

DATE: July 24, 2000

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 99-0554

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Arthur A. Elkins, Esq., Department Counsel

#### **FOR APPLICANT**

Jeffrey A. Lovitky, Esq.

Administrative Judge Jerome H. Silber issued a decision, dated January 24, 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 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 following issues: (1) whether the Administrative Judge erred by finding against Applicant under Criterion D despite the Judge's finding that Applicant is no longer subject to duress, coercion, or exploitation; (2) whether the Administrative Judge erred by failing to consider whether Applicant is likely to engage in future extramarital conduct; (3) whether the Administrative Judge erred by finding Applicant is likely to engage in future misuse of information technology systems; (4) whether Applicant was denied due process by not receiving notice as to the nature of the allegations against him under Criterion M; (5) whether the Board should reverse the Administrative Judge's formal findings under Criterion E because the Criterion E allegations are duplicative of the allegations under Criterion D and Criterion M; and (6) whether the Administrative Judge erred by failing to consider that Applicant voluntarily reported the information which served as the basis for the SOR.

### **Procedural History**

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated October 14, 1999 to Applicant. The SOR was based on Criterion D (Sexual Behavior), Criterion M (Misuse of Information Technology Systems), and Criterion E (Personal Conduct). A hearing was held on December 16, 1999. The Administrative Judge issued a written decision, dated January 24, 2000, in which he 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 Judge's adverse decision.

### **Appeal Issues**

1. Whether the Administrative Judge erred by finding against Applicant under Criterion D despite the Judge's finding

that Applicant is no longer subject to duress, coercion, or exploitation. The Administrative Judge found: (a) Applicant was engaged in an extramarital affair with a coworker from October 1996 to January 1998; (b) Applicant was terminated from his employment in August 1997 for violating company policy by using a company computer during work hours to view pornography on the Internet; (c) in June 1999 Applicant told a Defense Security Service (DSS) Special Agent that he would tell his wife about the extramarital affair; (d) Applicant's wife was not aware of his extramarital affair until Applicant told her in mid-October 1999, 4 months after his interview with the DSS agent and after he received the SOR; (e) Applicant's sexual indiscretions were not criminal in nature and did not indicate a sexual or other pathology; and (f) Applicant is no longer subject to coercion, exploitation, duress, or pressure based on his past misconduct because his wife is now aware of his extramarital affair, and his current supervisor is aware of his past misuse of a company computer to access pornography on the Internet. With respect to Criterion D, the Judge entered a formal finding for Applicant under SOR 1.a. (misuse of company computer to access Internet pornography) and a formal finding against Applicant under SOR 1.b. (extramarital affair and his concealment of it from his wife).

Applicant does not challenge the Administrative Judge's factual findings about his extramarital affair, his concealment of that affair from his wife, or his past misuse of a company computer to view pornography on the Internet. However, Applicant contends the Judge's adverse formal finding under SOR 1.b. was erroneous because: (i) such an adverse formal finding is unwarranted in light of the Judge's finding that Applicant is no longer subject to coercion, exploitation, duress, or pressure; (ii) it is not important when Applicant informed his wife about the extramarital affair; (iii) the Judge specifically found Applicant's sexual indiscretion was not criminal in nature and did not indicate addictive or compulsive sexual behavior; and (iv) Applicant's sexual indiscretion was not public in nature. Applicant's arguments fail to demonstrate the Judge erred. [\(1\)](#)

Even though the Administrative Judge concluded that Applicant was no longer vulnerable to blackmail because his wife now knew about his extramarital affair, the Judge was not precluded from considering the security significance of the overall facts and circumstances of Applicant's sexual indiscretion. *See, e.g.*, ISCR Case No. 98-0507 (May 17, 1999) at p. 4 (citing earlier Board decision for proposition that an adverse security clearance decision can be based on an applicant's conduct or present circumstances that may have security significance independent of any potential for blackmail or coercion). It was not arbitrary, capricious, or contrary to law for the Administrative Judge to consider the facts and circumstances of Applicant's belated disclosure of the extramarital affair to his wife. The Judge gave a rational explanation for his concerns about Applicant's failure to disclose the affair to his wife sooner.

The fact that Applicant's sexual indiscretion was not criminal in nature and did not indicate addictive or compulsive sexual behavior is not dispositive. The fact that Applicant's sexual indiscretion was not more serious does not mean the Administrative Judge erred by considering its security significance in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 99-0254 (February 16, 2000) at p. 3 ("Even if an applicant has not engaged in other conduct that has more serious negative security significance, the Judge still has the obligation to evaluate the security significance of the conduct the applicant did engage in."); ISCR Case No. 98-0265 (March 17, 1999) at pp. 6-7 ("The Administrative Judge's adverse decision is not made arbitrary, capricious, or contrary to law merely because Applicant's misconduct was not more serious or widespread than it was.").

The Board is not persuaded by Applicant's argument that the Administrative Judge should not have applied Sexual Behavior Disqualifying Condition 4 (E2.A4.1.2.4) ("Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment"). The wording of Disqualifying Condition 4 can cover sexual behavior of a public nature *or* sexual behavior that reflects lack of discretion or judgment. The Judge was not precluded from considering whether the overall facts and circumstances surrounding Applicant's sexual discretion reflected lack of discretion or judgment merely because it was not committed in public.

2. Whether the Administrative Judge erred by failing to consider whether Applicant is likely to engage in future extramarital conduct. Applicant correctly notes that the Administrative Judge did not expressly address the likelihood of recurrence of future extramarital conduct. Since the likelihood of recurrence is a relevant factor to be considered (Directive, Section 6.3.6 and Section E2.2.1.9), Applicant contends the Judge's failure to expressly discuss that factor is error. Applicant's argument fails to demonstrate the Judge committed error.

An Administrative Judge must consider and apply pertinent provisions of the Directive. It can be useful and often may

be preferable for a Judge to cite pertinent provisions of the Directive in a decision to enable the parties and this Board to better understand the Judge's reasoning and analysis of a case. *See, e.g.*, ISCR Case No. 99-0018 (December 6, 1999) at p. 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."). However, there is no requirement that a Judge must expressly cite or explicitly quote every single provision of the Directive that is applicable or pertinent to a case. In this case, the Board's reading of the Judge's decision in its entirety<sup>(2)</sup> persuades the Board that the Judge considered the pertinent provisions of the Directive sufficiently. Applicant's appeal argument on this issue is not persuasive.

3. Whether the Administrative Judge erred by finding Applicant is likely to engage in future misuse of information technology systems. The Administrative Judge found that Applicant is "very unlikely to access pornographic web sites from an office computer in the future." Despite that finding, the Judge concluded "there remains a substantial risk that some other kind of abuse of office computer capability in violation of applicable rules, procedures, guidelines, or regulations." Applicant contends the Judge erred because the Judge's adverse conclusion: (a) is not supported by the record evidence; (b) is a vague conclusion that covers a variety of possible situations that do not necessarily implicate the security concerns of Criterion M; and (c) is "completely speculative and conjectural." Applicant's contention is persuasive.

An Administrative Judge's conclusions must follow rationally from the Judge's factual findings. Having found that Applicant is "very unlikely" to misuse an office computer to access pornographic web sites in the future, the Judge failed to articulate any rational basis to infer that Applicant is at substantial risk to abuse an office computer in the future for some different, unidentified purpose. It would be one thing if the Judge had concluded Applicant was at risk to misuse an office computer to access pornographic web sites in the future. Such a conclusion would have fallen within the permissible bounds of his authority.<sup>(3)</sup> It is quite another thing for the Judge to speculate as to the possibility that Applicant might commit some other, unidentified misuse of an office computer that has no connection with or resemblance to the kind of computer misuse that was the subject of the SOR in this case.

4. Whether Applicant was denied due process by not receiving notice as to the nature of the allegations against him under Criterion M. Applicant contends he was denied due process because he did not receive adequate written notice of the allegations against him. In support of this contention, Applicant argues: (a) the SOR alleged that he misused a government computer to access pornographic sites on the Internet, (b) the Administrative Judge found that he misused a company computer, not a government computer, and (c) Applicant's ability to prepare a defense was materially prejudiced by the faulty wording of the SOR. Applicant's contention is not persuasive.

It is well-settled that administrative pleadings are not judged by the strict standards of a criminal indictment. *Citizens State Bank of Marshfield, Missouri v. FDIC*, 751 F.2d 209, 213 (8th Cir. 1984); *Consolidated Gas Supply Corp. v. Federal Energy Regulatory Commission*, 611 F.2d 951, 959 n.7 (4th Cir. 1979); *Aloha Airlines, Inc. v. Civil Aeronautics Board*, 598 F.2d 250, 262 (D.C. Cir. 1979).<sup>(4)</sup> To the contrary, administrative pleadings should be liberally construed and easily amended. *See, e.g.*, *New York State Electricity & Gas Corp. v. Secretary of Labor*, 88 F.3d 98, 104 (2d Cir. 1996); *Donovan v. Williams Enterprise, Inc.*, 744 F.2d 170, 177 n.10 (D.C. Cir. 1984); *Donovan v. Royal Logging Co.*, 645 F.2d 822, 826 (9th Cir. 1981). The purpose of an SOR is to give an applicant adequate notice of the allegations against him or her so that the applicant has a reasonable opportunity to respond to them. DISCR Case No. 89-1079 (September 13, 1990) at p. 3. In assessing the sufficiency of an SOR, it is necessary to balance the need for fair notice to an applicant against the need to avoid transforming SOR pleadings into a game of wits in which a minor or technical misstep is decisive. DISCR Case No. 88-2577 (February 22, 1991) at pp. 7-8; DISCR Case No. 89-1529 (February 7, 1991) at p. 6; DISCR Case No. 89-1122 (October 30, 1990) at p. 4. As long as there is fair notice to the affected party and the affected party has a reasonable opportunity to respond, a case should be adjudicated on the merits of relevant issues and not concerned with pleading niceties. *See, e.g.*, *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 358 (6th Cir. 1992).

The language of Criterion M is broad enough to cover misuse of government computers *or* private computers. The identity of a computer as a government-owned computer or an employer-owned computer is not critical under Criterion M. The SOR placed Applicant on fair notice of what conduct constituted the gravamen of the Criterion M allegations. Furthermore, the Board has held that Administrative Judge can find an applicant has engaged in a "lesser included

offense" covered by an SOR allegation. *See* ISCR Case No. 94-1213 (January 16, 1996) at p. 6. Applicant's contention that he was prejudiced by faulty wording of the SOR allegations is totally unpersuasive with respect to SOR 2.a.

Applicant's argument also fails to demonstrate any violation of due process with respect to SOR 2.b., which alleged that he misused a government computer in violation of 18 U.S.C. 1030. The language of SOR 2.b. clearly placed Applicant on notice that the government was alleging he had misused a government computer. Merely because the Administrative Judge found Department Counsel failed to meet its burden of proving the controverted allegation does not mean that Applicant was misled or otherwise prejudiced in his ability to respond to it. Furthermore, Applicant's argument on this point ignores the simple fact that Applicant had told an investigator in June 1999 that he had "view[ed] sexually explicit material on government time and with government equipment" (Exhibit 3 at p. 2). Having made such a statement to a government investigator, it is not reasonable for Applicant to complain now that the government alleged in SOR 2.b. that he had misused a government computer.

5. Whether the Board should reverse the Administrative Judge's formal findings under Criterion E because the Criterion E allegations are duplicative of the allegations under Criterion D and Criterion M. Applicant contends the Administrative Judge's adverse formal findings under Criterion E should be reversed because they are duplicative of the allegations under Criterion D and Criterion M. In support of this contention, Applicant argues that Criterion E does not provide any independent basis for an adverse decision in his case, and none of the Criterion E Disqualifying Conditions is applicable to his case. Applicant's contention is not persuasive.

An SOR allegation may rationally be included under more than one Criterion. *See, e.g.*, DISCR Case No. 93-1251 (July 29, 1994) at p. 4 ("[A]n applicant's security related conduct can be alleged under more than one Criterion and, in an appropriate case, can be given independent weight by an Administrative Judge under different Criteria."). So long as there is a rational basis for an SOR allegation to be included under more than one Criterion, it is legally permissible for a Judge to consider an applicant's conduct under different Criteria. Furthermore, the mere presence or absence of any Adjudicative Guidelines Disqualifying or itigating Condition is not dispositive of a case. Rather, a Judge must consider applicable Adjudicative Guidelines in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 99-0500 (May 19, 2000) at p. 4.

Applicant's argument seeks to divide the facts and circumstances of his misconduct into separate categories and then have them considered in an artificial, piecemeal fashion. Applicant's argument runs afoul of the "whole person" concept that must be applied in evaluating an applicant's security eligibility. *See, e.g.*, ISCR Case No. 98-0350 (March 31, 1999) at p. 3 (discussing "whole person" concept). The security significance of Applicant's conduct must be evaluated in light of the totality of the facts and circumstances of his case, not by considering each SOR allegation in isolation. *See, e.g.*, ISCR Case No. 99-0122 (April 7, 2000) at p. 4 (Administrative Judge should not engage in piecemeal analysis of an applicant's conduct, but should consider the security significance of the totality of the applicant's conduct).

6. Whether the Administrative Judge erred by failing to consider that Applicant voluntarily reported the information which served as the basis for the SOR. Applicant contends the Administrative Judge failed to apply in Applicant's favor the fact that Applicant voluntarily reported the information which served as the basis for the SOR in this case. Applicant's argument is not persuasive.

Applicant correctly notes that the Directive indicates an adjudicator should consider, among other things, whether an applicant has voluntarily reported information (Section E2.2.5.1.) or was truthful and complete in responding to questions (Section E2.2.5.2.). However, taken to its logical extension, Applicant's argument would turn the applicability of a mitigating factor into total exoneration of misconduct. The Directive does not require such a result. As noted earlier in this decision, the mere presence or absence of a mitigating factor is not dispositive of a case. An Administrative Judge must consider the record evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. *See, e.g.*, ISCR Case No. 98-0608 (June 27, 2000) at p. 2. Absent a showing that the Judge weighed the record evidence in a manner that is arbitrary, capricious, or contrary to law, the Board will not disturb the Judge's weighing of the favorable and unfavorable evidence. *See, e.g.*, ISCR Case No. 98-0380 (March 8, 1999) at p. 5. Applicant's disagreement with the Judge's weighing of the record evidence in this case falls short of meeting his burden of demonstrating the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law.

## Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error that warrants remand or reversal. Accordingly, the Board affirms the Administrative Judge's January 24, 2000 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's formal finding in favor of Applicant with respect to SOR 1.a. is not at issue on appeal.
2. *See, e.g.*, ISCR Case No. 99-0417 (February 24, 2000) at p. 5 ("[T]he Board does not review a Judge's decision based on consideration of isolated sentences. Rather the Board reviews a Judge's decision in its entirety to determine what the Judge found and concluded.").
3. As discussed earlier in this decision, an Administrative Judge must consider the likelihood of an applicant's conduct being repeated in the future.
4. The Board has applied this principle to SORs in DOHA proceedings. *See, e.g.*, ISCR Case No. 99-0382 (May 3, 2000) at p. 3; ISCR Case No. 97-0356 (April 21, 1998) at p. 3; ISCR Case No. 94-1213 (January 16, 1996) at p. 6.