual Behavior). Applicant submitted a response to the SOR in which he requested a hearing. A hearing was held on December 18, 1996. The Administrative Judge issued an unfavorable decision on March 26, 1997. The case is before the Board on appeal from that adverse decision.

Appeal Issues

Applicant does not contest most of the Administrative Judge's specific findings of fact. ⁽¹⁾ He does contest the Administrative Judge's conclusions. We construe his appeal as asserting that the Administrative Judge's conclusions were arbitrary, capricious or contrary to law.

Applicant argues that his period of good behavior (16 months as of the Administrative Judge's Decision) combined with Applicant's acknowledgment of wrongdoing now outweigh his prior misconduct which consisted of multiple acts of

sexual harassment. The Board finds that the Administrative Judge was acting within the bounds of his discretion when he concluded that Applicant's sixteen-month period of good behavior was an insufficient track record to mitigate Applicant's history of sexual harassment. This is substantiated by the Administrative Judge's observation that Applicant's recent record of good conduct has taken place in an environment where he has had little opportunity to misbehave (Applicant has been working out of his home).

Applicant also argues that "great credence" should be given to the testimony of a religious leader from his church. Although the Administrative Judge did not specifically cite the religious leader's testimony he did mention Applicant's church activity and there is a rebuttable presumption that the Judge considered all the evidence unless the Judge states otherwise. (*See, e.g.*, DOHA Case No. 96-0228, April 3, 1997 at page 3). Absent a showing that the Judge acted in an arbitrary and capricious manner, the Appeal Board will not overturn the Judge's weighing of the evidence. Applicant's brief fails to make such a showing on appeal.

Applicant requests that the Board consider Applicant's record through the date of Applicant's appeal brief, but the Board is prohibited from doing so (*See* Item 29 of the Directive, Additional Procedural Guidance "... No new evidence shall be received or considered by the Appeal Board."). On appeal, a Judge's findings and conclusions must be reviewed based on the record evidence before the Judge, not matters outside the record.

Also Applicant cites for the Board's consideration purported errors in Applicant's Exhibit A, which he offered at the hearing over Department Counsel's objection. The Board concludes that Applicant is estopped from complaining now for the first time about the quality of the evidence he himself presented below. And, in any event, the Judge cannot be fairly faulted for relying on plain, uncontroverted statements in Applicant's Exhibit A to make his finding that Applicant admitted to being involved in similar misconduct on earlier occasions.

None of the issues raised by Applicant demonstrate error by the Administrative Judge. There is no basis to conclude that the Administrative Judge's decision was arbitrary, capricious, or contrary to law.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's 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. As will be discussed later, Applicant does make an argument that has the practical effect of challenging one of the Judge's factual findings.