DATE: December 31, 1997

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 96-0461

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Michael H. Leonard, Esq., Department Counsel

FOR APPLICANT

Kenneth D. Brody, Esq.

Administrative Judge Jerome H. Silber issued a decision, dated August 12, 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. 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 following issues: (1) whether the Administrative Judge erred by admitting into evidence Government Exhibits 5 and 6; (2) whether the Administrative Judge erred by finding that Applicant engaged in criminal sexual conduct in July 1992; and (3) whether the Administrative Judge's adverse 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 April 29, 1997 to Applicant. The SOR was based on Criterion D (Sexual Behavior).

A hearing was held on July 24, 1997. The Administrative Judge subsequently issued a written decision in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Applicant's appeal from that adverse decision.

Appeal Issues[(1)]

1. Whether the Administrative Judge erred by admitting into evidence Government Exhibits 5 and 6. At the hearing, Department Counsel offered Government Exhibits 5 and 6 as evidence. Exhibit 5 consists of police records pertaining to the 1992 incident alleged in SOR subparagraph 1.a.). Exhibit 6 contains a military investigation pertaining to the 1992 incident, and includes a written statement by the woman who alleged the 1992 incident was not consensual in nature and that she was victimized by Applicant and his spouse on that occasion. Both exhibits were admitted into evidence. On appeal, Applicant contends the Judge erred by admitting those exhibits because they were violative of his right to

confront and cross-examine persons making adverse statements against him. Under the particular facts of this case, Applicant's contention lacks merit.

The right to confront and cross-examine persons making adverse statements is an important right provided to applicants by Executive Order 10865 (Section 4) and the Directive (Section D.3.c. and Additional Procedural Guidance, Item 22). However, that right can be waived by an applicant. *Adams v. Laird*, 420 F.2d 230, 237-38 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). *Accord* ISCR Case No. 96-0277 (July 11, 1997) at p. 3.

Applicant received a copy of the Directive, which placed him on notice of his rights under Executive Order 10865 and the Directive. Before the hearing, Applicant was provided a copy of the exhibits Department Counsel intended to offer as evidence against him. Furthermore, the Administrative Judge explained to Applicant that he was obligated to take steps to protect his rights during the hearing, including raising any objections he might have. During the hearing, Applicant was provided the opportunity to object to each of the exhibits offered by Department Counsel and he raised no objection with respect to Exhibit 5 or Exhibit 6. Considering the record as a whole, the Board concludes Applicant waived his right to confront and cross-examine with respect to Exhibits 5 and 6. Accordingly, the Judge did not err by admitting those exhibits into evidence.

2. Whether the Administrative Judge erred by finding that Applicant engaged in criminal sexual conduct in 1992. The Administrative Judge found that during the 1992 incident (SOR subparagraph 1.a.) Applicant and his wife forced a woman neighbor into sexual acts against her will. Applicant contends the Judge's finding of criminal sexual conduct on that occasion is in error because: (a) the Judge improperly relied on Exhibits 5 and 6, in violation of Applicant's right to confront and cross-examine persons making adverse statements against him; (b) the Judge erred by relying on Applicant's arrest in 1992 to find that the incident involved criminal sexual conduct; (c) the Judge improperly relied on Exhibits 5 and 6 because they contain hearsay not admissible under the Federal Rules of Evidence; and (d) even if Exhibits 5 and 6 were admissible, they are inherently unreliable and could not reasonably be relied upon by the Judge.

As discussed earlier, Applicant waived his right to object to Exhibits 5 and 6. Therefore, the Administrative Judge did not err by admitting those exhibits into evidence and considering them when making his findings of fact.

Applicant correctly notes that the mere fact that he was arrested does not establish that he engaged in criminal conduct. *See, e.g.*, DISCR Case No. 92-0113 (January 22, 1993) at p. 3 n.2. However, nothing in the decision indicates or suggests the Administrative Judge based his finding of criminal sexual conduct on the mere fact of Applicant's arrest. There is a rebuttable presumption that a Judge is capable of ignoring or disregarding incompetent or irrelevant evidence. *See*, *e.g.*, ISCR Case No. 94-0845 (October 18, 1995) at p. 6. Applicant's argument fails to rebut that presumption with respect to the matter of Applicant's arrest.

Applicant's reliance on the Federal Rules of Evidence is misplaced. The Federal Rules of Evidence are merely a guide (Directive, Additional Procedural Guidance, Item 19) and need not be strictly applied in these proceedings. *See, e.g.*, ISCR Case No. 96-0360 (September 25, 1997) at p. 5. Moreover, even if the Federal Rules of Evidence were more than merely a guide in these proceedings, Applicant's arguments ignore the important point that he waived his right to object to Exhibits 5 and 6. Once a party has waived the opportunity to object to evidence, that party cannot fairly claim on appeal that the Judge's admission of that evidence violated the Federal Rules of Evidence.

Even though Applicant waived his right to object to Exhibits 5 and 6, that waiver did not relieve the Administrative Judge of his responsibility to weigh those exhibits in light of their intrinsic evidentiary value, as well as the record evidence as a whole. *See, e.g.*, ISCR Case No. 96-0277 (July 11, 1997) at p. 4 ("[T]he absence of any objection by Applicant to Government Exhibit 6 did not relieve the Administrative Judge from her obligation to consider what weight, if any, the Judge reasonably could give to that document."). Standing alone, the Judge's negative credibility assessment of Applicant's denials of wrongdoing would be insufficient to support his finding that Applicant engaged in criminal sexual conduct in 1992. *See* ISCR Case No. 96-0608 (August 28, 1997) at p. 3 ("An Administrative Judge cannot use a credibility determination as a substitute for record evidence."); DISCR Case No. 87-1983 (August 29, 1989) at p. 3 ("[W]here Department Counsel has failed to offer credible evidence to support contested allegations in an SOR, the Examiner cannot reasonably find against an applicant on such contested allegations solely on the basis that he finds the applicant's testimony to be unpersuasive. . . . An Examiner's disbelief of an applicant's denials, standing alone,

is not a legally acceptable substitute for some credible evidence in support of the SOR allegations.")(emphasis in original). However, taking that part of Exhibit 5 that contained the personal observations of a police officer concerning the state of the woman when she reported the alleged sexual assault,[(2)] the statements of the woman in Exhibit 6, and the Judge's negative credibility assessment of Applicant's denials of wrongdoing, the Judge had a sufficient basis to find that Applicant engaged in criminal sexual conduct during that incident.

3. Whether the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law. Applicant contends the Administrative Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law because: (a) Applicant's past sexual conduct does not provide a rational basis to conclude he is a security risk; (b) there is no indication that Applicant ever engaged in a security violation; (c) any security significance that Applicant's past sexual conduct might have had was diminished because the Government was aware of it for at least five years, during which time he received favorable ratings and commendations for dedication, hard work, and dependability; (d) the Judge erred by not finding Applicant's military service was mitigating under Sexual Behavior Mitigating Guideline 3[(3)]; and (e) even the Judge found the 1992 incident was mitigated by the fact that it occurred more than five years ago. For the reasons that follow, the Board concludes the Judge's adverse security clearance decision is sustainable.

Implicit in Applicant's arguments is that a claim that the Government is equitably estopped from denying or revoking his security clearance because it was aware of his sexual conduct several years ago but did not act sooner. The Government is not equitably estopped from denying or revoking a security clearance. *See, e.g.*, ISCR Case 96-0371 (June 3, 1997) at p. 4; DISCR Case No. 93-0208 (May 12, 1994) at p. 4; DISCR Case No. 90-1493 (February 21, 1992) at p. 3; DISCR Case No. 88-1733 (February 20, 1991) at p. 3. Accordingly, Applicant is not entitled to a security clearance merely because the Government did not act sooner to deny or revoke his access to classified information. The question remains whether the Administrative Judge had a rational basis for his adverse security clearance decision.

Security clearance decisions are not an exact science, but rather are predictive judgments about a person's security suitability in light of that person's past conduct and present circumstances. *Department of Navy v. Egan*, 484 U.S. 518, 528-29 (1988). Direct or objective evidence of nexus is not required before the Government can deny or revoke access to classified information. *Gayer v. Schlesinger*, 490 F.2d 740, 750 (D.C. Cir. 1973). Furthermore, the Government need not wait until a person mishandles or fails to properly safeguard classified information before it can deny or revoke access to classified information. *Adams v. Laird*, 420 F.2d 230, 238-39 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). All that is required is proof of facts and circumstances that indicate a particular applicant is at risk for mishandling classified information, or does not demonstrate the high degree of judgment, reliability, and trustworthiness required of persons granted access to classified information. *See Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980) (noting a high degree of trust must be reposed in federal employee with access to classified information); *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960) (noting security requirements include consideration of person's honesty, judgment, and sense of obligations), *aff'd*, 367 U.S. 886 (1961).

In addition, security clearance decisions are not limited to consideration of an applicant's conduct during duty hours. Any off-duty conduct that has security implications can be considered in deciding an applicant's security suitability. *See, e.g.*, ISCR Case No. 96-0695 (August 18, 1997) at p. 3. Finally, any doubts about a person's security eligibility must be resolved in favor of the national security. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

In view of the foregoing, the Administrative Judge had a rational basis for concluding Applicant's history of sexual conduct was relevant and material to determining his security eligibility. Furthermore, it was not arbitrary, capricious, or contrary to law for the Administrative Judge to conclude the overall facts and circumstances of Applicant's history of sexual conduct raised questions about his judgment and discretion sufficient to preclude an affirmative finding that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.[(4)] The presence of favorable evidence cited by Applicant did not preclude the Judge from making an adverse decision. The Judge must consider all the evidence, both favorable and unfavorable. *See* Directive, Section F.3. (decision must be based on consideration of all relevant and material information). Error is not demonstrated merely because the Judge did not conclude the mitigating evidence presented by Applicant was sufficient to overcome the negative evidence in the case. *See, e.g.*, ISCR Case No. 96-0371 (June 3, 1997) at p. 5 ("When considering the record evidence, the Judge has to decide whether the favorable evidence outweighs the unfavorable evidence, or vice versa.")(citing federal case).

Applicant's reliance on Sexual Behavior Mitigating Guideline 3 is misplaced. Given the Judge's sustainable finding that the 1992 incident involved nonconsensual sexual conduct, the Judge had a rational basis for not applying Mitigating Guideline 3. Moreover, the passage of time is a factor that the Judge must take into account. *See* Directive, Section F.3.b.[(5)]; Sexual Behavior Mitigating Guideline 2.[(6)] However, considering the record as a whole, it was not arbitrary, capricious, or contrary to law for the Judge to conclude Applicant's history of sexual conduct was not yet mitigated by the passage of time.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's August 12, 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. The Administrative Judge entered formal findings in favor of Applicant with respect to the SOR subparagraphs 1.c. and 1.d. Those favorable formal findings are not at issue on appeal.

2. *See, e.g.*, ISCR Case No. 96-0575 (July 22, 1997) at p. 3 (noting that police report containing personal observations by reporting police officer is admissible over applicant's objection).

3. "[T]here is no other evidence of questionable judgment, irresponsibility, or emotional instability."

4. Although the Board sustains this particular decision because of the totality of the record, we are not prepared to rely on Applicant's jokes as significant indicia of his judgment.

5. "Frequency and recency of the conduct."

6. "[T]he behavior was not recent and there is no evidence of subsequent conduct of a similar nature."