

DATE: July 14, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0435

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Matthew E. Malone, Esq., Department Counsel

FOR APPLICANT

Renee L. Stasio, Esq.

Administrative Judge Richard A. Cefola issued a decision, dated February 27, 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. 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 issue of whether the Administrative Judge's favorable 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 October 10, 1997 to Applicant. The SOR was based on Criterion K (Security Violations) and Criterion E (Personal Conduct).

A hearing was held on February 5, 1998. The Administrative Judge subsequently issued a written decision. The Judge found Applicant committed various security violations over the period 1986-January 1996: (1) Applicant wrongfully copied four Confidential documents in 1986, stored them in a container authorized for classified storage after copying them, improperly removed the four classified documents in January 1987 when he left his employer, and improperly stored the four classified documents at his home until January 1996; (2) Applicant wrongfully copied a Secret document in 1994 and disguised its classification status, stored the document in a container authorized for classified storage after copying it, improperly removing the classified document from his employer's premises in April 1995, and improperly storing the classified document in his home until January 1996. The Judge found Applicant's security violations were mitigated because: (a) Applicant "has undergone an extensive reeducation program as to the handling of classified materials"; (b) Applicant "testified credibly that under no circumstances would he repeat his past transgressions"; and (c) Applicant has demonstrated a "very positive attitude towards the discharge of his security responsibilities" since January 1996. The Judge also indicated he was "convinced [Applicant's security violations] will not be repeated." The Judge 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 Issue

Department Counsel contends the Administrative Judge's decision is arbitrary, capricious, and contrary to law because: (1) there is insufficient evidence of mitigation to overcome Applicant's long history of security violations; (2) the Judge's favorable assessment of Applicant's credibility is not a substitute for record evidence; (3) the Judge erred in his application of pertinent Adjudicative Guidelines; (4) an insufficient amount of time has passed to allow the Judge to conclude that Applicant has reformed and will not repeat his past security violations; (5) the Judge gave undue weight to Applicant's security reeducation program; and (6) the serious implications of Applicant's deliberate security violations warrant a negative security clearance decision. ⁽¹⁾ For the reasons that follow, the Board concludes Department Counsel has demonstrated the Judge committed harmful error.

The Board reviews the Administrative Judge's factual findings to determine whether they "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. 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. The Board must consider not only whether there is evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings. *See, e.g.*, ISCR Case No. 97-0803 (June 19, 1998) at p. 3.

The Board also reviews the Administrative Judge's decision to determine whether the Judge's "rulings or conclusions are arbitrary, capricious, or contrary to law." Directive, Additional Procedural Guidance, Item 32.c. A 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, e.g.*, ISCR Case No. 97-0184 (June 16, 1998) at p. 5 n.3 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983)). Furthermore, an Administrative Judge's decision may be arbitrary and capricious even though the Judge's specific findings of fact are supported by record evidence. *See, e.g.*, ISCR Case No. 95-0600 (May 16, 1996) at p. 4; DISCR Case No. 86-3753 (February 28, 1990) at p. 12; DISCR Case No. 87-1268 (September 16, 1988) at p. 3.

The Administrative Judge's conclusion that Applicant demonstrated reform and rehabilitation sufficient to overcome the negative security implications of his long history of deliberate security violations during the period 1986-January 1996 is not sustainable. The Judge's conclusion: (a) fails to adequately consider the negative security implications of Applicant's long history of deliberate security violations; (b) does not consider relevant factors; and (c) is not supported by the totality of the record evidence.

The federal government 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 government need not wait until an applicant mishandles classified information before it can deny or revoke the applicant's access to such 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 the applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. *See, e.g.*, ISCR Case No. 97-0628 (April 17, 1998) at p. 3. Accordingly, security violations provide one of the strongest possible reasons for denying or revoking access to classified information. *See, e.g.*, DISCR Case No. 91-0859 (January 6, 1993) at pp. 5-6; DISCR Case No. 87-1696 (October 30, 1990) at p. 10; DISCR Case No. 88-2773 (January 30, 1990) at p. 5; DISCR Case No. 86-0388 (June 9, 1989) at p. 3.

Persons granted access to classified information are in a fiduciary relationship with the federal government and have strict obligations to properly handle and safeguard classified information entrusted to them. *See, e.g.*, DISCR Case No. 90-1546 (February 6, 1992) at p. 4; DISCR Case No. 89-0062 (October 30, 1991) at p. 7; DISCR Case No. 88-2577 (February 22, 1991) at p. 13. An applicant who deliberately commits security violations has breached his or her fiduciary obligations to the federal government and failed to demonstrate the high degree of trustworthiness and reliability that must be expected of persons entrusted with handling classified information. Furthermore, security

violations strike at the heart of the industrial security program, which has the objective of ensuring that classified information is properly handled and safeguarded.⁽²⁾ An applicant who deliberately engages in security violations demonstrates a disregard for, or indifference to, national security interests and undermines the integrity and effectiveness of the industrial security program. *See, e.g.*, DISCR Case No. 86-3753 (February 28, 1990) at p. 11 n.4 ("Conduct that shortcircuits or evades basic principles and practices associated with physical security or personnel security or both thwarts the basic purpose of the industrial security program, undermines its integrity, and jeopardizes the security of classified information."). Accordingly, security violations raise very serious questions about an applicant's suitability for access to classified information. *See, e.g.*, DISCR Case No. 88-2576 (November 15, 1990) at p. 9 ("Evidence that an applicant has failed to properly handle or safeguard classified information entrusted to him raises serious questions as to his security suitability.").

Applicant engaged in a pattern of deliberate security violations over a period of approximately 10 years. The continuing nature of Applicant's security violations was an aggravating factor because it increased the risk of loss or unauthorized disclosure of classified information. *See, e.g.*, DISCR Case No. 88-2773 (July 19, 1990) at p. 3 ("The improper storage of classified material becomes increasingly serious as the period of time increases."); DISCR Case No. 87-1760 (April 6, 1989) at p. 5 (taking classified documents home results in security violations that continue beyond the initial act of taking the classified documents home). The seriousness of Applicant's security violations was not reduced by the fortuitous circumstance that they did not result in a security disaster. *See, e.g.*, DISCR Case No. 90-0435 (August 20, 1991) at p. 6 (government's interest in protecting classified information "is not limited to those situations where an actual compromise or security disaster occurs"); DISCR Case No. 86-3753 (February 28, 1990) at p. 10 ("The fact that Applicant's deliberate violations of various security regulations fortuitously did not result in a security disaster does not extenuate or mitigate their seriousness."). Moreover, Applicant's explanation for his security violations demonstrates he failed to understand his fiduciary responsibilities, and made a deliberate choice to elevate his personal interests and convenience over the security interests of the United States. Such self-serving conduct is antithetical to the fiduciary obligations an applicant owes to the United States and demonstrates a fundamental breach of the trust reposed in the applicant. *See, e.g.*, DISCR Case 87-2107 (October 30, 1991) at p. 6 ("An applicant's fiduciary duty toward the United States with respect to protecting and safeguarding classified information necessarily takes priority over his personal or business interests or convenience."); DISCR Case No. 86-0388 (June 9, 1989) at p. 3 ("[A]pplicants who place their personal interests, business convenience or the interests of others before their fiduciary duty to the United States violate their fiduciary relationship and raise serious doubts as to whether they are trustworthy, reliable or otherwise suitable to be granted access to classified information."). Given the seriousness of Applicant's history of security misconduct, he has a very heavy burden of persuasion that he should be allowed to have access to classified information. *See* Directive, Additional Procedural Guidance, Item 15 (applicant "has ultimate burden of persuasion as to obtaining a favorable clearance decision"). *See also* DISCR Case No. 90-2069 (March 25, 1992) at p. 14 ("Given the 'clearly consistent with the national interest' standard for security clearance determinations, an applicant who has engaged in a pattern of security violations bears a heavy burden of demonstrating evidence of extenuation, mitigation, or changed circumstances sufficient to overcome the *prima facie* case against him.").

Against Applicant's long history of deliberate security violations, the Administrative Judge gave weight to: (a) Applicant's "very positive attitude" toward security since January 1996; (b) Applicant's "extensive reeducation" concerning his security responsibilities; (c) Applicant's heightened awareness of his security responsibilities; (d) Applicant's testimony that he will not repeat his past security misconduct; and (e) the Judge's conclusion that Applicant will not repeat his security misconduct. The Judge's analysis fails to adequately consider the negative security implications of Applicant's long history of deliberate security violations, does not consider relevant aspects of the case, and is not supported by the totality of the record evidence.

As discussed above, security violations raise serious questions about an applicant's security eligibility. In this case, Applicant's security violations were aggravated by their deliberate nature, their frequency, and their duration (spanning a period of approximately 10 years). Given the seriousness and duration of Applicant's security misconduct, a strong showing of reform and rehabilitation over an extended period of time was needed to overcome the negative implications of Applicant's security misconduct. *See, e.g.*, ISCR Case No. 96-0360 (September 25, 1997) at p. 5 ("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."). The evidence of reform relied on by the Judge falls short of meeting that standard. Reading a security manual and undergoing four one-hour sessions with a

security official does not constitute an "extensive reeducation" concerning security.⁽³⁾ Balanced against Applicant's long history of disregarding basic security principles and practices, Applicant's recently acquired "positive attitude" and "heightened awareness" about security are entitled to limited weight. A long history of deliberate security violations is not so easily overcome. *See, e.g.*, ISCR Case No. 94-1109 (January 31, 1996) at p. 4 ("While sincere expressions of remorse are the first steps on the road to rehabilitation, they are not evidence that demonstrates a track record of reform and rehabilitation."); DISCR Case No. 94-0215 (April 13, 1995) at p. 5 ("Even if the Judge found Applicant to be a sincere, credible witness, such a credibility determination is not a substitute for record evidence of reform and rehabilitation."). In addition, the Judge's conclusory statement that he is "convinced this conduct will not be repeated" is problematic because the Judge fails to provide any analysis or explanation for his conclusion. Given the record evidence of the seriousness, frequency, and duration of Applicant's deliberate security violations, and the "clearly consistent with the national interest" standard, a favorable security clearance decision requires more than merely a conclusory expression of confidence in Applicant's ability to conduct himself properly in the future.

Given the totality of the record evidence, the Administrative Judge's finding of reform and rehabilitation sufficient to overcome the negative implications of Applicant's long history of deliberate security violations is not sustainable. Directive, Additional Procedural Guidance, Item 32.a. *See Lauvik v. INS*, 910 F.2d 658, 660 (9th Cir. 1990) ("There is some point at which the evidence, though it exists, becomes so slight and so thoroughly outweighed by contrary evidence, that it would be an abuse of discretion to base a decision upon it.") (cited in DISCR Case No. 92-0404 (May 25, 1993) at p. 3). Furthermore, the Judge's analysis fails to address how a favorable security clearance decision in this case is "clearly consistent with the national interest" with respect to the integrity and credibility of the industrial security program. *See* ISCR Case No. 95-0622 (April 18, 1997) at pp. 5-6.

Conclusion

Department Counsel has met its burden of demonstrating 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, 1998 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. Applicant's reply brief takes issue, on several occasions, with Department Counsel's characterization of the record evidence in the appeal brief. The Board need not address Applicant's disagreements with Department Counsel's brief in order to decide this appeal. It is the Administrative Judge's decision, not the appeal briefs that are the subject of an appeal. Moreover, the Board relies on the record evidence itself, not a counsel's characterization of it.

2. The nexus concept in industrial security cases must be construed and applied in a manner that effectuates and advances the national security interests of the United States. This includes consideration of the need to protect the integrity of the industrial security program and maintain public confidence in it. *See* ISCR Case No. 95-0622 (April 18, 1997) at p. 6.

3. As Department Counsel notes, Applicant's deliberate security violations were not caused by ignorance about security requirements. Accordingly, it is not clear how the Administrative Judge concluded Applicant's reading a security manual constitutes a meaningful remedy that addresses Applicant's long history of deliberate disregard of, or indifference to, his security responsibilities.