

DATE: June 10, 1999

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 98-0394

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

William S. Fields. Esq., Department Counsel

FOR APPLICANT

Thomas E. Goodreid, Esq.

Administrative Judge Kathryn M. Braeman issued a decision, dated December 31, 1998, in which she 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 following issues: (1) whether the Administrative Judge failed to properly apply pertinent provisions of the Adjudicative Guidelines; and (2) 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 June 30, 1998 to Applicant. The SOR was based on Criterion J (Criminal Conduct) and Criterion D (Sexual Behavior).

A hearing was held on November 17, 1998. The Administrative Judge subsequently issued a written decision. The Judge 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 the Judge's adverse decision.

Administrative Judge's Findings and Conclusions

Applicant sexually abused his minor daughters over a period of 10-12 years, ending when he was arrested in December 1995. In 1996 Applicant pleaded guilty to two counts of sexual assault and was placed on probation, ordered removed from the family home, and prohibited from having any contact with his own or any other minor children. Applicant began treatment in December 1995, with a psychologist who is a certified sex offender provider and evaluator. Apart from an August 1996 incident that was a violation of probation, Applicant has had exemplary attendance and participation in his probation obligations. Applicant's probation officer is not willing to state whether or not Applicant would satisfy his treatment objectives by February 2000. Applicant's treating psychologist believes Applicant has made

significant progress in his treatment, but estimates that Applicant's probation will be extended 12 to 18 months beyond February 2000.

Appeal Issues

1. Whether the Administrative Judge failed to properly apply pertinent provisions of the Adjudicative Guidelines.

Applicant makes three arguments in support of his contention that the Administrative Judge failed to properly apply pertinent provisions of the Adjudicative Guidelines: (a) the Judge erred by concluding Applicant did not satisfy any of the Sexual Behavior Mitigating Conditions; (b) the Judge erred by concluding Applicant did not satisfy any of the Criminal Conduct Mitigating Conditions; and (c) the Judge erred by failing to consider some of the general factors set forth in the "Adjudicative Process" section of the Adjudicative Guidelines. For the reasons that follow, the Board concludes Applicant has failed to demonstrate harmful error by the Judge.

(a) The Administrative Judge concluded that none of the Sexual Behavior Mitigating Conditions applied to Applicant's case. Applicant contends the Judge erred because the record evidence supports application of Sexual Behavior Mitigating Conditions 2, 3, and 4. This contention has mixed merit.

Sexual Behavior Mitigating Condition 2. ⁽¹⁾ Sexual Behavior Mitigating Condition 2 does not give any definition of, or guidance about, the meaning of the word "recent." However, the absence of such a definition or guidance does not end the analysis. Because the Directive requires a common sense decision (Section F.3.), an Administrative Judge must apply undefined terms such as "recent" in a reasonable, common sense way.

There is no dispute that Applicant's sexual abuse of his three minor daughters occurred over a period of approximately 10-12 years and ended approximately three years before the hearing, and there is no evidence of subsequent misconduct of a similar nature. It is not frivolous for Applicant to argue that the passage of three years militates in favor of application of Sexual Behavior Mitigating Condition 2. Although the Judge's decision sets forth an analysis of Applicant's sexual misconduct, it fails to articulate a rational basis for why she decided not to apply Sexual Behavior Mitigating Condition 2. At most, the Judge's decision contains a discussion which provides a rational basis for giving little weight to Sexual Behavior Mitigating Condition 2.

The Board is not holding that the passage of three years without a recurrence, standing alone, mandates application of Sexual Behavior Mitigating Condition 2. However, the passage of three years without recurrence of sexual misconduct by an applicant calls for the Administrative Judge to give an explanation why the Judge concludes it is not appropriate to apply Sexual Behavior Mitigating Condition 2.

Sexual Behavior Mitigating Condition 3. ⁽²⁾ The Administrative Judge did not articulate a rational basis for why she decided not to apply Sexual Behavior Mitigating Condition 3. As with Sexual Behavior Mitigating Condition 2, the Judge's decision contains a discussion which, at most, provides a rational basis for giving little weight to Sexual Behavior Mitigating Condition 3. The Judge's discussion provides an insufficient basis for the Judge to conclude Sexual Behavior Mitigating Condition 3 did not apply in this case. However, given the record as a whole, there is not a significant chance that application of Sexual Behavior Mitigating Condition 3 would have led to a different result by the Judge.

Sexual Behavior Mitigating Condition 4. ⁽³⁾ Applicant's argument concerning Sexual Behavior Mitigating Condition 4 is not persuasive. Sexual Behavior Mitigating Condition 4 would be applicable if a Judge concluded: (a) an applicant's sexual misconduct caused the applicant to be vulnerable to undue influence or coercion (Sexual Behavior Disqualifying Condition 3), and (b) the applicant's current situation no longer left the applicant vulnerable to undue influence or coercion because of the past sexual misconduct. In this case, the Administrative Judge did not conclude that Applicant's sexual misconduct caused him to be vulnerable to undue influence or coercion. Absent such a conclusion, it was reasonable for the Judge to not apply Sexual Behavior Mitigating Condition 4 in this case. *Cf.* ISCR Case No. 97-0289 (January 22, 1998) at p. 4 (absent a finding by Administrative Judge that applicant's falsification increased his vulnerability to coercion, exploitation, or pressure, it was not error for Judge to not apply Personal Conduct mitigating condition pertaining to reduction or elimination of vulnerability to coercion, exploitation or pressure).

The Administrative Judge's errors with respect to Sexual Behavior Mitigating Conditions 2 and 3 are not harmful. The

mere presence or absence of a disqualifying or mitigating condition is not solely dispositive of a case. Even when a disqualifying or mitigating condition is applicable, the Judge cannot be expected to consider it in isolation and without regard to the record evidence as a whole. *See, e.g.*, ISCR Case No. 97-0825 (January 7, 1999) at p. 3. Considering the record as a whole, the Board is not persuaded that application of Sexual Behavior Mitigating Conditions 2 and 3 would have affected the Judge's overall analysis sufficiently to lead the Judge to reach a different result. Accordingly, the Board concludes these errors are harmless. *See, e.g.*, ISCR Case No. 98-0265 (March 17, 1999) at p. 5 (discussing harmless error doctrine); ISCR Case No. 97-0825 (January 7, 1999) at p. 3 (explaining why Administrative Judge's failure to apply Alcohol Consumption Mitigating Condition 3 was harmless error).

(b) The Administrative Judge concluded Applicant did not satisfy any of the Criminal Conduct Mitigating Conditions. Applicant contends the Judge erred because the record evidence supports application of Criminal Conduct Mitigating Conditions 1 and 5. For the reasons that follow, this contention has mixed merit.

Criminal Conduct Mitigating Condition 1. ⁽⁴⁾ Criminal Conduct Mitigating Condition 1 does not give any definition of, or guidance about, the meaning of the word "recent." As discussed earlier in this decision, an Administrative Judge must apply undefined terms such as "recent" in a reasonable, common sense way.

As noted earlier, there is no dispute that Applicant's sexual abuse of his three minor daughters occurred over a period of approximately 10-12 years and ended approximately three years before the hearing, and there is no evidence of subsequent misconduct of a similar nature. Again, it is not frivolous for Applicant to argue that the passage of three years militates in favor of application of Criminal Conduct Mitigating Condition 1. Although the Judge's decision sets forth an analysis of Applicant's criminal sexual misconduct, it fails to articulate a rational basis for why she decided not to apply Criminal Conduct Mitigating Condition 1. At most, the Judge's decision contains a discussion which provides a rational basis for giving little weight to Criminal Conduct Mitigating Condition 1.

The Board is not holding that the passage of three years without a recurrence, standing alone, mandates application of Criminal Conduct Mitigating Condition 1. However, the passage of three years without recurrence of criminal conduct by an applicant calls for the Administrative Judge to give an explanation why the Judge concludes it is not appropriate to apply Criminal Conduct Mitigating Condition 1.

The Administrative Judge's error with respect to Criminal Conduct Mitigating Condition 1 is not harmful. As discussed earlier in this decision, the mere presence or absence of an Adjudicative Guidelines disqualifying or mitigating condition is not solely dispositive of a case. Considering the record as a whole, the Board is not persuaded that application of Criminal Conduct Mitigating 1 would have affected the Judge's overall analysis sufficiently to result in a different result. Accordingly, the Board concludes this error is harmless.

Criminal Conduct Mitigating Condition 5. ⁽⁵⁾ Applicant's argument concerning Criminal Conduct Mitigating Condition 5 lacks merit. The Administrative Judge gave an explanation for her conclusion that Applicant's rehabilitation efforts did not merit application of this mitigating condition. Considering the record evidence as a whole, the Judge's overall explanation reflects a reasonable, plausible interpretation of the evidence. Applicant's ability to argue for an alternate interpretation of the record evidence is not sufficient to demonstrate the Judge's weighing of the evidence concerning Applicant's rehabilitation efforts was arbitrary, capricious, or contrary to law.

Applicant's brief does identify some minor flaws with the Administrative Judge's discussion of Applicant's rehabilitation efforts. However, the Board does not measure a Judge's decision against a standard of perfection. *See, e.g.*, ISCR Case No. 97-0765 (December 1, 1998) at p. 6. In this case, Applicant's ability to identify some minor flaws with the Judge's discussion does not demonstrate errors that warrant remand or reversal.

(c) Applicant contends the Administrative Judge failed to consider and apply some of the general factors set forth in the "Adjudicative Process" section of the Adjudicative Guidelines (Directive, Enclosure 2 at page 2-3). Specifically, Applicant contends the Judge failed to take into account the following factors: (i) Applicant voluntarily reported his misconduct to the government; (ii) Applicant sought assistance and followed professional guidance; and (iii) Applicant has demonstrated positive changes in behavior. Applicant's contention lacks merit.

A reading of the decision below shows the Administrative Judge: noted that Applicant volunteered information about his sexual misconduct to the Defense Security Service; discussed Applicant's participation in therapy and a counseling program; and found Applicant had demonstrated positive changes in his behavior. The Judge also gave rational explanations for why she concluded these, and other favorable evidence, were not sufficient to meet Applicant's burden of demonstrating extenuation, mitigation or changed circumstances sufficient to warrant a favorable security clearance decision (Directive, Additional Procedural Guidance, Item 15). The fact that the Judge did not find the favorable evidence cited by Applicant to be of sufficient weight to warrant a favorable security clearance decision does not mean the Judge failed to consider it.

2. Whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law. Applicant makes four arguments that raise the issue of whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law: (a) the Judge erred by evaluating Applicant's case under a Criterion not alleged in the SOR; (b) the Judge failed to properly apply pertinent provisions of the Adjudicative Guidelines; (c) the Judge failed to properly weigh the favorable record evidence; and (d) there is no evidence that Applicant ever committed a security violation.

(a) Applicant argues the Administrative Judge erred by discussing Criterion I (Emotional, Mental, and Personality Disorders) because that Criterion was not alleged in the SOR. This argument lacks merit.

In general, an adverse security clearance decision cannot be based on matters not alleged in the SOR. *See, e.g.*, ISCR Case No. 97-0356 (April 21, 1998) at p. 3. However, this case does not involve an adverse decision based on matters not alleged in the SOR issued to Applicant. The SOR alleged that Applicant's sexual misconduct with his minor daughters fell under Criterion D (Sexual Behavior) and Criterion J (Criminal Conduct). Under the Sexual Behavior portion of the Adjudicative Guidelines section of the Directive (Enclosure 2 at page 2-10), the following footnote appears: "The adjudicator should also consider guidelines pertaining to criminal conduct (criterion J), or emotional, mental, and personality disorders (criterion I), in determining how to resolve the security concerns raised by sexual behavior." That language places an applicant on sufficient notice that allegations under Criterion D (Sexual Behavior) can be evaluated by an adjudicator⁽⁶⁾ under any applicable guidelines under Criterion J and Criterion I. Accordingly, the Judge did not err in this case by considering Applicant's case under the adjudicative guidelines for Criterion I.

The result on appeal would be the same even if the Board were to accept Applicant's request that it ignore the Administrative Judge's analysis under Criterion I. The Judge's adverse decision can be sustained solely by her analysis of Applicant's conduct under Criterion J and Criterion D.

(b) The Board has already discussed Applicant's arguments concerning the Administrative Judge's application of the Adjudicative Guidelines. To the extent the Judge erred in her application of those Adjudicative Guidelines, the Judge acted in a manner that was arbitrary, capricious, or contrary to law. However, for the reasons given earlier in this decision, the Judge's errors are harmless in this case.

(c) Applicant argues the Administrative Judge failed to give due weight to the favorable evidence presented by Applicant, and that the Judge's failure to do so warrants reversal by the Board. For the reasons that follow, this argument is not persuasive.

The Administrative Judge has the primary responsibility for weighing the record evidence and making factual findings. Directive, Additional Procedural Guidance, Item 25. The Judge's factual findings are subject to review on appeal. Directive, Additional Procedural Guidance, Item 32.a. The Board will not disturb a Judge's weighing of the evidence unless there is a showing that the Judge did so in a way that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. ISCR Case No. 98-0685 (May 20, 1999) at p. 3.

The Administrative Judge's responsibility as trier of fact is not diminished because the record in this case is mixed, containing both favorable and unfavorable evidence. The Judge had to consider the evidence as a whole and decide whether the favorable evidence outweighed the unfavorable evidence, or *vice versa*. *See, e.g.*, ISCR Case No. 98-0685 (May 20, 1999) at p. 3. Accordingly, Applicant's ability to cite to favorable evidence in the record does not, by itself, demonstrate the Judge acted in an arbitrary or capricious manner when she weighed the record evidence in this case. Furthermore, given the clearly consistent with the national interest standard (Executive Order 10865, Section 2;

Directive, Sections C.2. and D.2.), Applicant had a heavy burden of persuasion when seeking to demonstrate extenuation, mitigation or changed circumstances sufficient to warrant a favorable security clearance decision. Directive, Additional Procedural Guidance, Item 15.

(d) Applicant's favorable security record weighs in his favor, but it is not dispositive. The government need not wait until an applicant fails to properly handle or safeguard classified information before it can deny or revoke that applicant's access to such information. *Adams v. Laird*, 420 F.2d 230, 238-39 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). All that is necessary is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons given access to classified information. *See, e.g.*, ISCR Case No. 98-0685 (May 20, 1999) at pp. 3-4. Applicant's long history of sexually abusing his minor daughters provides a rational basis for the Judge's negative conclusions about Applicant's security eligibility. *See, e.g.*, ISCR Case No. 97-0605 (July 8, 1998) at p. 3 ("Acts of criminal sexual misconduct raise questions about an applicant's judgment, reliability, and trustworthiness which the applicant has the burden of overcoming."); ISCR Case No. 97-0618 (June 11, 1998) at p 3 ("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.").

Conclusion

Applicant has failed to meet his burden of demonstrating error that warrants remand or reversal. Accordingly, the Board affirms the Administrative Judge's December 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. "[T]he behavior was not recent and there is no evidence of subsequent conduct of a similar nature."
2. "[T]here is no other evidence of questionable judgment, irresponsibility, or emotional instability."
3. "[T]he behavior no longer serves as a basis for undue influence or coercion."
4. "[T]he criminal behavior was not recent."
5. "[T]here is clear evidence of successful rehabilitation."

6. Department Counsel's reply brief contains the following question: "Is an Administrative Judge an 'adjudicator,' within the meaning of Footnote 1 to Criterion D?" The answer is yes.