

DATE: April 8, 1999

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 98-0320

APPEAL BOARD DECISION AND REMAND ORDER

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

Lynn H. Ball, Esq.

Administrative Judge Barry M. Sax issued a decision, dated October 22, 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. The Board remands the case to the Administrative Judge for further processing consistent with the rulings and instructions set forth in this Decision and Remand Order.

This Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6, dated January 2, 1992, as amended.

Applicant's appeal presents the following issues: (1) whether the Administrative Judge erred by rendering an adverse decision despite the fact that a military service Central Adjudication Facility cleared Applicant in May 1998; (2) whether the Administrative Judge failed to apply the whole person concept; and (3) whether the Administrative Judge erred by considering Applicant's extramarital affair under the Personal Conduct Adjudicative Guidelines instead of the Sexual Behavior Adjudicative Guidelines.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR), dated April 30, 1998. The SOR was based on Criterion E (Personal Conduct). A hearing was held on September 24, 1998.

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 Issues

1. Whether the Administrative Judge erred by rendering an adverse decision despite the fact that a military service Central Adjudication Facility cleared Applicant in May 1998. During the hearing, Applicant proffered a May 19, 1998 letter from a military service Central Adjudication Facility (CAF). That letter (Applicant Exhibit B) informed Applicant she was being granted a security clearance because the CAF had determined that she had provided information that

"sufficiently explained, mitigated, or provided extenuating circumstances regarding the disqualifying information [about her]. Accordingly, you have been granted a . . . security clearance and determined eligible for assignment to a sensitive position." During the hearing, Applicant's counsel referred to the favorable clearance decision made by the CAF concerning Applicant, and argued that the favorable CAF decision should result in a favorable decision in this case (Hearing Transcript at pp. 16-18). Department Counsel argued that the favorable CAF decision was "a separate situation" and "shouldn't apply as a precedent here." (Hearing Transcript at pp. 92-93). The Administrative Judge acknowledged the CAF's favorable decision, but noted Applicant did not submit any evidence about the information underlying the CAF's favorable decision (Decision at p. 4). Apart from a general reference to the documents presented by Applicant (Decision at p. 7), the Judge did not specifically discuss or state what weight or significance he gave to the CAF's favorable decision.

On appeal, Applicant contends it would be "absurd and inconsistent" that the Administrative Judge could make an adverse clearance decision in her case when she was cleared by the CAF. Department Counsel responds that Applicant's contention is based on a theory of estoppel or *res judicata*, and that she is not entitled to a security clearance based on either theory. These arguments raise the issue of whether the Judge erred by rendering an adverse decision despite the fact that Applicant received a favorable security clearance decision from the CAF in May 1998. *See Directive, Additional Procedural Guidance, Item 32* ("The Appeal Board shall address the material issues raised by the parties. . . .").

When there is no express provision of law (*e.g.*, federal statute, Executive Order, regulation, or directive) that covers an issue in a case, then general principles of law (such as collateral estoppel, equitable estoppel and *res judicata*) may be applied, as appropriate, to make a ruling or decide a case. However, such general legal principles do not apply when there is a provision of law that specifically covers an issue in a case. For the reasons that follow, the general legal principles of collateral estoppel, equitable estoppel and *res judicata* do not apply to this case.

Executive Order 12829 ("National Industrial Security Program") was promulgated on January 8, 1993. Pursuant to that Executive Order, the Secretary of Defense promulgated the National Industrial Security Program Operating Manual (NISPOM).⁽¹⁾

A review of Executive Order 12829 and the NISPOM shows that they apply to contractor employees, such as Applicant.

Of particular note in this case, Section 2-203 of the NISPOM reads as follows:

"Federal agencies that grant security clearances (TOP SECRET, SECRET, CONFIDENTIAL, Q or L) to their employees or their contractor employees are responsible for determining whether such employees have been previously cleared or investigated by the Federal Government. Any previously granted PCL⁽²⁾

that is based upon a current investigation of a scope that meets or exceeds that necessary for the clearance required, shall provide the basis for issuance of a new clearance without further investigation or adjudication unless significant derogatory information that was not previously adjudicated becomes known to the granting agency."

Nothing in the language of Section 2-203 indicates or suggests that it is a discretionary provision. To the contrary, the language of Section 2-203 clearly indicates it is mandatory in nature. Accordingly, the Board rejects Department Counsel's contention that the Judge has the discretion to decide what weight, if any, should be given to the prior favorable CAF adjudication of Applicant's security eligibility.

The question remains whether Section 2-203 applies to adjudications by DOHA. It is a principle of statutory construction (applicable by analogy to Executive Orders and agency regulations)⁽³⁾ that different statutes should be construed in a manner that gives full force and effect to each whenever practical. *See, e.g., Vimar Seguros Y Reaseguros v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995) (when two statutes are capable of coexistence, court should regard each as effective in the absence of express congressional intention to the contrary); *United States ex rel. Sutton v. Double Day Office Services*, 121 F.3d 531, 535 (9th Cir. 1997) (unless there is a "positive repugnancy" between two laws, court must give effect to both laws); *In re Colonial Realty Co.*, 980 F.2d 125, 132 (2d Cir. 1992) ("[I]n addressing arguably inconsistent requirements of two statutes, the courts must give effect to both where possible."). Apart from this principle

of statutory construction, Section 203(b) of Executive Order 12829 directs that "[a]gency implementing regulations, internal rules, or guidelines shall be consistent with this order, its implementing directives, and the Manual." Accordingly, the language of Section 2-203 of the NISPOM should not be construed to nullify Executive Order 10865 or the Directive, or *vice versa*.

Nothing in Executive Order 12829 or the NISPOM exempts adjudications under Executive Order 10865. Furthermore, since the NISPOM applies to contractor employees (Sections 1-100, 1-102), there is no basis in the record below to conclude that Applicant's case does not fall, as a matter of law, within the scope of Section 2-203 of the NISPOM. In addition, because Section 2-203 of the NISPOM directs that reciprocity be given to favorable security clearance decisions but not to unfavorable ones, application of Section 2-203 in DOHA proceedings in appropriate cases would not be in derogation of an applicant's right to a hearing under Executive Order 10865 and the Directive.⁽⁴⁾

The Board's conclusions about Section 2-203 of the NISPOM require it to modify its holdings in several prior Board decisions that addressed the significance of a prior security clearance decision. There are two categories of Board decisions that need to be addressed: (a) Board decisions issued prior to implementation of the NISPOM; and (b) Board decisions issued after implementation of the NISPOM. In those Board decisions issued before the NISPOM,⁽⁵⁾

the Board's resolution of the matter was based on discussion of general legal principles. While application of those general legal principles was appropriate prior to implementation of the NISPOM, the reasoning of those Board decisions is superseded to the extent that the Section 2-203 of the NISPOM (or any other similar provision of applicable federal law) is applicable and takes precedence over general legal principles. In those Board decisions issued after implementation of the NISPOM,⁽⁶⁾ the Board erred to the extent it did not address the applicability of the NISPOM. However, a review of the pertinent Board decisions issued after implementation of the NISPOM shows the result in five of those cases would be the same because they involved applicants who engaged in misconduct after they had received favorable security clearance decisions. The applicants' new misconduct in those cases constituted "significant derogatory information that was not previously adjudicated" within the meaning of Section 2-203 of the NISPOM. In the sixth Board decision (ISCR Case No. 96-0461), the reasoning of today's decision might have had a dispositive impact. However, there is not sufficient information available⁽⁷⁾ in the sixth case to determine whether there actually was a prior security clearance adjudication on the applicant's pertinent conduct.

The Board's holdings in any other cases concerning the application of the general principles of collateral estoppel, equitable estoppel, and *res judicata* are affected by this decision only to the extent that Section 2-203 of the NISPOM (or any other similar provision of federal law) is applicable to a given applicant's case. Whenever Section 2-203 of the NISPOM (or any other similar provision of federal law) is not applicable, the general principles of collateral estoppel, equitable estoppel, and *res judicata* should be applied as appropriate.

The record below is insufficient to enable the Board to conclude, as a matter of law, that Applicant was entitled to a favorable security clearance decision by virtue of Section 2-203 of the NISPOM. However, Applicant has effectively raised the issue of whether DOHA processed her case consistent with applicable regulations, including the NISPOM. Pursuant to Item 33.b. of the Additional Procedural Guidance, the case is remanded to the Administrative Judge with instructions to allow the parties to develop the record concerning the applicability of Section 2-203 to Applicant's case. Given the mandatory language of Section 2-203, Department Counsel must take all reasonable steps to procure and provide information relevant to the applicability of Section 2-203, including information that will clarify questions such as whether the SOR was issued on the basis of "significant derogatory information that was not previously adjudicated."

2. Whether the Administrative Judge failed to apply the whole person concept / 3. Whether the Administrative Judge erred by considering Applicant's extramarital affair under the Personal Conduct Adjudicative Guidelines instead of the Sexual Behavior Adjudicative Guidelines. For the reasons stated in resolution of the first appeal issue, the Board is remanding the case for further proceedings and issuance of a new decision. Issuance of a new decision might render these two appeal issues moot. Therefore, it would be premature for the Board to address these issues at this time.

Conclusion

For the reasons stated in this decision, the Board remands the case to the Administrative Judge for further processing

pursuant to Items 35 and 25 of the Directive's Additional Procedural Guidance, in accordance with the Board's rulings and instructions. If the Judge determines the conduct alleged in the SOR was covered by the CAF adjudication, then he must enter a favorable decision based on the reciprocity language of Section 2-203 unless Department Counsel presents evidence showing an exception to Section 2-203 applies.

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. A copy of the NISPOM can be found on the Internet at <<http://www.dis.mil>>
2. According to Section 1-300 of the NISPOM, a PCL is an employee's personnel clearance.
3. *See* DISCR Case No. 93-1050 (December 20, 1994) at p. 5 (canons of statutory construction can be applied to interpret provisions of Directive). *Accord* ISCR Case No. 97-0783 (August 7, 1998) at p. p. 4 n.2.
4. Department Counsel has the right to ask for a hearing if an applicant does not ask for one. *See* Directive, Additional Procedural Guidance, Item 3. However, that procedural right does not nullify or supersede the mandatory language of Section 2-203 of the NISPOM. Of course, it is possible that the applicability of Section 2-203 may not arise or be ascertainable until the hearing stage of a case.
5. *See, e.g.*, DISCR Case No. 93-1003 (June 28, 1994); DISCR Case No. 93-0208 (May 12, 1994); ISCR Case No. 92-1181 (June 14, 1993); DISCR Case No. 91-1436 (May 3, 1993) at p. 4; DISCR Case No. 91-0775 (August 25, 1992) at p. 3; DISCR Case No. 91-1040 (March 26, 1992); DISCR Case No. 88-2710 (February 12, 1990).
6. ISCR Case No. 97-0191 (April 28, 1998); ISCR Case No. 97-0195 (April 2, 1998); ISCR Case No. 96-0461 (December 31, 1997); ISCR Case No. 96-0371 (June 3, 1997); ISCR Case No. 94-0964 (January 29, 1996); DOHA Case No. 94-0966 (July 21, 1995).
7. From the Board decision, the Administrative Judge's decision, or the SOR.