

DATE: November 28, 2000

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 99-0007

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Chief Department Counsel

FOR APPLICANT

James A. Endicott, Jr, Esq.

Administrative Judge John R. Erck issued a decision dated June 28, 2000 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 that follow, 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.

The Board construes Applicant's arguments as presenting the issue of whether the Administrative Judge's decision was arbitrary, capricious or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) to Applicant dated November 5, 1999. The SOR was based on Guideline E (Personal Conduct), Guideline D (Sexual Behavior), and Guideline J (Criminal Conduct). Applicant requested a hearing which was held on May 9-10, 2000. Subsequently the Administrative Judge issued a decision in which he concluded that it was not clearly consistent with the national interest to grant or continue a clearance for Applicant. ⁽¹⁾ The case is before the Board on Applicant's appeal of the Administrative Judge's adverse decision.

Appeal Issue

Whether the Administrative Judge's decision was arbitrary, capricious or contrary to law. Applicant makes the following specific comments about his case: (1) he made a mistake by never taking his case to a trial by court-martial and no court would have convicted him of the outstanding criminal charges; (2) other military personnel who faced similar charges were not discharged from the service under other than honorable conditions; (3) the Judge erroneously chose to believe the version of events presented by the two female victim witnesses in this case; (4) the Judge is biased in favor of females; (5) Applicant has had rehabilitation by virtue of what he has gone through in this case; (6) Applicant is sorry what he truly did; and (7) he has 19 plus years with an unblemished security record. The Board construes these various arguments as raising the issue of whether the Administrative Judge's decision is arbitrary, capricious or contrary to law.

Applicant comments that he made an error in offering his resignation in lieu of court-martial and that a military court would never have convicted him. Applicant's assertion that a military court would never have convicted him is purely speculative on his part and is irrelevant to the record evidence and the various factors that the Administrative Judge was required to consider in evaluating this case.

Applicant compares the outcome in his case to several prominent national legal cases of the last few years involving the President and military personnel which have had a sexual component. Applicant asserts that denying him a security clearance is inequitable in light of the outcomes in those cases. The Board has previously noted that such arguments are misplaced. The Board lacks jurisdiction to evaluate the results of courts martial or impeachments of individuals whose case is not before us. *See* ISCR Case No. 97-0184 (December 8, 1998) at p. 8 ("These proceedings are not the proper forum to address directly or indirectly the merits of matters that are committed to the authority and jurisdiction of another governmental body.").

Applicant argues on appeal that he was the victim of Victim 1 (an incoming subordinate when both were military officers). Victim 1 testified at length at the hearing regarding Applicant's repeated overtures. The Administrative Judge found her testimony more credible than Applicant's. The Board defers to an Administrative Judge's credibility determination unless it is not supported by the record evidence (*see* ISCR Case 99-0194, February 29, 2000). Applicant has not demonstrated that the record undermines the Administrative judge's credibility determination. Furthermore, when faced with military justice charges of sexual harassment (of Victim 1 and other victims) Applicant chose to resign from the military for the good of the service rather than defend and justify his conduct at a court martial. Similarly, Applicant's negative insinuation (from a finding of fact that the subordinate wanted to make a good impression) is designed to suggest improper motive or conduct by Victim 1, which the record did not compel the Judge to find or conclude. Applicant has not demonstrated error below. Applicant also challenges the Administrative Judge's credibility determination regarding Victim 2's testimony. Again, the Board defers to the Administrative Judge's credibility determination because our review of the record does not convince us that the Judge's credibility determination was unreasonable. *See, e.g.*, ISCR Case No. 97-0184 (December 8, 1998) at p. 5 (giving examples of when credibility determinations may be set aside or reversed). Applicant has failed to demonstrate error below.

Applicant asserts that the Administrative Judge is biased in favor of females on matters of sexual harassment. There is a rebuttable presumption that Administrative Judges are unbiased, and Applicant has a heavy burden of demonstrating bias. *See, e.g.*, ISCR Case No. 99-0462 (May 25, 2000) at p. 3. There is no evidence of bias in the record nor is any cited by Applicant. Applicant's bare assertion of bias is clearly inadequate to meet his burden of overcoming the rebuttable presumption that the Judge acted in a fair and impartial manner.

Applicant argues that he has been rehabilitated by virtue of his military resignation, forfeiture of retirement pay, estrangement from wife and family, and public disgrace. The Administrative Judge considered the evidence (including the evidence presented by Applicant) and explained why he concluded Applicant had failed to demonstrate rehabilitation. The Judge's analysis was not arbitrary, capricious, or contrary to law. Applicant has failed to demonstrate error below.

Applicant argues that he acknowledged wrongdoing and implies that he is therefore suitable for a clearance. Even if Applicant had acknowledged all of his misconduct that would not necessarily demonstrate suitability for a security clearance. Serious misconduct is not automatically mitigated merely by acknowledgment. Other factors such as the recency and seriousness of the conduct and lack of rehabilitation would have to be considered on this record. Applicant has not demonstrated error below.

Applicant argues that he is eligible for a security clearance in light of nineteen years of access to classified information without incident. The federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). Security clearance decisions are not an exact science, but rather involve predictive judgments about whether a person may be at risk to fail to properly handle classified information. *Department of Navy v. Egan*, 484 U.S. 518, 528-29 (1988). The federal government need not wait until an applicant actually mishandles or otherwise fails to safeguard classified information before it can deny or revoke access to such information. *Adams v. Laird*, 420 F.2d 230, 238-39 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). Applicant's overall history of misconduct provides a rational basis for the Judge's adverse

conclusions notwithstanding Applicant's unblemished security record.

None of Applicant arguments on appeal demonstrate that the Administrative Judge's decision below was arbitrary, capricious or contrary to law.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error below. the Administrative Judge's decision is affirmed.

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 Administrative Judge issued formal findings in Applicant's favor on SOR Paragraph 2 (Criterion D) and SOR Subparagraphs 1.c and 1.f. Those favorable findings are not challenged on appeal and are not addressed in this decision.