

DATE: April 7, 2000

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 99-0122

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Robert R. Gales issued a decision, dated October 27, 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 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 erred by not finding against Applicant based on two incidents not alleged in the Statement of Reasons; (2) whether the Administrative Judge erred by analyzing Applicant's conduct in a piecemeal manner; (3) whether the Administrative Judge erred by applying Criminal Conduct Mitigating Condition 5; and (4) 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 to Applicant a Statement of Reasons (SOR) dated February 23, 1999. The SOR was based on Criterion E (Personal Conduct) and Criterion J (Criminal Conduct). A hearing was held on August 18, 1999. The Administrative Judge issued a written decision, dated October 27, 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 Judge's favorable security clearance decision.

Appeal Issues

1. Whether the Administrative Judge erred by not finding against Applicant based on two incidents not alleged in the Statement of Reasons. The SOR alleged under Criterion E that, among other things, Applicant violated security rules and regulations of his employer in October 1997 by leaving a controlled room for classified information unattended for more than 10 minutes while he was the room custodian. During the course of the hearing, information was admitted into the record evidence that indicated that, on two other occasions, Applicant failed to secure a dial lock on a cabinet. Although the Administrative Judge discussed that evidence in his findings of fact, the Judge indicated he would not base

an adverse decision on them because they were not alleged in the SOR and Department Counsel did not move to amend the SOR to include those two incidents. On appeal, Department Counsel contends the Judge erred.

Department Counsel's argument is not well-founded. During the hearing, Department Counsel had the opportunity to move to amend the SOR to include allegations about the two other security incidents. Department Counsel did not do so. Department Counsel cannot fairly complain now that the Judge did not rely on those incidents in making his security clearance decision. If Department Counsel felt those incidents were serious enough to warrant consideration independently or in conjunction with the other record evidence, Department Counsel could have moved to amend the SOR to include them. Furthermore, Department Counsel's closing argument focused on Applicant's history of poor judgment and criminal conduct, referred once to the October 1997 security incident covered by SOR 1.c., and did not mention the other two incidents. Under the circumstances, it was not arbitrary or capricious for the Judge to base his decision on the matters alleged in the SOR. ⁽¹⁾

2. Whether the Administrative Judge erred by analyzing Applicant's conduct in an arbitrary, capricious, and piecemeal manner. Department Counsel contends the Administrative Judge erred by analyzing the various incidents in Applicant's history of misconduct in an arbitrary and capricious manner, and by viewing each incident in isolation and without regard to the evidence as a whole. Department Counsel's contention has merit.

The record evidence shows that Applicant was involved in six domestic incidents, five of which resulted in police intervention, and two of which resulted in arrests and court actions. The Administrative Judge's piecemeal analysis of those six incidents was artificial, strained, and failed to reflect a reasonable interpretation of the record evidence as a whole. By analyzing each incident, one at a time, the Judge failed to consider the significance of Applicant's pattern of conduct. *See, e.g., Raffone v. Adams*, 468 F.2d 860, 866 (2d Cir. 1972)(taken together, separate events may have a significance that is missing when each event is viewed in isolation). In this case, where there is evidence of similar conduct by Applicant that spans a period of years, beginning when he was over 40 years old, the pattern is quite important. The totality of the record evidence does more than "raise the specter (sic) of a possible pattern of questionable judgment, untrustworthiness, and unreliability" (Decision at p. 8); it demonstrates such a pattern by Applicant. Viewed in their totality, the various incidents in which Applicant was involved as a mature adult demonstrate a pattern of poor judgment and irresponsibility (manifested by Applicant's inability to control his impulses or manage his anger) that resulted in inappropriate and criminal behavior over a period of years.

3. Whether the Administrative Judge erred by applying Criminal Conduct Mitigating Condition 5. The Administrative Judge applied Criminal Conduct Mitigating Condition 5 ("[T]here is clear evidence of successful rehabilitation"). Department Counsel contends the Judge erred because the record evidence does not support application of that Mitigating Condition in this case. In support of this contention, Department Counsel argues: (a) the record evidence shows Applicant failed to complete court-ordered rehabilitation; (b) the Judge noted Applicant's failure to complete court-ordered rehabilitation, but failed to discuss that fact in his decision; and (c) the Judge gave too much weight to counseling that Applicant was undergoing despite the absence of any evidence or documentation about the type of counseling or whether it was completed. Department Counsel's contention is persuasive.

On its face, Criminal Conduct Mitigating Condition 5 requires more than just some evidence of rehabilitation. Apart from the plain language of Mitigating Condition 5, the Board must consider not only whether there is some evidence that supports an Administrative Judge's findings and conclusion, but rather whether the Judge's findings and conclusions are supported by the record as a whole, taking into account any record evidence that fairly detracts from those findings and conclusions. Directive, Additional Procedural Guidance, Item 32.a. *See, e.g., ISCR Case No. 99-0194* (February 29, 2000) at p. 2. In this case, the evidence that might support a finding of rehabilitation by Applicant does not, in light of the record as a whole, warrant a conclusion that there is "clear evidence of successful rehabilitation" that would justify applying Criminal Conduct Mitigating Condition 5. In this regard, it is significant that Applicant offered no documentation in support of his claim that he had complied with or completed court-ordered rehabilitation. The absence of such corroborating evidence is significant in light of Applicant's burden (under Additional Procedural Guidance, Item 15) of presenting evidence to rebut, extenuate, or mitigate the facts of his case, which were established through his admissions to the SOR allegations and the evidence presented by Department Counsel at the hearing. The absence of such corroborating evidence undercuts any application of Criminal Conduct Mitigating Condition 5 in this case.

Furthermore, some of the Administrative Judge's conclusions are framed in qualified language that undercuts his application of Criminal Conduct Mitigating Condition 5. For example, the Judge concluded: Applicant's "counseling *seems* to have been successful" and "it *appears* that Applicant has matured and become more acutely aware of his responsibilities in his conduct with others" (Decision at p. 8)(italics added); "there are at least two conditions that *could* mitigate security concerns" and "it *appears* Applicant has matured"(Decision at p. 9)(italics added); and Applicant's "counseling *seems* to have been successful" (Decision at pp. 9-10)(italics added). Given the Judge's use of such qualified language, it was arbitrary and capricious for the Judge to apply Mitigating Condition 5, which requires "clear evidence of rehabilitation."

4. Whether the Administrative Judge's favorable security clearance decision is arbitrary, capricious, or contrary to law. Department Counsel contends the Administrative Judge's favorable security clearance decision is arbitrary, capricious, or contrary to law because: (a) it does not reflect an overall common sense decision under Section F.3. of the Directive; and (b) the record evidence does not support the Judge's conclusion that Applicant has demonstrated rehabilitation. This contention is persuasive.

As discussed earlier, the Administrative Judge erred by applying Criminal Conduct Mitigating Condition 5. Furthermore, given Applicant's history of poor judgment and criminal conduct, he had a heavy burden under Additional Procedural Guidance, Item 15 to present evidence of reform and rehabilitation sufficient to warrant a favorable security clearance decision. Applicant's evidence of reform and rehabilitation was limited, sketchy and uncorroborated. In addition, Applicant's evidence of reform and rehabilitation was relatively recent and brief in duration compared to his history of misconduct. Considering the record evidence as a whole, the Administrative Judge gave undue weight to Applicant's limited evidence of reform and rehabilitation. Considering the record as a whole, it was arbitrary and capricious for the Judge to conclude that Applicant had met his heavy burden of persuasion under Additional Procedural Guidance, Item 15.

Furthermore, as discussed earlier, the Administrative Judge acted in an arbitrary and capricious manner by analyzing Applicant's conduct in a piecemeal manner. Under the whole person concept, a Judge must consider the totality of Applicant's conduct when deciding whether it was clearly consistent with the national interest to grant or continue a security clearance for Applicant. *See, e.g.,* ISCR Case No. 98-0350 (March 31, 1999) at p. 3. The Judge's piecemeal analysis of Applicant's overall conduct did not satisfy the requirements of Section F.3. Even if Applicant's various incidents, viewed separately, could be deemed insufficient to warrant an adverse security clearance decision, the totality of Applicant's conduct had negative security implications that went beyond the security significance of any given incident standing alone.

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 requirements include consideration of a person's judgment, reliability, and trustworthiness. *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961). Viewed in its totality, Applicant's history of questionable judgment, criminal conduct and his involvement in an October 1997 security incident raise serious questions about his suitability for access to classified information.

Conclusion

Department Counsel has met its burden of demonstrating harmful error that warrants reversal. Pursuant to Item 33.c. of the Directive's Additional Procedural Guidance, the Board reverses the Administrative Judge's October 27, 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. An Administrative Judge may amend an SOR on his or her own motion at the hearing to "render it in conformity with the evidence admitted or for other good cause." Directive, Additional Procedural Guidance, Item 17. That authority is permissive and not mandatory in nature. Even though there are some situations where it would be arbitrary and capricious for a Judge to decline to exercise that authority on his or her own motion, this case does not present such a situation.