

DATE: April 11, 2000

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 99-0018

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Michael H. Leonard , Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

Administrative Judge Richard A. Cefola issued a remand decision, dated December 20, 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 reverses the Administrative Judge's remand 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.

Department Counsel's appeal presents the following issues: (1) whether the Administrative Judge abused his discretion by refusing to consider a brief on remand proffered by Department Counsel; (2) whether the Administrative Judge erred by applying Sexual Behavior Mitigating Condition 2; (3) whether the Administrative Judge erred by applying Criminal Conduct Mitigating Condition 1; (4) whether the Administrative Judge erred by applying Criminal Conduct Mitigating Condition 5; and (5) whether the Administrative Judge's overall decision was arbitrary, capricious and 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). The SOR alleged that Applicant engaged in acts of sexual molestation with several female victims (who were minors) at various times in 1997. It also alleged that Applicant pled guilty to one count of lewdness involving a child in a state court, was placed on probation, violated his probation by committing an additional act of sexual molestation and had his probation revoked and subsequently reinstated.

Applicant elected to have the case determined on a written record in lieu of a hearing. The Administrative 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. Department Counsel appealed the favorable decision.

On December 6, 1999, the Board issued its Appeal Board Decision and Remand Order (hereinafter "Remand Order"). In

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that decision, the Board held: (1) the Judge's conclusory citation of Criminal Conduct Mitigating Condition 1 and Sexual Behavior Mitigating Condition 2⁽²⁾ did not provide the parties and the Board with a basis to conclude whether the Judge engaged in reasoned decision-making; (2) the Judge's failure to discuss his reasoning as to the significance of Applicant's 1997 probation violation when applying Criminal Conduct Mitigating Condition 5⁽³⁾ left the Board unable to discern whether the Judge engaged in reasoned decision-making when deciding this part of the case; and (3) the Judge's brief, cursory discussion in the Conclusions section of the decision below left the Board unable to discern whether the Judge weighed the record evidence as a whole in a reasonable, common sense manner. The Board remanded the case to the Judge with instructions to correct the errors identified by the Board and to weigh a letter authored by a clinician in light of the record evidence as a whole, including Applicant's probationary status and Applicant's probation violation.

Following the issuance of the Board's Remand Order, Department Counsel on its own initiative submitted a "Brief on Remand" to the Administrative Judge on December 8, 1999. In the Brief on Remand, Department Counsel provided arguments highlighting the reasons the Judge should not give the report of Applicant's clinician much weight in his remand decision. In response to this submission the Administrative Judge issued a show cause order, also dated December 8, 1999 in which stated, "Department Counsel must show good cause why I should **now** (emphasis in original) consider this argument, as the Government had ample opportunity to posit such an argument when the case was first before me." Department Counsel responded to the show cause order on December 15, 1999. Copies of the Show Cause Order and Department Counsel's response were provided to the Applicant, but no response was ever solicited from the Applicant.

The Administrative Judge issued a new decision, dated December 20, 1999 (hereinafter "Remand Decision"). In the Remand Decision the Judge related that he considered the Government's response to his Show Cause Order and found that it failed to show good cause. In the Remand Decision, the Administrative Judge found that: (a) a period of more than two years is a sufficient passage of time to conclude the Applicant's past criminal and sexual behavior is not recent; (b) there was no evidence of subsequent criminal sexual behavior during the intervening two plus years; (c) there is clear evidence of successful rehabilitation; (d) the two-page report of Applicant's clinician states unambiguously that Applicant has successfully rehabilitated himself and there is absolutely no evidence to the contrary; (e) notwithstanding the fact that Applicant violated the terms of his original probation and was again placed on probation, based on the totality of the record evidence and applying the whole person concept, there is uncontroverted evidence that Applicant has successfully rehabilitated himself; and (f) Applicant's inappropriate sexual behavior and related criminal conduct are distant enough in the past as not to be of present security significance. The Judge made formal findings for Applicant under Criteria D and J, and 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 Remand Decision.

Appeal Issues

1. Whether the Administrative Judge abused his discretion by refusing to consider Department Counsel's Brief on Remand. Department Counsel offers a number of reasons why the Administrative Judge should have considered their Brief on Remand. It states that: (a) nothing in the Board's December 6, 1999 decision stated that Department Counsel was prohibited from making arguments on remand and the Board's decision seemed to encourage asserting the arguments on remand; (b) the arguments provide legitimate reasons why the Judge should have given the clinician's letter less weight; (c) the arguments are based on existing record evidence and should have surprised neither Judge nor Applicant; and (d) consideration of the arguments would not result in undue delay of the case.

Absent issues affecting due process rights of the parties, the Board does not act as a general arbiter of the processing of the cases on remand. There would have been absolutely no reason for the Board to prohibit either party from submitting arguments to the Judge after the issuance of the Remand Order. Therefore, the absence of such a prohibition is of no consequence. Department Counsel misconstrues the language of the Remand Order by suggesting that it contains an implied invitation to file a Brief on Remand.

Department Counsel's second and third arguments are centered around assertions of the substantive merits of the

arguments made in the Brief on Remand. The issue it brings before the Board now calls into question the Judge's discretion on a purely procedural matter. The substantive merits of the arguments Department Counsel wished the Judge to consider are irrelevant to a consideration of whether the Judge abused his discretion on a matter of procedure.

The mere fact that consideration of the arguments would have caused no undue delay in the processing of the case fails to establish that the Judge abused his discretion. The Administrative Judge is entitled to consider a number of factors when making a decision about a request such as this one, including the timing of the request, the nature of the request, and the extent to which the moving party had an earlier opportunity to proffer the arguments. It appears that the Administrative Judge had some of these factors in mind when he refused to consider the arguments. He did not abuse his discretion by doing so.

The Directive is silent on this issue. Nothing prevents an Administrative Judge from considering a Brief on Remand such as the one proffered by Department Counsel so long as there is notice to the opposing party and an opportunity to respond. By the same token, there is no requirement that the Judge consider the arguments. Department Counsel has failed to establish that the Judge abused his discretion.

Some comment about the Judge's use of the show cause order is appropriate since Department Counsel called it into question in its argument. The Administrative Judge was not required to use a show cause order to resolve the issue of Department Counsel's Brief on Remand. However, once the order issued, the Judge was obligated out of a duty of fairness to the parties to allow comment by the opposing party and to specifically respond to the input provided by the parties. However, the Judge's handling of the show cause order, while clearly perfunctory and arguably arbitrary and capricious, does not mean that the Judge's overall resolution of this issue was an abuse of discretion.

2. Whether the Administrative Judge erred by applying Sexual Behavior Mitigating Condition 2. (4) Department Counsel contends that, given the record evidence in this case, it was improper for the Judge to apply Sexual Behavior Mitigating Condition 2. Department Counsel's argument has merit.

The Board has declined to furnish "bright-line" guidance regarding the concept of recency. The conclusion of the Judge that conduct of security significance was not recent must be evaluated through careful consideration of the totality of the specific record at hand. In this case, the last incident of sexual molestation took place a little over two years before the close of the record. That interval of time must be evaluated in light of other significant factors in the case, namely: (a) the fact that Applicant has been on criminal court-ordered probation for the entire time interval; (b) the fact that Applicant engaged in acts of sexual molestation repeatedly over a time span of approximately six months; and (c) the fact that Applicant violated his probation by engaging in another act of sexual molestation after his criminal conviction. Given the totality of the circumstances, on this record it was not reasonable for the Judge to conclude that the conduct was not recent.

The second portion of Sexual Behavior Mitigating Condition 2 speaks to the lack of evidence of subsequent misconduct of a similar nature. Department Counsel's argument on this point hints at an interpretation of Sexual Behavior Mitigating Condition 2 that would make its application appropriate only in instances of isolated conduct. The Board need not adopt such an interpretation to reach the conclusion that the Administrative Judge's application of the mitigating Condition was inappropriate in this case. After being placed on criminal probation for certain repeated sexual misconduct, the Applicant subsequently engaged in exactly the same type misconduct. Given these facts, the Judge's application of Sexual Behavior Mitigating Condition 2 does not reflect a reasonable interpretation of the record evidence.

3. Whether the Administrative Judge erred by applying Criminal Conduct Mitigating Condition 1. This particular mitigating condition deals with the concept of recency alone. The Board's ruling above with regard to the "recency" prong of Sexual Behavior Mitigating Condition 2 applies with equal force to the Judge's application of this Criminal Conduct Mitigating Condition.

4. Whether the Administrative Judge erred by applying Criminal Conduct Mitigating Condition 5. Department Counsel argues that the record evidence does not support the Judge's conclusion that there is clear evidence of successful rehabilitation. Department Counsel's argument here centers around the notion that the Judge gave too much weight to

the clinician's report wherein the clinician concluded that Applicant was completely rehabilitated. Department Counsel's specific arguments regarding the Judge's consideration of the report are: (a) the report is not signed by a licensed physician, licensed clinical psychologist, or board certified psychiatrist; (b) there was no opportunity to cross-examine the author of the report; (c) the author of the report erroneously made statements about applicant's security clearance eligibility; (d) the report appears to have been prepared in anticipation of litigation; and (e) the report is not binding or conclusive simply because it is un rebutted. Department Counsel's contentions have mixed merit.

Department Counsel complains first about the fact that the signatory of the report is not a licensed physician, licensed clinical psychologist, or board-certified psychiatrist. The Board notes that Criminal Conduct Mitigating Condition 5 includes no requirement that the evidence of successful rehabilitation come from any specific professional source. While an evaluation of successful rehabilitation may be weighed more heavily or more lightly depending on the source of that evaluation, the Board does not accept the notion that the clinician's report is entitled to little or no weight simply because it is not signed by a member of the professional categories enumerated by Department Counsel.

Department Counsel is in a problematic position regarding its argument that the absence of its ability to cross-examine the author of the report reduces the amount of weight that may be properly assigned to it. Notwithstanding the fact that this case was decided on a written record rather than a hearing, Department Counsel still had an opportunity to object to Applicant's proffer of the clinician's letter. Having decided not to do so, they have little room on appeal to argue that the lack of ability to cross-examine should materially affect the weight to be given the document.

The clinician's statements regarding Applicant's security clearance eligibility were not statements made within the clinician's field of expertise and thus were not proper for the Judge's consideration. There is nothing in the Judge's decision however to indicate that the clinician's comments along these lines were a factor in the Judge's ultimate conclusion. The Board will not presume error below. Absent an express indication that the Judge was swayed by the clinician's comments regarding Applicant's eligibility for a security clearance, the Board will not conclude that the Judge gave too much weight to the document on that basis.

Department Counsel correctly points out that the clinician's letter appears to have been prepared in anticipation of litigation. This would properly lessen the amount of weight to be ascribed to the document, but this factor alone would not mandate that the Judge assign little or no weight to the document.

Department Counsel asserts that the clinician's report is not binding or conclusive solely because it is un rebutted. It states that the Judge must consider the report along with the evidence as a whole. Department Counsel's contention has merit.

There is record evidence that significantly detracts from the conclusions espoused in the clinician's report. It was arbitrary and capricious for the Judge to characterize the report as un rebutted when there is other record evidence, such as the pattern of criminal activity, the violation of probation for the same type of activity, and the continued probationary status, that call the contents of the report into serious question. Similarly, given the totality of the countervailing evidence, it was improper for the Judge to give "much weight" to the clinician's report. This is especially true considering the Judge's failure to explain how he evaluated the report in light of Applicant's history, failed probation and continued probationary status.

Regarding the Judge's failure to analyze the clinician's report with specific reference to the fact that Applicant was placed on probation and then violated his probation, his Remand Decision does not comply with the portion of the Remand Order where the Board directed that "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."⁽⁵⁾ It is arbitrary, capricious and contrary to law for a Judge to fail to comply with the law of the case on remand. *See, e.g.*, ISCR Case No. 97-0184 (December 8, 1998) at p. 7.

Viewing the record evidence in its totality, it was error for the Administrative Judge to apply Criminal Conduct Mitigating Condition 5, as Applicant has failed to produce clear evidence of successful rehabilitation. Department Counsel persuasively argues that evidence of Applicant's placement on supervised probation and the subsequent violation of that probation undercuts any conclusion that there is such clear evidence. The record evidence does not

support the Judge's assertion that the clinician's report establishes "Applicant has successfully rehabilitated himself . . . [and] there is absolutely no evidence to the contrary."

5. Whether the Administrative Judge's Remand Decision was arbitrary, capricious and contrary to law. Department Counsel also argues that the Remand Decision of the Administrative Judge is arbitrary, capricious and contrary to law. This contention is, in large part, a variation of the arguments it made regarding the Judge's erroneous application of the various mitigating conditions in the case. Specifically, Department Counsel argues: (a) Applicant's pattern of behavior shows that sexual misconduct has become part of his lifestyle; (b) involvement with law enforcement raises doubts about Applicant's judgment; (c) his repetitive conduct shows that he will strike again if given the opportunity; (d) he repeated his illegal conduct while on probation; (e) Applicant may have exhibited some reform, but he has not established long-term successful reform; and (f) the unwillingness of the state court to trust Applicant around minor females creates doubt about his security suitability.

Department Counsel's first and third arguments overstate the case against Applicant. Characterizations such as "has become part of his lifestyle" and "he will strike again if given the opportunity" connote a deeply entrenched pattern of behavior that is not established on this record. However, it should be noted that proof of such an entrenched pattern is not necessary to raise serious concerns about Applicant's security clearance eligibility. Regarding Department Counsel's second argument, involvement with law enforcement obviously raises some doubt as to an Applicant's security eligibility, but this factor alone is rarely dispositive of a case. Department Counsel's sixth argument regarding the state court's unwillingness to trust Applicant around minor females is worthy of some consideration. Of course, this unwillingness presumably lasts as long as the probation lasts. To the extent that this argument suggests or implies that the imposition of conditions of probation upon Applicant should be a *per se* bar to the granting of a security clearance, the Board rejects it.

Department Counsel's fourth and fifth arguments carry greater weight than the others. As indicated in Section 4 of this decision above, the fact that Applicant engaged in an act of sexual molestation while on probation significantly undercuts any conclusion that he has been successfully rehabilitated. The passage of time since the most recent violation may well indicate some progress toward reform, but the totality of the record evidence, including the fact that Applicant has not concluded his probation and then gone successfully beyond it renders premature any conclusion of long-term rehabilitation.

An Administrative Judge's decision can be arbitrary, capricious if: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. The Judge's Remand Decision in this case is arbitrary and capricious because it: (1) does not comply with the law of the case as set forth in the Board's Remand Order; (2) offers explanations for the decision that run contrary to the weight of the record evidence; and (3) does not reflect a common sense decision within the meaning of Section F.3. of the Directive.

Conclusion

Department Counsel has met its burden of demonstrating errors that warrant reversal. Pursuant to Item 33.c. of the Directive's Additional Procedural Guidance, the Board reverses the Administrative Judge's December 20, 1999 Remand Decision.

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Separate Opinion of Chairman Emilio Jaksetic,

concurring in part and dissenting in part

I concur with the lead opinion's statement of the procedural history and the issues raised on appeal. I also concur with the lead opinion's discussion and resolution of the appeal issues concerning: (a) Sexual Behavior Mitigating Condition 2; (b) Criminal Conduct Mitigating Condition 1; and (c) Criminal Conduct Mitigating Condition 5.

I agree with the lead opinion's rejection of Department Counsel's argument that the Board's December 6, 1999 Decision and Remand Order contained an implied suggestion to file a brief on remand. Department Counsel's attempt to infer subtle messages from the Board by reading between the lines of a Board decision is misplaced. However, I disagree with the lead opinion's conclusion that the Administrative Judge did not err by refusing to consider Department Counsel's brief on remand. It was not unreasonable for Department Counsel to submit a brief for consideration by the Judge in connection with an evidentiary issue that was specifically remanded to the Judge.⁽⁶⁾ Considering the procedural posture of the case on remand, the Judge's perfunctory and back-handed reaction to Department Counsel's brief was arbitrary and capricious.

I agree with the lead opinion's conclusion that the Administrative Judge's December 20, 1999 Remand Decision should be reversed. Given the record evidence of Applicant's history of sexual misconduct, Applicant had a heavy burden of persuasion to demonstrate that it is clearly consistent with the national interest to grant or continue a security clearance for him. Directive, Additional Procedural Guidance, Item 15. The Judge's Remand Decision fails to articulate a sustainable basis for concluding that Applicant met that heavy burden of persuasion. Even reading the record evidence in a light most favorable to Applicant, the evidence of reform and rehabilitation is mixed and not sufficiently strong to satisfy the "clearly consistent with the national interest" standard that must be applied. *See, e.g.*, ISCR Case No. 97-0821 (October 15, 1998) at p. 3 (presence of some evidence of rehabilitation not enough to warrant a favorable security clearance decision). Without a sustainable basis for the Judge's favorable conclusions, the negative security implications of Applicant's history of sexual misconduct mandate an unfavorable security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Separate Opinion of Administrative Judge Michael Y. Ra'anan, Concurring in part and

Dissenting in part

I agree with the lead opinion's discussion and resolution of the first appeal issue.

I cannot vote for reversal in this case. The Applicant in this case met his burden of mitigating the government's case. His period of bad conduct was six months. His track record of reform is two years. Unfortunately, the Administrative Judge did not follow the Appeal Board's instructions on remand.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

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

2. "[T]he behavior was not recent and there is no evidence of subsequent conduct of a similar nature."

3. "[T]here is clear evidence of successful rehabilitation."
4. "[T]he behavior was not recent and there is no evidence of subsequent conduct of a similar nature."
5. See the Board's Appeal Board Decision and Remand Order, dated December 6, 1999 at p. 4.
6. It would have been unreasonable for Department Counsel to submit a brief in connection with any issue that was not specifically remanded to the Administrative Judge. Unless an issue is left open on remand, a party has no right to expect a Judge to give it another chance to make arguments about an issue that could have been raised earlier.