

DATE: December 6, 1999

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 99-0018

## **APPEAL BOARD DECISION AND REMAND ORDER**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Michael H. Leonard, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

Administrative Judge Richard A. Cefola issued a decision, dated August 9, 1999, 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 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 (Directive), dated January 2, 1992, as amended.

Department Counsel's appeal presents the following issues (1) whether the Administrative Judge erred by applying Sexual Behavior Mitigating Condition 2 and Criminal Conduct Mitigating Conditions 1 and 5; 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 a Statement of Reasons (SOR) dated January 8, 1999 to Applicant. The SOR was based on Criterion J (Criminal Conduct) and Criterion D (Sexual Behavior).

Applicant submitted an answer to the SOR, in which he indicated he did not wish a hearing. A File of Relevant Material (FORM) was prepared. A copy of the FORM was given to Applicant, who submitted a response to the FORM.

The case was then assigned to the Administrative Judge for disposition. The Judge issued a written decision, dated August 9, 1999, 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 the Administrative Judge's favorable security clearance decision.

### **Appeal Issues [\(1\)](#)**

1. Whether the Administrative Judge erred by applying Sexual Behavior Mitigating Condition 2 and Criminal Conduct

Mitigating Conditions 1 and 5. Department Counsel contends the Administrative Judge erred by applying these three Adjudicative Guidelines Mitigating Conditions. The Board will address Department Counsel's arguments with respect to each of those Mitigating Conditions.

Sexual Behavior Mitigating Condition 2. <sup>(2)</sup> Department Counsel contends the Administrative Judge erred by applying this Mitigating Condition because: (a) Applicant's sexual misconduct was recent in light of the record evidence as a whole; and (b) Applicant's touching of the breasts of a 17-year-old girl in June 1997 is evidence of subsequent conduct of a similar nature.

On page 4 of the decision below, the Administrative Judge cited Sexual Behavior Mitigating Condition 2 as being pertinent to this case. Yet, a review of the Judge's decision shows no discussion or explanation by the Judge as to why he concluded Mitigating Condition 2 applied to this case. Department Counsel's appeal arguments raise legitimate questions about whether the Judge had a rational basis for applying Mitigating Condition 2.

An Administrative Judge's decision must set forth findings and conclusions with sufficient specificity and clarity that the parties and the Board can discern what the Judge is finding and concluding. *See, e.g.*, ISCR Case No. 98-0809 (August 19, 1999) at p. 2. Furthermore, a Judge must articulate a satisfactory explanation for his conclusions, including a rational connection between the Judge's findings and the Judge's conclusions. *See, e.g.*, ISCR Case No. 97-0595 (February 19, 1999) at p. 4. Given the nature of the record evidence in this case, the Judge's conclusory citation of Mitigating Condition 2 does not provide the parties and the Board with a basis to conclude whether the Judge engaged in reasoned decision-making.

Criminal Conduct Mitigating Condition 1. <sup>(3)</sup> Department Counsel contends the Administrative Judge erred by applying this Mitigating Condition, citing its argument against the Judge's application of Sexual Behavior Mitigating Condition 2. The Board's discussion of Department Counsel's argument about Sexual Behavior Mitigating Condition 2 applies here with equal force.

Criminal Conduct Mitigating Condition 5. <sup>(4)</sup> Department Counsel contends the Administrative Judge erred by applying this Mitigating Condition because: (a) other Judges have declined to apply Criminal Conduct Mitigating Condition 5 in similar situations; (b) the Judge disregarded Applicant's probationary status; (c) Applicant violated his probation in June 1997; and (d) the Judge gave undue weight to a favorable letter from Applicant's clinician.

(a) The decisions of DOHA Administrative Judges are not binding on their colleagues. *See, e.g.*, ISCR Case No. 98-0265 (March 17, 1999) at p. 8 ("Just as a trial judge is not bound by the decisions of another trial judge, a DOHA Administrative Judge is not bound to follow the decisions of his or her colleagues in the Hearing Office. Accordingly, the Judge's decision in this case is not made arbitrary, capricious, or contrary to law merely because [the appealing party] believes that other Judges' decisions in different cases indicate the other Judges might have ruled in [the appealing party's] favor."). Therefore, the Board will not conclude the Judge erred in this case merely because other Judges have ruled differently when applying Criminal Conduct Mitigating Condition 5.

(b) According to the record evidence, Applicant still was on probation. That evidence is not solely dispositive. *See, e.g.*, ISCR Case No. 98-0247 (January 20, 1999) at page 5 note 3 (there is no *per se* bar to a favorable security clearance decision because applicant is still on probation). However, the Administrative Judge could not simply ignore Applicant's probationary status. *See, e.g.*, ISCR Case No. 96-0710 (June 20, 1997) at p. 3. Applicant's probationary status has obvious relevance to any analysis of whether Applicant's efforts at rehabilitation warrant application of Criminal Conduct Mitigating Condition 5. Although, the Judge referred to Applicant's probation in the Findings of Fact section of the decision, he did not mention or discuss it in the brief, cursory Conclusions section of the decision. Absent any discussion by the Judge about his analysis of the significance of Applicant's probationary status leaves the Board unable to discern whether the Judge engaged in reasoned decision-making with respect to this aspect of the case.

(c) Department Counsel correctly notes the record shows Applicant violated probation. The Administrative Judge made a brief reference to that fact in the Findings of Fact section of the decision, but did not discuss it in his analysis of Applicant's security eligibility. A probation violation constitutes evidence that, as a matter of common sense, calls for explicit discussion in evaluating Applicant's claims of reform and rehabilitation. The failure of the Judge to discuss his

reasoning as to the significance of Applicant's probation violation leaves the Board unable to discern whether the Judge engaged in reasoned decision-making when considering this aspect of the case.

(d) Department Counsel makes several arguments in support of its contention that the Administrative Judge gave undue weight to the report by Applicant's clinician. If a party concludes that a document is admissible but should not be given much weight, the party may decline to object to the admissibility of that document, but set forth arguments why the Judge should not give that document much weight. Such arguments by a party can help the Judge in deciding how much weight to give the document in question. Failure to make such arguments during the proceedings below does not constitute a waiver of the right to argue on appeal that a Judge gave undue weight to a particular document. *See, e.g.*, ISCR Case No. 98-0123 (October 28, 1998) at p. 2 ("The admission of Government Exhibits 3, 4, 5 and 6 without objection from Applicant did not relieve the Administrative Judge from the obligation to evaluate those documents and consider what weight, if any, they reasonably could be given in light of the record evidence as a whole."). However, if a party does not make such arguments when it has an opportunity to do so during the proceedings below, then that party has a heavy burden of persuasion on appeal to demonstrate the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law.

The Administrative Judge's decision to give weight to the letter by Applicant's clinician did not relieve the Judge of his obligation to consider that letter in light the record evidence as a whole (Directive, Section F.3). *See also* ISCR Case No. 98-0265 (March 17, 1999) at p. 4 ("The Judge's responsibility to consider and weigh the record evidence as a whole is not diminished by the presence of expert opinions."). The Judge's brief, cursory discussion in the Conclusions section of the decision below leaves the Board unable to discern whether the Judge weighed the record evidence as a whole in a reasonable, common sense manner.

Since the Board is remanding the case to the Administrative Judge for issuance of a new decision after correction of the errors identified by the Board, the Judge should explain how he weighs the clinician's letter in light of the record evidence as a whole, including Applicant's probationary status and Applicant's probation violation. *See, e.g.*, ISCR Case No. 97-0191 (April 28, 1998) at p. 4 ("[A] Judge must consider all the evidence, not just the evidence that supports his findings.").<sup>(5)</sup>

2. Whether the Administrative Judge's favorable security clearance decision is arbitrary, capricious, or contrary to law. Department Counsel contends the Administrative Judge's decision is arbitrary, capricious, or contrary to law because the decision is not an overall common sense one. On remand, the Judge will issue a new decision after correction of the errors identified by the Board. Since the Judge's new decision may render this contention by Department Counsel moot, it would be premature for the Board to address it now.

### **Conclusion**

Department Counsel has met its burden on appeal to demonstrate error that warrants remand. Pursuant to Item 33.b. of the Directive's Additional Procedural Guidance, the Board remands the case to the Administrative Judge for further processing consistent with Items 35 and 25 of the Additional Procedural Guidance.

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 proffered new evidence with his reply brief. The Board cannot consider new evidence on appeal. Directive, Additional Procedural Guidance, Item 29.
2. "[T]he behavior was not recent and there is no evidence of subsequent conduct of a similar nature."
3. "[T]he criminal behavior was not recent."
4. "[T]here is clear evidence of successful rehabilitation."
5. The Administrative Judge's characterization of the clinician's page-and-a-half letter as "lengthy" is unwarranted. However, Department Counsel's appeal argument about the length of the clinician's letter suffers from the same flaw as the Judge's discussion of the length of the clinician's letter. The evidentiary weight to which a document is entitled should not be based on its length, short or long.