

DATE: June 11, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0618

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Roger C. Wesley issued a decision, dated March 31, 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 24, 1997 to Applicant. The SOR was based on Criterion D (Sexual Behavior) and Criterion J (Criminal Conduct).

Applicant submitted an answer to the SOR, in which he indicated he did not wish to have a hearing. A File of Relevant Material (FORM) was prepared, and a copy of the FORM was provided to Applicant. Applicant did not submit a response to the FORM. The case was then assigned to the Administrative Judge for determination.

The Administrative Judge 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

The Administrative Judge found Applicant engaged in sexual misconduct with minor females in 1975 and 1993-1994, received military discipline in connection with the 1975 misconduct, and was convicted (as a civilian) in 1995 for sexual misconduct with minor females during 1993-1994. The Judge also found that, prior to appearing in court for the 1995 charges, Applicant volunteered to participate in a court-approved counseling program for sex offenders and was

continuing to participate in that program. The Judge concluded that Applicant's sexual misconduct with minor females raised security concerns, and that Applicant had not demonstrated sufficient evidence of rehabilitation to warrant a favorable security clearance decision.

On appeal, Applicant does not challenge the Administrative Judge's findings about his sexual misconduct with minor females. However, Applicant argues that: (a) he has never mishandled classified information during his military or civilian careers; (b) because of the professional counseling he has received, he recognizes the seriousness of his past misconduct and will not repeat it; (c) he intends to continue with his counseling and treatment until he is deemed cured and no threat to society; and (d) he would like to retain a security clearance so that he can continue to serve the country and the national interest. [\(U\)](#) The Board construes Applicant's arguments as raising the issue of whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law.

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). Accordingly, the absence of any security violations by Applicant did not preclude the Administrative Judge from making an adverse security clearance decision based on other security-significant conduct.

Security clearance decisions are not an exact science, but rather involve predictive judgments about a person's security eligibility based on consideration of that person's conduct and present circumstances. *Department of Navy v. Egan*, 484 U.S. 518, 528-29 (1988). 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. 96-0871 (January 29, 1998) at p. 3. Accordingly, the fact that Applicant's misconduct was not work-related did not preclude the Administrative Judge from making an adverse security clearance decision.

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). Security requirements include consideration of a person's honesty, judgment, and sense of his obligations. *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961). Engaging in sexual misconduct with minor females raises serious questions about a person's judgment and reliability and can provide a rational basis for an adverse security clearance decision. *See, e.g.*, *Stahlans v. National Security Agency*, 678 F.2d 482 (4th Cir. 1982)(person in sensitive position requiring access to classified information could be terminated for engaging in sexual activity with his minor daughter). *Cf. Swann v. Walters*, 620 F. Supp. 741 (D.D.C. 1984)(upholding termination of federal employee from position of trust based on employee's sexual misconduct with minor children). Indeed, the Board has upheld adverse security clearance decisions where the applicants engaged in sexual misconduct with minor children. *See, e.g.*, ISCR Case No. 96-0587 (March 24, 1997); ISCR Case No. 95-0061 (December 4, 1995); DISCR Case No. 94-0282 (February 21, 1995). Here, the Administrative Judge's findings about Applicant's sexual misconduct with minor females in 1973 and 1993-1994 provide a rational basis for his negative conclusions about Applicant's security eligibility.

Finally, the favorable evidence cited by Applicant on appeal does not demonstrate the Administrative Judge erred. The Judge considered the evidence about Applicant's counseling and rehabilitation efforts, but concluded that favorable evidence was not enough to overcome the negative security implications of Applicant's sexual misconduct. The Judge had to weigh the evidence both favorable and unfavorable (Directive, Section F.3.), apply pertinent Adjudicative Guidelines, and decide whether the favorable evidence outweighed the unfavorable evidence or *vice versa*. *See, e.g.*, ISCR Case No. 97-0191 (April 28, 1998) at pp. 4-5. It was reasonable for the Judge to evaluate Applicant's rehabilitation efforts in light of the nature and recency of Applicant's misconduct, and the fact Applicant is still on probation and undergoing counseling. Nothing in Applicant's appeal brief demonstrates the Judge weighed the record evidence in an arbitrary or capricious manner.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's March 31, 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. Attached to Applicant's appeal brief are two letters that he asks the Board to consider. The Board cannot consider new evidence on appeal. Directive, Additional Procedural Guidance, Item 29. Accordingly, the Board will not consider the two letters attached to Applicant's appeal brief. Applicant had the opportunity to submit documentation in response to the FORM, but he did not avail himself of that opportunity. By failing to do so, Applicant waived his right to have such evidence considered in his case.