

DATE: March 24, 1997

In Re:

----- ISCR Case No. 96-0587

SSN: -----

Applicant for Security Clearance

APPEAL BOARD DECISION

Appearances

FOR GOVERNMENT

Martin H. Mogul, Esq.

Department Counsel

FOR APPLICANT

William H. Cashman, Esq.

Administrative Judge Elizabeth M. Matchinski issued a decision, dated December 2, 1996, in which she 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 presuming a police officer reported a conversation accurately merely because he was acting within the scope of his official duties; and (2) whether the Applicant met his burden of demonstrating mitigating circumstances sufficient to warrant a favorable security clearance decision.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated August 26, 1996 to Applicant. The SOR was based on Criterion J (Criminal conduct) and Criterion D (Sexual behavior).

A hearing was held on October 24, 1996. The Administrative Judge subsequently issued a decision in which she 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. Whether the Administrative Judge erred by presuming a police officer reported a conversation accurately merely because he was acting within the scope of his official duties. The Administrative Judge found that Applicant engaged in sexual misconduct with a minor boy as alleged in the SOR. In reaching that finding, the Judge stated "The [police] officer was acting within the scope of his official duties and it is presumed, absent proof to the contrary, that he reported accurately what Applicant told him during the interview." Applicant contends the Judge erred because there is no such

legal presumption.

Applicant's contention is persuasive. There is no presumption in the law that a police officer's version of a conversation or interview is accurate merely because the officer is making a report of it in the course of his official duties. Therefore, the Judge's reasoning concerning the accuracy of the police officer's report is legally flawed. However, the Judge's error is harmless under the particular facts of this case.

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,⁽¹⁾ but none of those exceptions are present in this case.⁽²⁾ Given Applicant's conviction for sexual misconduct with a minor boy, the error identified by Applicant is not outcome determinative. Accordingly, no useful purpose would be served by remanding the case. *See, e.g.*, ISCR Case No. 95-0495 (March 22, 1996) at p. 4 (remand required only where there is a significant chance that, but for the error, a different result might have been reached)(citing federal case).

2. Whether the Applicant met his burden of demonstrating mitigating circumstances sufficient to warrant a favorable security clearance decision. Applicant contends, in the alternative, that even if the sexual misconduct actually occurred, he has met his burden of demonstrating mitigating circumstances sufficient to warrant a favorable security clearance decision. In support of this contention, Applicant argues: (a) prior to 1994, he was never charged with or convicted of any crime; (b) he is 57 years of age and has an unblemished record apart from a 4-month period in 1994; (c) he has been employed by the same defense contractor for 34 years with an excellent work record and no disciplinary actions taken against him; (d) the criminal conduct was not recent, it was an isolated incident, and it is not likely to recur; (e) Applicant has undergone therapy for the past two years and there is clear evidence of rehabilitation; (f) there is no evidence of compulsive or addictive behavior by Applicant; and (g) Applicant is not vulnerable to coercion or pressure because his criminal conviction received wide publicity in the community. For the reasons that follow, the Board concludes Applicant has failed to demonstrate the Administrative Judge erred by rendering an adverse security clearance decision.

It was not arbitrary or capricious for the Administrative Judge to conclude Applicant's misconduct was recent and not an isolated incident. Applicant did not engage in a single incident of sexual misconduct, but rather sexual misconduct on three separate occasions. Moreover, those occasions occurred in 1994, which is not in the distant past.

The favorable evidence cited by Applicant does not demonstrate the Administrative Judge erred. There is a rebuttable presumption the Judge considered all the record evidence unless the Judge specifically states otherwise. Apart from that presumption, a reading of the decision shows the Judge considered the favorable evidence submitted by Applicant. As the trier of fact, the Judge has the discretion to weigh such favorable evidence in light of the record as a whole. *See, e.g.*, DOHA Case No. 96-0031 (December 30, 1996) at p. 3. Nothing in Applicant's brief persuades us that the Judge acted in a matter that was arbitrary, capricious, or contrary to law when she weighed the record evidence, both favorable and unfavorable, in this case.

The Administrative Judge found that Applicant is not vulnerable to coercion or pressure due to the publicity surrounding his conviction. However, that finding did not preclude the Judge from rendering an adverse decision. Even in the absence of any blackmail potential, an applicant's conduct can be considered for its security significance. *See, e.g.*, ISCR Case No. 95-0793 (September 30, 1996) at p. 4. Accordingly, the publicity surrounding Applicant's conviction did not preclude the Judge from considering the negative security significance of Applicant's criminal sexual misconduct itself.

The United States must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). The overall facts and circumstances surrounding

Applicant's involvement in criminal sexual misconduct with a minor boy provided a rational basis for the Administrative Judge's doubts about Applicant's judgment, reliability and security eligibility. Given those doubts, the Judge properly resolved them in favor of the national security. *See Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error that warrants remand or reversal. Accordingly, the Board affirms the Administrative Judge's December 2, 1996 decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

See concurring opinion

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

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Administrative Judge

Member, Appeal Board

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CONCURRING OPINION OF ADMINISTRATIVE JUDGE MICHAEL Y. RA'ANAN

My colleagues are persuaded that the Administrative Judge erred when she wrote of the police officer's report "it is presumed, absent proof to the contrary, that he reported accurately what Applicant told him during the interview." They construe the Judge's language to mean that there is a legal presumption which applies here. They correctly note that there is no such legal presumption.

I differ from my colleagues in my interpretation of the Judge's formulation. I believe she meant that she presumes rather than the law presumes. In other words, I understand her to be saying that she finds the police report accurate because nothing in the record persuades her it was inaccurate. Of course making such a finding is not only her prerogative, it is her responsibility. Using my interpretation, I find no error by the Administrative Judge except, perhaps, in her choice of ambiguous language.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

1. *See* ISCR Case No. 94-1213 (June 7, 1996) at pp. 3-4 (discussing exceptions to collateral estoppel doctrine).
2. The fact that Applicant is appealing his criminal conviction is legally irrelevant. Collateral estoppel applies even if a criminal conviction is being appealed. *Rice v. Dept. of Treasury*, 998 F.2d 997, 999 (Fed. Cir. 1993)