

DATE: February 23, 2000

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 99-0381

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Chief Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Kathryn M. Braeman issued a decision, dated November 9, 1999, in which she 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 issue of whether the Administrative Judge's decision is arbitrary, capricious or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated June 7, 1999 to Applicant. The SOR was based on Criterion M (Misuse of Information Technology Systems), Criterion E (Personal Conduct), Criterion J (Criminal Activity) and Criterion D (Sexual Behavior).

Applicant responded to the SOR on July 7, 1999. In that response he indicated his desire to have the case decided on the written record without a hearing. The government mailed a File Of Relevant Material (FORM) to Applicant on August 27, 1999. The FORM detailed the case against Applicant and provided copies of the documents that the government relied on in bringing the case. Applicant responded to the FORM on September 28, 1999.

The Administrative Judge issued a written decision, dated November 9, 1999, in which she 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 the Administrative Judge's adverse security clearance decision.

Appeal Issue⁽¹⁾

Applicant makes the following assertions in his appeal brief: (1) he is very sorry for his actions concerning the unauthorized downloading of pornographic files while using his government computer; (2) it was not his intent to

misuse his government assigned computer system and he acted without malice and without the intent to break any rules or regulations; (3) if he had known that an extensive file existed concerning a 1995 interview he gave to the government pursuant to an investigation into his computer activities, he would have informed the Defense Security Service (DSS) agent who interviewed him in 1998 about the earlier investigation and interview; and (4) he has been entrusted with a great deal of responsibility in the computer security area in the four years since the misuse incidents. The Board construes these statements as raising the issue of whether the Administrative Judge's adverse decision was arbitrary, capricious or contrary to law.

Expressions of regret regarding past conduct may constitute a positive first step toward genuine rehabilitation. In this case, however, Applicant's indications that he is sorry provide little in the way of mitigation. This is especially true when his expressions of remorse are considered in the context of his assertions concerning his state of mind when he misused his government computer. These assertions are discussed in the next paragraph.

Applicant's statement on appeal that it was not his intent to misuse his government computer or break any rules or regulations appears to echo his claim in the case below that his downloading of pornographic files was the result of carelessness or inadvertence. A review of the record below, especially the contents of the 1995 investigation into Applicant's activities, indicates there is substantial evidence that Applicant knowingly downloaded pornographic materials. The Administrative Judge's finding that Applicant acted intentionally is well-founded in light of the record evidence in this case.

Applicant argues that he would have told an interviewing DSS agent in 1998 about the 1995 investigation and interview concerning his computer activities had he known that an extensive file existed on the earlier investigation. The existence or non-existence of any record of a prior investigation is wholly irrelevant to Applicant's duty to be forthright and truthful with the government when he was asked about his past. Likewise, Applicant's state of knowledge as to the existence of any record of a prior investigation is irrelevant to his duty to fully disclose his past dealings with government investigators when asked. To the extent that Applicant is arguing that these facts provide mitigation for his falsifications during the October 15, 1998 DSS interview, his position lacks merit.

Applicant speaks of his good behavior regarding his use of computers in the four years since the investigation, presumably to advance facts in mitigation. The Administrative Judge concluded that no mitigating guidelines applied to the case against Applicant under Criterion M. Given the facts of this case, she was not compelled to do so. Applicant has failed to demonstrate that the Judge erred.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's November 9, 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 Administrative Judge ruled in Applicant's favor on several of the subparagraphs of the SOR, namely subparagraphs 2.b., 2.c., 3.a. and 4.a. Those favorable rulings are not at issue in this appeal.