

DATE: January 20, 1999

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 98-0247

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Martin H. Mogul, Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Joseph Testan issued a decision, dated July 30, 1998, in which he concluded that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Department Counsel appealed that decision. For the reasons set forth below, the Board affirms the Administrative Judge's decision.

The 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'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; (2) whether the Administrative Judge's ultimate decision was arbitrary and capricious in light of the record evidence; and (3) whether the Administrative Judge's failure to discuss or evaluate Applicant's current probationary status was error.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated April 13, 1998 to Applicant. The SOR was based on Criterion J (Criminal Conduct) and Criterion D (Sexual Behavior).

A hearing was held on July 2, 1998. The Administrative Judge subsequently issued a written decision on July 30, 1998 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's findings of fact are supported by the record evidence. Department Counsel challenges the Judge's basic finding that Applicant was not guilty of sexually abusing his girlfriend's granddaughter. ore specifically, Department Counsel asserts that (1) The Judge failed to consider certain facts in the record which mandate a finding that Applicant committed sexual abuse upon a minor child, and (2) The Judge erroneously substituted a credibility determination for a consideration of record evidence. For the reasons set forth below, the Board concludes

that Department Counsel's arguments lack merit.

Department Counsel highlights certain facts that the Judge did not specifically mention in his decision and which Department Counsel contends the Judge failed to consider. Those facts are as follows: (1) Applicant slept alone in bed with the child in question on several occasions and therefore had the opportunity to commit the abuse; (2) The child accused Applicant of sexual abuse without any prompting or suggestion from anyone; (3) The child had serious vaginal bruising at the time she accused Applicant of the alleged sexual abuses;⁽¹⁾ (4) The child's grandmother saw Applicant tickling the girl on the lower abdomen near the genital area; (5) The grandmother believes her granddaughter's story and believes her more credible than Applicant; and (6) The consequences of Applicant's guilty plea which included three years probation, sex offender counseling and restitution.

There is a rebuttable presumption that the Administrative Judge considered all the record evidence unless he or she specifically states otherwise. *See, e.g.*, ISCR Case No. 97-0289 (January 22, 1998) at p. 5. Furthermore, error is not established merely because Department Counsel can cite to pieces of record evidence which the Judge did not specifically discuss. *See, e.g.*, ISCR Case No. 97-0730 (October 21, 1998) at p. 3 ("[T]here is no requirement that a Judge mention each and every item of evidence in the record when deciding a case."). In this case, notwithstanding the fact that the Judge did not specifically mention the facts listed above, Department Counsel has failed to demonstrate the Judge erred.

The Judge's decision does not contain a wealth of detail concerning the specific evidentiary findings the Judge made in support of his ultimate finding that Applicant did not commit acts of sexual abuse upon his girlfriend's stepdaughter. He does make a number of specific findings, however, that adequately support his overall finding that Applicant did not engage in any misconduct with the minor child, namely: (1) the Applicant's excellent reputation for honesty and integrity; (2) the absence of any other charges of sexual abuse despite the fact that Applicant lived with other minor children in his house for extended periods; (3) the Applicant's accuser was a "troubled" child who lacked credibility; (4) medical professionals assessed the case as one of "possible abuse" as opposed to probable or definitive abuse; (5) an examining psychiatrist concluded Applicant is not a pedophile or a psychopath; (6) the District Attorney made the concession of allowing Applicant to plead guilty to a single misdemeanor count after initially charging him with five felony counts; and (7) Applicant pled guilty to the misdemeanor because he did not have the financial resources to fight the charges. When viewed in the context of all of the contrary evidence in the record, the Board cannot conclude that the Judge's overall finding is erroneous.

The facts cited on appeal by Department Counsel tend, in varying degrees, to support the proposition that Applicant is guilty of sexual abuse of the minor child.⁽²⁾ However, even taken together, these facts fall short of detracting sufficiently from the evidence to the contrary cited by the Judge to establish that his ultimate finding was erroneous. Concerning the fact that Applicant and the minor child were occasionally in bed together, the mere opportunity to commit improper acts on isolated occasions is of limited probative value. Concerning the minor child's accusations against Applicant, the record contains conflicting evidence as to whether the accusations were spontaneous and wholly without prompting. Concerning the physiological evidence, as indicated in footnote 1 above, the record established no temporal relationship between the child's genital bruising and any actions on the part of Applicant. The fact of the Applicant's probation, while relevant to the issue of guilt or innocence, is not highly probative on that ultimate issue.

The Administrative Judge has the responsibility of weighing the evidence of record before making findings of fact. In this case, the Board concludes that his resolution of the basic issue of the Applicant's guilt or innocence was reasonable in light of the record evidence. The fact that the Judge weighed the record evidence differently than Department Counsel wanted does not demonstrate that the Judge ignored that evidence or that he weighed the conflicting evidence erroneously.

Department Counsel asserts that the Judge attempted to insulate his findings from review by denominating them as credibility determinations. Department Counsel correctly notes that an Administrative Judge cannot rely on a credibility determination as a substitute for record evidence. *See, e.g.*, ISCR Case No. 97-0727 (August 3, 1998) at p. 3. It is true that the Judge's assessment of Applicant's credibility was an integral part of his fact finding process. However, Department Counsel has failed to demonstrate that the Judge used the credibility determination of the Applicant as a substitute for record evidence. In a case such as this, where Applicant denies allegations in the face of a portion of the

record evidence that suggests the contrary, a credibility determination of Applicant is unavoidable. A Judge's careful analysis of credibility where it is necessary should not suggest that the Judge is using the credibility determination improperly. Here, a reading of the Judge's decision makes clear that in addition to the credibility determination, he relied on objective evidence obtained from the record in making his findings of fact. His credibility determination, while an important factor in the case, did not detract from his weighing of the conflicting evidence of record.

2. Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. Department Counsel makes two arguments in support of its contention that the Administrative Judge's decision is arbitrary, capricious, and contrary to law: (1) it was arbitrary and capricious for the Administrative Judge to halt his analysis of the facts of the case in the "Conclusions" section of his decision and discuss only the law of collateral estoppel; and (2) the Judge's conclusion that Applicant's accuser was a "troubled child" and therefore not credible as a witness is arbitrary and capricious in light of the record evidence. For the reasons that follow, the Board concludes that Department Counsel's arguments are not persuasive.

Department Counsel asserts that it was error for the Judge to halt his analysis of the facts of the case in the "Conclusions" section of the decision by only discussing in detail the doctrine of collateral estoppel and its inapplicability to the case. Given the Judge's resolution of the conflicting evidence in the "Findings of Fact" section of the decision, the Board does not find error in the "Conclusions" section. Inasmuch as the Judge concluded in his "Findings of Fact" that Applicant did not engage in the alleged conduct that formed the basis for the SOR, little if any additional discussion was needed in the "Conclusions" section. The fact that the Judge reached his ultimate conclusion about the case in the "Findings of Fact" section rather than the "Conclusions" section of the decision does not constitute error.

Department Counsel claims the Judge erred by describing the alleged victim in this case as a "very troubled child." Department Counsel asserts that this characterization lacks a basis in the record and is the Administrative Judge's "own formulation." After a review of the record as a whole, the Board concludes that the Judge's assessment of the credibility of the minor child is sustainable. While it would have been useful for the Judge to expand upon his characterization so as to make it more precise, remand is not required. Administrative Judges' decisions are not measured against a standard of perfection. In this case, the family babysitter testified to a number of factors, including the minor child's history of "acting out" sexually, that could reasonably cast doubt on the child's credibility. Portions of the babysitter's testimony concerning the child's history were corroborated by other evidence in the record. Department Counsel has failed to demonstrate that the Judge's characterization of the child was arbitrary and capricious.

3. Whether the Administrative Judge's failure to discuss or evaluate Applicant's current probationary status was error. Department Counsel argues that the Administrative Judge erred when he failed to mention that Applicant was still on probation at the time of the hearing with more than two years yet to serve. The Board concludes that Department Counsel fails to demonstrate error on the part of the Judge.

As Department Counsel concedes, the Judge specifically mentioned the fact that Applicant was given three years probation as part of his guilty plea. Thus, it is clear that the Judge was aware of this fact and, absent evidence to the contrary, gave it due consideration in his evaluation of the facts of this case. Department Counsel correctly notes that the Board has held that probationary status is a circumstance that cannot be overlooked in assessing an applicant's suitability to hold a clearance.⁽³⁾ However, inasmuch as the Judge found that Applicant did not commit the alleged disqualifying conduct in this case, his failure to specifically discuss Applicant's continuing probation is neither surprising nor unreasonable. As regards continuing probation, the situation in this case differs significantly from cases where Applicant is still on probation at the time of the hearing for admitted or proven misconduct. Department Counsel has failed to demonstrate the Judge erred.

Conclusion

Department Counsel has failed to meet its burden of demonstrating error. Accordingly, the Board affirms the Administrative Judge's July 30, 1998 decision.

See concurring opinion

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

Concurring opinion by Chairman Emilio Jaksetic

There are some aspects of the majority opinion that I do not agree with, but my differences with that opinion are not worth discussing in detail. There is no presumption of error below and the appealing party has the burden of raising and demonstrating error. A review of the record and the appeal briefs leads me to conclude that Department Counsel has failed to demonstrate the Administrative Judge erred. Accordingly, I concur with my colleagues' decision to affirm.

I have no doubt that it would be legally permissible for DoD Directive 5220.6 to be amended to include a provision that precludes an applicant on probation from having a security clearance. The current edition of the Directive does not have any such provision. The appeal arguments made by Department Counsel about the significance of probation would be better addressed to DoD officials in a position to amend the Directive, not to the Appeal Board.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

1. Department Counsel's assertion that the vaginal bruising occurred at the time of the alleged sexual abuses is not supported by the record evidence. The record contains no specific time that the alleged sexual abuse occurred.
2. One fact cited by Department Counsel is not probative on the issue of Applicant's guilt. The belief of the minor child's grandmother as to whether or not Applicant committed the sexual abuse is irrelevant to the inquiry as to whether Applicant committed sexual abuse.
3. Paragraphs 2 through 6 of Section C of Department Counsel's brief contain a lengthy discussion about the nature of probation and the manner in which probation disqualifies individuals for numerous privileges (including participation in government programs or holding certain positions) outside the security clearance setting. *Gayer v. Scheslinger*, 490 F.2d 740 (D.C. Cir. 1973) is cited for the proposition that the requirements for holding a security clearance ought to be higher than the trustworthiness requirements in other areas. It appears that Department Counsel has included this discussion to attempt to persuade the Board to adopt a *per se* rule of disqualification where an Applicant remains on probation at the close of the record. The Board has declined to adopt such a rule in the past. It will not change its position now.

