

DATE: August 19, 1999

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 98-0809

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

Thomas M. Abbott, Esq.

Administrative Judge Richard A. Cefola issued a decision, dated April 21, 1999, 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 following issues: (1) whether the Administrative Judge failed to explain his decision adequately; (2) whether the Administrative Judge failed to apply pertinent mitigating factors; (3) whether the Administrative Judge erred by finding that a pattern of criminal activity existed; and (4) whether the Administrative Judge failed to apply the whole person concept.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated December 11, 1998 to Applicant. The SOR was based on Criterion J (Criminal Conduct) and Criterion E (Personal Conduct).

A hearing was held on March 17, 1999. 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 failed to explain his decision adequately. Applicant's brief does not list this as a specific appeal issue. However, Applicant's brief contains several arguments that contend the Administrative Judge failed to explain various aspects of his decision in an adequate manner. These arguments, taken collectively, raise a serious issue.

Administrative Judges have broad latitude and discretion in how they write their decisions. However, that latitude and

discretion must be exercised within the legal constraints of the Directive and basic concepts of due process. A Judge must issue a written decision that sets forth "pertinent findings of fact, policies, and conclusions as to the allegations in the SOR . . ." Directive, Additional Procedural Guidance, Item 25. A Judge's decision must set forth findings and conclusions with sufficient specificity and clarity that the parties and this Board can discern what the Judge is finding and concluding. *See, e.g.*, ISCR Case No. 98-0476 (July 22, 1999) at p. 4; ISCR Case No. 98-0608 (August 28, 1997) at p. 4. Furthermore, a Judge must consider pertinent factors and Adjudicative Guidelines (Directive, Section F.3), and articulate a rational explanation for any deviations from them. *See, e.g.*, ISCR Case No. 98-0507 (May 17, 1999) at p. 6. Finally, a Judge cannot make rulings or reach conclusions that are arbitrary, capricious or contrary to law. Directive, Additional Procedural Guidance, Item 32.c. Some actions that would be arbitrary and capricious include: failure to articulate a satisfactory explanation for conclusions; failure to consider relevant factors; and failure to consider an important aspect of a case. *See, e.g.*, ISCR Case No. 98-0331 (May 26, 1999) at p. 6 (discussing arbitrary and capricious standard). Such failures could be manifested in the form of an inadequate decision. Nothing in the Directive or general principles of due process require that a decision be of any particular length. The issue is not the particular length of a decision, but whether the decision contains findings, conclusions, and pertinent discussion that satisfies the requirements of the Directive and due process. A short decision may be sufficient to satisfy those requirements while a long decision may fail to do so.

In view of the foregoing, a decision may be challenged on appeal if it: (a) does not satisfy the requirements of the Directive; (b) has deficiencies that preclude the parties and this Board from being able to discern what the Judge is finding or concluding; or (c) it has deficiencies that render it arbitrary and capricious. In this case, Applicant challenges the Judge's decision on the first and third grounds. As will be discussed later in this decision, the Board concludes Applicant's arguments have some merit, but that the particular errors identified by Applicant are harmless and do not warrant remand or reversal under the particular facts of this case.

2. Whether the Administrative Judge failed to apply pertinent mitigating factors. Applicant contends the Administrative Judge's decision is arbitrary and capricious because the Judge: (a) did not consider or apply pertinent Section F.3. factors; (b) failed to consider pertinent Adjudicative Guidelines under Criterion J; and (c) failed to consider pertinent Adjudicative Guidelines under Criterion E.

(a) The Administrative Judge must consider the six factors listed in Section F.3. of the Directive, as appropriate to the particular facts of the case.⁽²⁾ In addition to noting the general applicability of the Section F.3. factors and listing them (Decision at pp. 3-4), the Judge's decision touches upon such matters as the nature and seriousness of Applicant's conduct, including the circumstances surrounding it (Section F.3.a.), the frequency and recency of Applicant's conduct (Section F.3.b.), Applicant's age (Section F.3.c.), and Applicant's motivation (Section F.3.d.). Accordingly, the Board does not find persuasive Applicant's argument that the Judge failed to consider Sections F.3.a. and F.3.b. Applicant's ability to argue for an alternate interpretation or weighing of the record evidence does not demonstrate the Judge failed to consider those Section F.3. factors.

Applicant correctly notes that the Administrative Judge's decision does not specifically address the likelihood of recurrence (Section F.3.f.). At most, the Judge implicitly reached a negative conclusion about that factor when the Judge stated Applicant did not meet "the mitigating conditions of . . . Section F.3. of the Directive" (Decision at p. 5). The Judge's failure to address Section F.3.f. except in such a perfunctory manner is somewhat problematic. However, the Judge's failure to explicitly comment on Section F.3.f. is not harmful error. Considering the totality of the record evidence and the Judge's decision in its entirety, there is not a significant chance that, but for this error, the Judge would have reached a different result. Accordingly, a remand is not warranted. *See, e.g.*, ISCR Case No. 98-0380 (March 8, 1999) at p. 4 (discussing harmless error doctrine).

(b) Applicant contends the Administrative Judge's decision is arbitrary and capricious because the Judge failed to consider pertinent Criminal Conduct Mitigating Conditions or explain why he decided not to apply such pertinent Mitigating Conditions. In support of this contention, Applicant lists all the Criminal Conduct Mitigating Conditions in his brief and makes a general assertion that the Judge ignored them. However, Applicant only makes specific arguments with respect to the applicability of Criminal Conduct Mitigating Conditions 1⁽³⁾ and 2.⁽⁴⁾

Applicant argues the Administrative Judge should have applied Criminal Conduct Mitigating Condition 1 because: (i)

his April 1998 arrest for disorderly conduct (for soliciting a sex act from an undercover police officer) occurred approximately one year before the hearing without any recurrence, and (ii) the Judge did not specifically find that such conduct would be repeated. Applicant also cites the Board's decision in ISCR Case No. 98-0608 (August 28, 1997) in support of his argument. Applicant's argument fails to demonstrate the Judge erred for two reasons. First, Applicant's argument overlooks the fact that his falsification of a security questionnaire, which is felonious conduct under 18 U.S.C. Section 1001, occurred in August 1998. Accordingly, Applicant's last instance of criminal conduct took place in August 1998, not April 1998. Second, the Board's decision in ISCR Case No. 98-0608 is distinguishable on its facts. In that case, the applicant's last use of marijuana occurred approximately 17 months before the hearing. In this case, Applicant's April 1998 disorderly conduct occurred 11 months before the hearing and his falsification occurred

7 months before the hearing. Applicant's argument fails to demonstrate the Judge erred by not applying Criminal Conduct Mitigating Condition 1.

Applicant also contends the Administrative Judge should have applied Criminal Conduct Mitigating Condition 2. In support of this contention, Applicant argues: (a) Applicant's misconduct is the only misconduct he has been involved in during the 13-year period he has held a security clearance; (b) Applicant has not been involved in any subsequent acts of misconduct; and (c) it was arbitrary and capricious for the Judge to characterize Applicant's conduct as a "pattern" of ongoing criminal conduct because Applicant's April 1998 disorderly conduct incident and his August 1998 falsification are "part and parcel of a single event."

Applicant's first and second arguments are not persuasive. Multiple acts of misconduct are not "isolated" within the meaning of Criminal Conduct Mitigating Condition 2 merely because they take place in a short period of time relative to an applicant's life or the time an applicant holds a security clearance. Furthermore, multiple acts of misconduct are not "isolated" within the meaning of that Mitigating Condition merely because an applicant has refrained from subsequent acts of misconduct.

Applicant's third argument is not so easily disposed of. On the one hand, it is difficult to accept Applicant's characterization of his April 1998 disorderly conduct incident and his August 1998 falsification as "part and parcel of a single event"; they were discrete acts, involving very different kinds of behavior, separated by a period of just over three months.⁽⁵⁾ On the other hand, it was a stretch for the Administrative Judge to characterize two very different acts as a "pattern." However, the Judge's characterization of Applicant's conduct as a "pattern" cannot be considered harmful error because it is not outcome determinative under Criterion J, which covers "[a] history *or* pattern of criminal activity" (italics added). *See also* Criminal Conduct Disqualifying Condition 1 ("[A]ny criminal conduct, regardless of whether the person was formally charged") and Criminal Conduct Disqualifying Condition 2 ("[A] single serious crime or multiple lesser offenses").⁽⁶⁾ Even in the absence of a pattern of criminal conduct, a single act of falsification can be sufficient to support an adverse security clearance decision. Error in a Judge's decision does not warrant remand when there are sustainable findings and conclusions in the decision that are sufficient to support the Judge's overall security clearance decision. *See, e.g.*, ISCR Case No. 98-0355 (March 12, 1999) at p. 3 (error by Administrative Judge is harmless when his sustainable findings and conclusions are sufficient to support his final adverse security clearance decision).

(c) Applicant contends the Administrative Judge failed to consider pertinent Personal Conduct Mitigating Conditions.⁽⁷⁾ Specifically, Applicant contends the Judge ignored application of Personal Conduct Mitigating Condition 3.⁽⁸⁾ In support of this contention, Applicant argues he voluntarily corrected his omission of the April 1998 arrest from his August 1998 security questionnaire when he was interviewed in November 1998.

The Administrative Judge did not give any explanation for why he did not apply Personal Conduct Mitigating Condition 3. However, considering the record evidence in this case, the Judge's silence concerning Mitigating Condition 3 is not clearly an error, as Applicant contends.

Given the Administrative Judge's findings in this case, the Board will not assume the Judge was unaware of the passage of three months between Applicant's August 1998 falsification and his November 1998 interview. In connection with Personal Conduct Mitigating Condition 3, a Judge properly may consider the passage of time between an applicant's falsification and the applicant's later disclosure of the facts to the government. *See, e.g.*, ISCR Case No. 97-0595 (May

22, 1998) at p. 4 (not arbitrary, capricious, or contrary to law for Administrative Judge to conclude applicant's disclosures in June 1997 interview of facts concealed in January 1997 were not "prompt" within meaning of Personal Conduct Mitigating Condition 3). In that case, there was a passage of approximately five months between the applicant's falsification and the applicant's disclosure of the concealed facts. In this case, there was a passage of three months between Applicant's falsification and his subsequent disclosures. Is the two-month difference legally significant? The Board has not yet issued a decision that sets forth a "bright line" definition of "prompt" and it does not propose to do so in this case.

The Administrative Judge's failure to discuss Mitigating Condition 3 is troubling. However, that failure is not harmful error unless the Board holds, as a matter of law, that the Judge should have applied Mitigating Condition 3 despite the evidence that: (a) Applicant made no effort to disclose his concealed arrest until three months after he falsified his security questionnaire; and (b) even then, Applicant only disclosed his concealed arrest after the investigator called him to set up an interview, went through the security questionnaire with him, and then reached the falsified section of the questionnaire. The Board declines to do so.

3. Whether the Administrative Judge erred by finding that a pattern of criminal activity existed. Applicant repeats a variation of his earlier argument concerning the Administrative Judge's characterization of his conduct as a pattern of criminal activity. The Board incorporates by reference its earlier discussion of this issue.

4. Whether the Administrative Judge failed to apply the whole person concept. Applicant contends the Administrative Judge failed to apply the whole person concept in this case. In support of this contention, Applicant argues: (a) the Judge's decision failed to account for any favorable mitigating element of Applicant's life; (b) the Judge failed to take into account the fact that Applicant held a security clearance for over 13 years without a security incident; and (c) the Judge gave only summary consideration to the declarations by Applicant's supervisors and colleagues. None of these arguments demonstrate the Judge erred.

Although an Administrative Judge must consider all the record evidence (Section F.3.), the Judge is not required to specifically discuss each and every piece of record evidence. *See, e.g.*, ISCR Case No. 98-0247 (January 20, 1999) at p. 2. Accordingly, error is not demonstrated merely because Applicant can cite to portions of the record evidence that were not specifically discussed by the Judge. Furthermore, the presence of favorable evidence does not compel a Judge to issue a favorable decision. The Judge must weigh the record evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. *See, e.g.*, ISCR Case No. 98-0614 (July 12, 1999) at p. 3. The fact that the Judge did not find the favorable evidence cited by Applicant to be of sufficient weight to warrant a favorable decision does not mean that the Judge simply failed to consider that evidence. *See, e.g.*, ISCR Case No. 98-0394 (June 10, 1999) at p. 5.

Furthermore, Applicant's favorable security record weighs in his favor, but it is not dispositive. The absence of security violations does not preclude an adverse security clearance decision based on other grounds, such as criminal conduct or falsification. *See, e.g.*, ISCR Case No. 98-0394 (June 10, 1999) at p. 7.

Contrary to Applicant's contention, the Administrative Judge did more than give only summary consideration to the declarations by Applicant's supervisors and colleagues. Those declarations all contains statements that address the security concerns raised by SOR 2.b. The Judge's favorable findings and conclusions about SOR 2.b. (including his application of Personal Conduct Mitigating Condition 5) indicate the Judge did not simply ignore those declarations. The fact that the Judge did not give those declarations more weight with respect to other aspects of the case does not demonstrate he simply ignored them.

Conclusion

Applicant has failed to meet his burden of demonstrating harmful error below. Accordingly, the Board affirms the Administrative Judge's April 21, 1999 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. The Board does not have supervisory jurisdiction over the practices of Administrative Judges on the hearing level. However, the Board does have appellate jurisdiction over the rulings and decisions of those Judges under Item 32 of the Additional Procedural Guidance.

2. The Section F.3. factors are essentially indistinguishable from the general factors listed in the Adjudicative Guidelines at Enclosure 2, pages 2-1 and 2-2.

3. "[T]he criminal behavior was not recent."

4. "[T]he crime was an isolated incident."

5. It is untenable for Applicant to contend the August 1998 falsification "would not have occurred 'but for' the [April 1998 sex incident]" (Appeal Brief at p. 20). Applicant's argument suggests a causal connection that is simply not supported by the record evidence.

6. As noted earlier in this decision, Applicant's falsification of a security questionnaire was felonious conduct. Felonious conduct clearly is a "serious crime" within the meaning of Criminal Conduct Disqualifying Condition 2.

7. Applicant correctly notes the Administrative Judge applied Personal Conduct Mitigating Condition 5 ("[T]he individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or pressure") in his favor.

8. "[T]he individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts."