

DATE: August 17, 1998

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 97-0625

## APPEAL BOARD DECISION AND REVERSAL ORDER

### APPEARANCES

#### FOR GOVERNMENT

Pamela C. Benson, Esq., Department Counsel

#### FOR APPLICANT

*Pro Se*

Administrative Judge John G. Metz, Jr. issued a decision, dated April 14, 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 following issues: (1) whether the Administrative Judge erred by finding Applicant had only one-alcohol related incident in May 1995; and (2) 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 to Applicant a Statement of Reasons (SOR) dated October 14, 1997. The SOR was based on Criterion G (Alcohol Consumption), Criterion D (Sexual Behavior), and Criterion J (Criminal Conduct). Applicant submitted an answer to the SOR, in which he indicated he wanted a decision made in his case without a hearing. A File of Relevant arial (FORM) was prepared, and Applicant was provided with a copy. Applicant submitted a response to the FORM. After Applicant's response to the FORM was received, the case was assigned to the Administrative Judge for determination.

The Administrative Judge 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** [\(1\)](#)

1. Whether the Administrative Judge erred by finding Applicant had only one-alcohol related incident in May 1995. The Administrative Judge found that Applicant was involved in an alcohol-related incident in May 1995 (driving under the influence), but found insufficient record evidence to support the allegations that Applicant abused alcohol on other

occasions. The Judge concluded the May 1995 incident was insufficient to warrant adverse formal findings under Criterion G or to support an adverse security clearance. Department Counsel contends: (a) the Judge erred by finding credible Applicant's explanations about his drinking and the indecent exposure incidents alleged in the SOR; and (b) the record evidence does not support the Judge's findings about Applicant's drinking. For the reasons that follow, the Board concludes Department Counsel's arguments fail to demonstrate the Judge erred.

In general, an Administrative Judge's credibility determinations are entitled to deference on appeal because the Judge has the opportunity to personally observe and assess the demeanor of witnesses when they testify. Although a Judge can make credibility determinations based on a paper record,<sup>(2)</sup> such credibility determinations do not rest on personal observation and assessment of the demeanor of witnesses at a hearing. Here, the Judge's assessment of Applicant's credibility is based solely on his reading of a documentary record. As such, the Judge's credibility determination is not entitled to the level of deference it would receive if this case had involved a hearing.

There is conflicting record evidence concerning Applicant's drinking. The presence of such conflicting evidence does not diminish the Administrative Judge's responsibility as the trier of fact. *See, e.g.*, ISCR Case No. 97-0630 (May 28, 1998) at p. 2. The Board need not agree with the Administrative Judge to conclude his findings about Applicant's drinking are sustainable based on the record evidence. Department Counsel's ability to argue for an alternate interpretation of the record evidence, standing alone, is not enough to demonstrate the Judge's findings about Applicant's drinking are arbitrary or capricious. *See, e.g.*, ISCR Case No. 97-0289 (January 22, 1998) at p. 6.

Because the Administrative Judge's finding of a single alcohol-related incident in May 1995 is sustainable, Department Counsel has failed to demonstrate the Judge's formal findings in favor of Applicant under Criterion G are arbitrary, capricious, or contrary to law.

## 2. Whether the Administrative Judge's favorable security clearance decision is arbitrary, capricious, or contrary to law.

The Administrative Judge found Applicant was involved in three separate indecent exposure incidents (two on the same day in August 1993, the other in February 1995) The Judge found those incidents demonstrated poor judgment by Applicant, but concluded Applicant's misconduct was mitigated. In support of that conclusion, the Judge stated: (1) although Applicant's conduct was criminal, "it appears to have lacked any specific sexual intent"; (2) "[t]here is no reliable diagnosis of any psychological disfunction [sic] triggering Applicant's conduct"; (3) Applicant is not vulnerable to coercion because of that misconduct; (4) the most recent incident is more than three years old and there is no evidence of subsequent similar misconduct; and (5) "there is no other evidence of questionable judgment, irresponsibility, or emotional instability."

Department Counsel contends: (a) the Judge erred by concluding there is "no evidence of questionable judgment, irresponsibility, or emotional instability;" (b) the Judge erred by finding Applicant's indecent exposure incidents were mitigated; and (c) the Judge's decision is not an overall common sense decision under Section F.3. of the Directive. For the reasons that follow, the Board concludes Department Counsel's appeal arguments have mixed merit. The Board will first address two arguments made by Department Counsel that fail to demonstrate the Administrative Judge erred.

Department Counsel asserts the Administrative Judge found "no evidence of questionable judgment, irresponsibility, or emotional instability" (Appeal Brief at p. 10). That assertion is based on a misquotation of a sentence in the Judge's decision, which reads: "Further, there is no *other* evidence of questionable judgment, irresponsibility, or emotional instability" (Decision at p. 7)(italics added). Department Counsel's failure to correctly quote the Judge's decision renders this argument groundless. Furthermore, Department Counsel's argument fails to recognize or acknowledge that the Judge used language that tracks the language of Sexual Behavior Mitigating Guideline 3. Accordingly, this argument by Department Counsel is groundless.

Department Counsel contends the Administrative Judge erred by finding Applicant's indecent exposure incidents were mitigated, in part, because Applicant's conduct on those occasions lacked any specific sexual intent. Department Counsel's argument concerning the legal significance of Applicant's *Alford* plea (made in connection with the August 1993 indecent exposure incidents) fails to demonstrate the Administrative Judge erred. Department Counsel correctly cites a Board decision (ISCR Case No. 96-0525, June 17, 1997) for the proposition that a conviction based on an *Alford* plea precludes an applicant from contending he or she did not engage in the criminal acts for which he or she was

convicted. However, Department Counsel's argument concerning Applicant's *Alford* plea fails to demonstrate the Judge erred. In the jurisdiction in which Applicant was convicted, indecent exposure is a general intent crime which does not require any proof that the defendant engaged in the conduct with sexual intent. *See Ricketts v. State*, 436 A.2d 906, 910-911 (Md. 1981)(discussing indecent exposure cases). Since sexual intent is not a required element of the offense of indecent exposure in the jurisdiction in which Applicant was convicted, his conviction for indecent exposure does not establish, as a matter of law, that Applicant acted with sexual intent. Accordingly, Department Counsel's *Alford*-plea argument is misplaced in this case.

Department Counsel also makes several arguments to support its contention that the Administrative Judge's favorable decision should not be affirmed: (a) the Judge's decision does not reflect an overall, common sense evaluation of Applicant's indecent exposure conduct; (b) the record evidence does not support the Judge's finding that Applicant's conduct was mitigated or isolated; (c) the Judge failed to take into account Applicant's refusal to accept responsibility for his indecent exposure conduct, and Applicant's refusal undercuts a finding of sufficient rehabilitation; (d) the Judge did not take into account the fact that Applicant is on supervised probation until January 1999; (e) the record evidence and the Judge's findings about Applicant's indecent exposure conduct demonstrate Applicant lacks the degree of judgment, reliability, and trustworthiness required of persons who will be entrusted with protecting and safeguarding classified information. For the reasons that follow, the Board concludes Department Counsel's contention is persuasive.

Security clearance decisions are not committed to the unfettered discretion of the Administrative Judge. Rather, the Judge's decision must be made within the parameters of the Directive and other applicable legal principles. The decision must be a "common sense determination based upon consideration of all the relevant and material information" (Directive, Section F.3). The decision must be based on factual findings supported by record evidence that reasonably take into account all contrary record evidence (Directive, Additional Procedural Guidance, Item 32.a.). The Judge's conclusions must not be arbitrary, capricious, or contrary to law (Directive, Additional Procedural Guidance, Item 32.c.). The decision must reflect a careful consideration of the entirety of the record evidence to assess the applicant as a "whole person" (Directive, Adjudicative Guidelines, Enclosure 2 at pages 2-1 to 2-3). The decision must be based on the "clearly consistent with the national interest" standard (Directive, Sections C.2. and D.2. and Additional Procedural Guidance, Item 25). The Judge's decision in this case does not satisfy these requirements in several respects.

The Administrative Judge found that Applicant engaged in acts of indecent exposure on three separate occasions (twice on the same day in August 1993, and once in February 1995).<sup>(3)</sup> Those findings are supported by the record evidence as a whole. However, the Judge's favorable conclusions about Applicant's security eligibility are not sustainable because: (a) they do not reflect a reasonable or rational interpretation of the record evidence; (b) they do not rationally flow from his own factual findings about Applicant's indecent exposure incidents; (c) they do not reflect a common sense evaluation of the record evidence as a whole; and (d) they fail to reflect a "whole person" assessment of Applicant.<sup>(4)</sup>

The Administrative Judge had a rational basis in the record evidence to reject Applicant's denial that he was indecently exposed during the first incident in August 1993. However, the Judge erred by ignoring a clear implication of Applicant's denial. By continuing to deny the occurrence of the first incident, Applicant continues to refuse to acknowledge his misconduct or accept responsibility for it. Such a refusal to acknowledge proven misconduct or accept responsibility for it seriously undercuts the Judge's finding that Applicant has mitigated his misconduct. *See, e.g.*, ISCR Case No. 96-0360 (September 25, 1997) at p.5 ("Where an applicant is unwilling or unable to accept responsibility for his or her own actions, such a failure is evidence that detracts from a finding of reform and rehabilitation."). Whatever mitigating value attaches to the passage of time since the indecent exposure incidents, it is seriously diminished by Applicant's failure to acknowledge his misconduct or accept responsibility for it. Therefore, the Judge gave undue weight to the passage of time under Criminal Conduct Mitigating Guideline 1<sup>(5)</sup> and Section F.3.

The Administrative Judge's finding that Applicant lacked sexual intent in connection with the August 1993 indecent exposure incidents (Decision at p. 7) is not sustainable because it is based on an artificial, piecemeal analysis that does not reflect a common sense evaluation of the record evidence, which is required by Section F.3. of the Directive.<sup>(6)</sup> It is irrelevant that Applicant's explanations are "not inconsistent" with the criminal charges filed against him or his *Alford* plea. By using that reasoning, the Judge failed to consider whether, in light of the record evidence as a whole, Applicant's explanations are credible and worthy of belief. Although not all incidents of indecent exposure involve

sexual intent,<sup>(7)</sup> a common sense consideration of human experience leads to the conclusion that many such incidents do involve sexual intent. Absent substantial evidence of a credible alternative explanation, it violates common sense to conclude an act of indecent exposure lacks some form of sexual intent. It strains credulity for the Judge to find Applicant's explanation for the second incident in August 1993 is "not . . . unbelievable."<sup>(8)</sup> It is frankly incredible for Applicant to claim he was unaware that his pants were unzipped and his penis was exposed while he was driving a motorcycle around a mall parking lot. Furthermore, having found Applicant indecently exposed himself twice in the same day, it was arbitrary and capricious for the Judge to fail to address what he found or concluded about Applicant's motivation or state of mind during the first incident. In addition, the Judge gives no explanation how he can reconcile his finding that Applicant's denial of the first incident is not credible (Decision at p. 3 n.8) with his conclusion that Applicant's denials of sexual intent are "not . . . unbelievable" (Decision at p. 7). Having concluded that Applicant falsely denied the first indecent exposure incident (which involved essentially identical misconduct as the second incident), there is no rational basis in the record evidence for the Judge to conclude Applicant should be viewed as credible in connection with his explanation for the indecent exposure incident that occurred later that same day. In order to accept Applicant's explanation as credible, one would have to find that Applicant indecently exposed himself unintentionally on two separate occasions, approximately five hours apart, in an identical manner (while discounting the negative credibility implications of the Judge's finding that Applicant's denial of the first incident was not believable). The Judge's finding that Applicant lacked sexual intent in connection with the August 1993 indecent exposure incidents does not reflect a reasonable interpretation of the record evidence as a whole and cannot be sustained. *See, e.g., 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 based a decision upon it.").

Even assuming for purposes of deciding this appeal that the Administrative Judge had a rational basis for finding Applicant's acts of indecent exposure lacked sexual intent, the Judge's favorable conclusions about Applicant's security eligibility do not reflect a common sense evaluation of the record evidence in its entirety or a "whole person" assessment of Applicant. The Judge's finding that Applicant's indecent exposure incidents (two in August 1993 and one in February 1995) were "isolated" is not a reasonable interpretation of the record evidence. Furthermore, even in the absence of sexual intent, Applicant's multiple acts of indecent exposure demonstrate criminal conduct, poor judgment and unreliability. Coupled with Applicant's refusal to acknowledge his misconduct and accept responsibility for it, Applicant's acts of indecent exposure raise serious questions as to his judgment, reliability, and trustworthiness, as well as his willingness or ability to act responsibly and in accordance with the law. The Judge's decision does not articulate a rational basis for his conclusion that Applicant has successfully overcome the negative implications of his proven misconduct. *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."). Nor does the Judge's decision reflect an overall common sense decision within the meaning of Section F.3. *See DISCR Case No. 93-1251* (July 29, 1994) at pp. 5-6 (Administrative Judge's decision must be a common sense determination).

## Conclusion

Department Counsel has met its burden of demonstrating harmful error that warrants reversal. Pursuant to Item 33.c. of the Directive's Additional Procedural Guidance, the Board reverses the Administrative Judge's April 14, 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 contains some statements that make factual assertions that go beyond the record evidence. Such statements constitute new evidence, which the Board cannot consider on appeal. Directive, Additional Procedural Guidance, Item 29.
2. *See, e.g.*, DISCR Case No. 90-0279 (June 9, 1994) at p. 9 (Administrative Judge can make credibility determination based on documentary record)
3. The Administrative Judge's factual findings are not a model of clarity. Furthermore, it is not always easy to determine when the Judge is making factual findings and when he is merely summarizing the record evidence. However, the Board does not measure a Judge's decision against a standard of perfection. *See, e.g.*, ISCR Case No. 97-0551 (May 28, 1998) at p. 3.
4. Even if an Administrative Judge's factual findings are supported by the record evidence, the Judge's ultimate security clearance decision may be arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 97-0435 (July 14, 1998) at p. 3.
5. "[T]he criminal behavior was not recent."
6. There is an arguable basis in the record evidence for the Administrative Judge's finding of no sexual intent in connection with the February 1995 incident. However, that finding is extremely tenuous in light of the record evidence as a whole.
7. *See Ricketts v. State*, 436 A.2d 906, 910-911 (Md. 1981)(discussing indecent exposure cases).
8. As noted earlier, this case does not involve a credibility determination based on personal observation of the Applicant's demeanor during a hearing.