

DATE: June 16, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0184

APPEAL BOARD DECISION AND ORDER FOR REMAND

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

Larry H. Layton, Esq.

Administrative Judge Wilford H. Ross issued a decision, dated February 11, 1998, in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Department Counsel appealed. The Board remands the case to the Administrative Judge for further processing consistent with the rulings and instructions set forth in this Decision and Order for Remand.

This Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6, dated January 2, 1992, as amended.

Department Counsel's appeal presents the following issues: (1) whether the Administrative Judge erred by finding Government Exhibit 1 was obtained under circumstances reflecting duress and disregarding it as not a credible statement; (2) whether the Administrative Judge's favorable credibility determination of Applicant is sustainable; and (3) whether the Administrative Judge's conclusions are arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR), dated April 7, 1997. The SOR was based on Criterion D (Sexual Behavior), Criterion E (Personal Conduct), and Criterion J (Criminal Conduct). The SOR alleged that Applicant engaged in criminal sexual conduct in March 1986 and January 1996, and falsely denied to government investigators in November 1987 and December 1996 that he had engaged in such criminal sexual conduct.

A hearing was held on August 26, 1997. The Administrative Judge later issued a written decision in which he 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 erred by finding Government Exhibit 1 was obtained under circumstances reflecting duress and disregarding it as not a credible statement. At the hearing, Department Counsel proffered

Government Exhibit 1, a written statement signed by Applicant in December 1996, which was admitted into evidence. A Special Agent of the Defense Investigative Service⁽¹⁾ and Applicant testified about the December 1996 interview which led to the creation and execution of Government Exhibit 1. The Administrative Judge found Government Exhibit 1 was not a credible statement. Department Counsel contends the Judge erred because there is no legal or factual support for the Judge's finding about Government Exhibit 1. Department Counsel's contention is well-founded.

Because DOHA proceedings are civil, not criminal in nature, the procedural protections available to defendants in criminal proceedings are not applicable. *See, e.g.*, ISCR Case No. 96-0127 (July 29, 1997) at p. 2; ISCR Case No. 95-0818 (January 31, 1997) at p. 6. In addition, the exclusionary rule is not applicable in DOHA proceedings. *See, e.g.*, ISCR Case No. 95-0792 (June 27, 1996); DISCR Case No. 90-2069 (March 25, 1992) at p. 5. Accordingly, even in the face of a claim that an applicant's statement was the product of coercion or duress, an Administrative Judge should not exclude the statement from the record evidence. However, if the Judge finds that an applicant's statement was the product of coercion or duress, such a finding clearly would go to the weight to which that statement is entitled. *See, e.g.*, ISCR Case No. 94-1075 (August 10, 1995) at p. 3; DISCR Case No. 92-0896 (December 30, 1993) at p. 4 n.1.

In reviewing the Administrative Judge's findings about Government Exhibit 1, the Board will consider federal decisions addressing the issue of whether confessions made by criminal defendants were the product of coercion or duress. Because DOHA proceedings are civil in nature, the federal decisions in criminal law cases will be considered as persuasive authority only. For the reasons that follow, the Board concludes that under applicable legal principles, the record evidence does not support a finding that Applicant's written statement was the product of coercion or duress.

In considering whether a confession was voluntary, it is necessary to consider the totality of the circumstances surrounding that confession. Matters pertinent to such an evaluation include: the circumstances surrounding the interrogation (including its length and continuity); the person's maturity; the person's education; the person's physical condition; and the person's mental health or condition. *Withrow v. Williams*, 507 U.S. 680, 693 (1993).⁽²⁾ Essential to any finding that a confession was not voluntary is evidence that the confession was obtained because the actions of the interrogator(s) were coercive, oppressive, or reasonably calculated to overbear the will of the person making the confession. *Colorado v. Connelly*, 479 U.S. 157, 163-64 (1986); *Miller v. Fenton*, 474 U.S. 104, 109-110 (1985); *Lucero v. Kerby*, 133 F.3d 1299, 1310-11 (10th Cir. 1998); *United States v. Braxton*, 112 F.3d 777, 780-81 (4th Cir. 1997)(en banc), *cert. denied*, 118 S.Ct. 192 (1997).

In this case, the Administrative Judge specifically noted that there was no evidence that the Special Agent tried to intimidate Applicant, but found that "under the particular circumstances of this case, the Applicant could reasonably perceive himself to be under duress." There is no record evidence showing that the actions of the Special Agent were coercive, oppressive or reasonably calculated to overbear Applicant's will. Indeed, the Judge's finding of duress is contradicted by the Judge's recognition that there is no record evidence that the Special Agent tried to intimidate Applicant. The Judge's finding of duress is not based on applicable legal principles nor supported by the record evidence, and therefore, it cannot be sustained.

The Administrative Judge's finding of duress was pivotal and essential to his finding that Government Exhibit 1 is not a credible statement. Since the Judge's finding of duress is legally and factually flawed, his finding that Government Exhibit 1 is not a credible statement cannot be sustained.

2. Whether the Administrative Judge's favorable credibility determination of Applicant is sustainable. The Administrative Judge found that Applicant was a credible witness. In support of this finding, the Judge indicated Applicant was "a very credible witness" who gave testimony that "is consistent with his prior statements," and concluded Applicant's "credibility was not shaken by vigorous cross-examination by the Department Counsel." Elsewhere in the decision, the Judge noted that Applicant's wife and best friend "confirmed circumstantial parts of the Applicant's testimony concerning his ability to repair cars and that he only has one kidney." Department Counsel contends the Judge's favorable credibility determination should not be sustained because it is not supported by the record evidence as a whole and the Judge failed to consider Applicant's testimony in light of record evidence that was contrary to his testimony. For the reasons that follow, the Board finds Department Counsel's contention to be persuasive.

The Administrative Judge's credibility determinations must be given deference on appeal. Directive, Additional Procedural Guidance, Item 32.a. However, the deference owed to a Judge's credibility determinations does not immunize them from review, nor does it preclude the Board from concluding that a challenged credibility determination cannot be sustained. *See, e.g.*, ISCR Case No. 97-0356 (April 21, 1998) at p. 3; ISCR Case No. 96-0360 (September 25, 1997) at p. 3. *See also Paredes-Urrestarazu v. U.S. Immigration and Naturalization Service*, 36 F.3d 801, 818 (9th Cir. 1994)(factual finding is not rendered unassailable merely because trier of fact indicates the finding is based on demeanor of witness).

An Administrative Judge's credibility determinations are entitled to deference because the Judge has the opportunity to personally observe and assess the demeanor of an applicant while the applicant is testifying at the hearing. However, a Judge cannot rely solely on his or her assessment of an applicant's hearing testimony when making a credibility determination about the applicant. 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).

In this case, the Judge's favorable assessment of Applicant's credibility is flawed because it erroneously limits itself to considering Applicant's hearing testimony and ignores record evidence that clearly detracts from that testimony. *See* Directive, Additional Procedural Guidance, Item 32.a. ("The Appeal Board shall . . . determine whether or not: The 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. . .").

As discussed earlier, the Administrative Judge's finding that Applicant's written statement (Government Exhibit 1) was given under duress is legally and factually flawed. On its face, that written statement seriously detracts from a finding that Applicant's testimony was credible or consistent with his prior statements. Moreover, the Judge's favorable credibility determination is not saved by his conclusions that Applicant successfully withstood cross-examination or that his wife and best friend "confirmed circumstantial parts of the Applicant's testimony." The portions of their testimony cited by the Judge were trivial, tangential to the issues of the case, and essentially unresponsive of the important aspects of Applicant's testimony.

The Administrative Judge's favorable assessment of Applicant's credibility is not sustainable on the record evidence as a whole, or for the reasons given in the Judge's decision.

3. Whether the Administrative Judge's conclusions are arbitrary, capricious, or contrary to law. Department Counsel contends that the Administrative Judge's conclusions are arbitrary, capricious, or contrary to law. In support of that contention, Department Counsel argues: (a) the Administrative Judge erred by finding that Department Counsel had presented a *prima facie* case against Applicant, but then concluding that Applicant did not engage in the conduct alleged in the SOR; (b) the Judge erred by suggesting the investigation of Applicant and the issuance of the SOR were improperly motivated; and (c) the Judge's favorable conclusions under Criteria E, D, and J are not supported by the record evidence. For the reasons that follow, the Board concludes some of Department Counsel's arguments have merit.⁽³⁾

The reasoning of Department Counsel's first argument is legally flawed because the logical structure of the Administrative Judge's analysis is legally sound. Department Counsel has the obligation to present evidence to support contested SOR allegations. Directive, Additional Procedural Guidance, Item 14. Once Department Counsel has presented evidence to support contested SOR allegations,⁽⁴⁾ the burden shifts to the applicant to present evidence that either: (a) rebuts the evidence against him, or (b) extenuates or mitigates proven conduct. Directive, Additional Procedural Guidance, Item 15. If an applicant presents evidence that successfully rebuts or refutes the evidence presented against the applicant, then the Judge can find that the alleged conduct did not occur. It is legally permissible for a Judge to find that Department Counsel presented evidence that supports controverted SOR allegations, yet also

find that the evidence presented by an applicant successfully explained, rebutted or refuted the evidence presented against that applicant.⁽⁵⁾ See *Black's Law Dictionary* (6th edition, West Publishing Co., 1990) at pp. 1189-1190 (definitions of "prima facie," "prima facie case," and "prima facie evidence"). Accordingly, the Board rejects Department Counsel's argument that once the Judge found Department Counsel had presented evidence supporting the controverted SOR allegation, the Judge was legally or logically precluded from finding that Applicant successfully rebutted or refuted the evidence against him. However, because of the errors identified elsewhere in this decision, the Board cannot sustain the Judge's finding that Applicant successfully rebutted or refuted the evidence against him.

Department Counsel's second argument has merit. It was arbitrary, capricious, and contrary to law for the Administrative Judge to suggest (Decision at footnote 4) the decisions to investigate Applicant and issue the SOR were improperly motivated by an impermissible animus against Applicant's sexual orientation. First, Applicant did not raise the issue of impermissible animus in response to the SOR or at the hearing. Indeed, Applicant's defense to the SOR allegations was inconsistent with raising any such defense. Second, the Judge's suggestion is based on mere conjecture, lacks any basis in the record evidence,⁽⁶⁾ and ignores the legal principle that there is a rebuttable presumption of good faith and regularity on the part of government officials. Third, the Judge's supposition is untenable because the security significance of allegations of falsification and criminal sexual misconduct do not, logically or legally, turn or depend on the sexual orientation of an applicant. Regardless of an applicant's sexual orientation, acts of falsification raise serious questions about an applicant's suitability for access to classified information and can warrant an adverse security clearance decision. See, e.g., ISCR Case No. 96-0525 (June 17, 1997)(falsification concerning sexual abuse of granddaughter); DISCR Case No. 93-1314 (October 25, 1994)(falsification concerning criminal heterosexual misconduct). Regardless of an applicant's sexual orientation, acts of criminal sexual misconduct raise serious questions about an applicant's suitability for access to classified information and can warrant an adverse security clearance decision. See, e.g., ISCR Case No. 96-0461 (December 31, 1997)(sexual misconduct with adult woman); ISCR Case No. 96-0587 (March 24, 1997)(sexual misconduct with minor boy); ISCR Case No. 95-0912 (February 27, 1997)(sexual exhibitionism); ISCR Case No. 95-0817 (February 21, 1997)(sexual misconduct with minor stepdaughter). The Judge's imputation of bad faith on the part of the government lacks any basis in law or the record evidence. To the extent the Judge's favorable decision is based on his unsustainable finding of bad faith, it is arbitrary, capricious, and contrary to law.

Department Counsel's third argument also has merit. As discussed earlier in this decision, the Administrative Judge's finding of duress in connection with Government Exhibit 1 and his favorable credibility determination are legally flawed and cannot be sustained. Because the Judge's favorable findings and conclusions are based on his rejection of Government Exhibit 1 and his favorable credibility determination, they cannot be sustained on appeal.

Conclusion

Department Counsel has met its burden of demonstrating harmful error. Pursuant to Item 33.b. of the Additional Procedural Guidance, the Board remands the case to the Administrative Judge. After correction of the errors identified in this decision, the Judge must issue a new decision consistent with the requirements of Items 35 and 25 of the Additional Procedural Guidance.

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 Defense Investigative Service was subsequently renamed the Defense Security Service.
2. The failure of law enforcement officers to advise a person of the person's *Miranda* rights is also relevant in criminal law cases. *Withrow v. Williams*, 507 U.S. 680, 693-94 (1993). However, the absence of any advisement of *Miranda* rights is irrelevant in DOHA proceedings because interviews in security clearance cases do not involve custodial interrogation by law enforcement officers. *See* ISCR Case No. 94-0722 (September 28, 1995) at p. 5
3. An Administrative Judge's decision can be arbitrary and capricious if: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983). *Accord* ISCR Case No. 95-0600 (May 16, 1996) at p. 4.
4. If Department Counsel does not present evidence that supports a controverted SOR allegation, then the applicant need not present any evidence concerning that allegation because there is nothing the applicant has to rebut, explain, extenuate or mitigate. *See* DISCR Case No. 90-1524 (April 29, 1993) at p. 3 n.4 ("If Department Counsel fails to present sufficient evidence to prove controverted facts, Applicant is not under any legal obligation to disprove the controverted SOR allegations."). *Cf.* ISCR Case No. 97-0595 (May 22, 1998) at p. 5 (Judge need not consider whether applicant has taken steps to mitigate particular set of facts or circumstances if the Judge has not made threshold finding that such facts or circumstances exist); ISCR Case No. 97-0016 (December 31, 1997) at p. 3 ("If Department Counsel failed to prove controverted SOR allegations, the Judge would have been obligated to enter findings in favor of Applicant with respect to such unproven allegations.").
5. Indeed, Judge did that in this case. However, the Judge erred when he found the misconduct alleged in the SOR did not happen but then found Applicant had "successfully mitigated the Government's case." As stated in footnote 4 above, issues in mitigation are not raised if the Judge makes the initial finding that the conduct in controversy did not take place.
6. *See, e.g.*, ISCR Case No. 97-0299 (December 11, 1997) at p. 2 ("[T]he Judge must based his or her findings and conclusions on the record evidence and reasonable inferences drawn from that evidence.").