

DATE: July 8, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0605

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Michael H. Leonard, Esq., Department Counsel

FOR APPLICANT

Carter A. Robinson, Esq.

Administrative Judge Paul J. Mason issued a decision, dated March 12, 1998, 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 issue of whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated September 9, 1997 to Applicant. The SOR was based on Criterion J (Criminal Conduct) and Criterion D (Sexual Behavior). Under Criterion J, the SOR alleged that Applicant was arrested in February 1997 for sexual misconduct, and he was found guilty and sentenced to a \$300 fine plus court costs and ten days in jail (suspended). Under Criterion D, the SOR alleged Applicant engaged in oral sex with another male in a public area in February 1997.

A File of Relevant Material (FORM) was prepared and a copy of the FORM was provided to Applicant. A response to the FORM was submitted by Applicant's counsel. The case was then assigned to the Administrative Judge for determination.

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 Issue

During the proceedings below, Applicant did not deny the allegation under Criterion J. However, Applicant asserted that

he was not guilty of any sexual misconduct and that although he had not engaged in any sex act on the occasion of his arrest, he pleaded guilty on advice of a public defender in an effort to avoid "undue publicity for an unwarranted arrest on a *sensationalized* charge" (FORM, Item 3; Applicant's response to FORM)(italics in original). The Administrative Judge considered the totality of the record evidence and explained in his decision why he found Applicant's claim of innocence was not credible. The Judge found Applicant engaged in criminal sexual misconduct as alleged in the SOR. The Judge concluded Applicant's criminal sexual misconduct demonstrated poor judgment and was not sufficiently mitigated by the favorable record evidence to warrant a favorable security clearance decision.

On appeal, Applicant does not challenge the Administrative Judge's finding that he engaged in criminal sexual misconduct. However, Applicant argues: (a) his arrest would not have taken place but for the fact that both persons involved were of the same sex; (b) it is discriminatory and violative of equal protection to treat heterosexuals and homosexuals differently; (c) it is none of the government's business what two consenting adults do in the privacy of their own residence or elsewhere when they have an expectation of privacy; (d) just as sexual orientation *per se* is not a bar to military service, sexual orientation should not be a bar to holding a security clearance; (e) the sexual conduct Applicant engaged in did not demonstrate dishonesty, instability, or other defect such as demonstrated by crimes such as rape, murder, or theft; (f) there is no evidence that persons aware of Applicant's situation have questioned his competence or his ability to properly handle secrets; and (g) an adverse decision would merely reflect an unreasonable fear of homosexuals. The Board construes Applicant's arguments as raising the issue of whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. For the reasons that follow, the Board concludes Applicant has failed to demonstrate the Judge erred.

Contrary to Applicant's contention, this case is not one that is based on sexual orientation. Standing alone, sexual orientation cannot form the basis of an adverse security clearance decision. Executive Order 12968, Sections 3.1.(c) and 3.1.(d). The SOR and the Administrative Judge's decision in this case were not based on Applicant's sexual orientation, but rather his conduct. 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. ISCR Case No. 97-0184 (June 16, 1998) at p. 6 (citing prior Board decisions in cases involving criminal sexual misconduct of various types). An applicant's sexual orientation does not preclude consideration of the negative security implications of his or her criminal sexual misconduct.

Applicant's privacy argument is not well-founded. This case is not about two consenting adults engaged in a sex act in a residence or other private place such as a hotel room. Rather, the case involves a sex act that occurred in trail area open to the public and frequented by hikers and bicyclists (FORM, Items 3, 5 and 7). There is no reasonable expectation of privacy associated with engaging in a sex act in such a public place. *See, e.g., Doe v. Schachter*, 804 F.Supp. 53, 59 (N.D. Cal. 1992) ("Whatever constitutional right there may be to private sexual activity, there is no fundamental right to engage in the type of public activity which resulted in revocation of plaintiff's security clearance.") (industrial security clearance case involving acts of sexual misconduct in open or public places). *See also* DISCR Case No. 91-0762 (February 18, 1993) at p.4 n. 4 (sex acts committed in establishments open to members of public under circumstances under which the conduct could be observed by others are acts which are open or public in nature).⁽¹⁾ Accordingly, this case does not involve governmental intrusion into Applicant's privacy.

Applicant correctly notes that his sexual misconduct is less serious than other crimes such as rape or murder. However, the mere fact that Applicant did not engage in more serious criminal misconduct does not render the Administrative Judge's decision arbitrary, capricious, or contrary to law. *See, e.g.,* DISCR Case No. 93-1314 (October 25, 1994) at p. 4 (misdemeanor criminal conduct can form basis of adverse security clearance decision). The Judge had to consider the facts and circumstances surrounding Applicant's criminal sexual misconduct, apply pertinent Adjudicative Guidelines, and consider whether the unfavorable evidence outweighed the favorable evidence or *vice versa*. *See* Directive, Section F.3. Applicant's argument fails to demonstrate the Judge's analysis is arbitrary, capricious, or contrary to law.

The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snapp v. United States*, 444 U.S. 507, 511 n.6 (1980). Acts of criminal sexual misconduct raise questions about an applicant's judgment, reliability, and trustworthiness which the applicant has the burden of overcoming. *See* Directive, Additional Procedural Guidance, Item 15 ("The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant, or proven by

Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."'). In this case, the Judge explained why he concluded Applicant's proven criminal sexual misconduct raised questions about Applicant's judgment, and why those questions were not successfully answered by the favorable evidence presented by Applicant. Because the Judge was left with doubts about Applicant's suitability for access to classified information, the Judge properly resolved those doubts in favor of the national security. *See* ISCR Case No. 97-0595 (May 22, 1998) at pp. 2-3 (discussing *Department of Navy v. Egan*, 484 U.S. 518 (1988)). Applicant's appeal argument fails to demonstrate the Judge's analysis 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 March 12, 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. Given the Board's resolution of this argument, it need not address Department Counsel's argument concerning *Bowers v. Hardwick*, 478 U.S. 186 (1986).