

DATE: March 19, 2001

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 99-0710

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Wilford H. Ross issued a decision, dated October 5, 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 making findings and reaching conclusions that go beyond the matters alleged in the Statement of Reasons issued to Applicant; (2) whether the Administrative Judge erred by making certain findings that are not supported by the record evidence; (3) whether the Administrative Judge erred by finding a nexus between Applicant's conduct and his suitability for a security clearance; and (4) whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated February 2, 2000 to Applicant. The SOR was based on Guideline J (Criminal Conduct). A hearing was held on July 19, 2000. The Administrative Judge issued a written decision, dated October 5, 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 making findings and reaching conclusions that go beyond the matters alleged in the Statement of Reasons issued to Applicant. Applicant contends the Administrative Judge erred by making findings and reaching conclusions that go beyond the two incidents alleged in the SOR. Although Applicant's contention is not frivolous, it fails to demonstrate the Judge erred.

An SOR must give an applicant adequate notice of the reasons why the government proposes to deny or revoke access to classified information so that the applicant has a reasonably opportunity to respond to the SOR allegations and to

present a defense to the government's case against him or her. *See* Executive Order 10865, Section 3; Directive, Section 4.3. In considering the adequacy of an SOR, it is important to note that an SOR is an administrative pleading, and such pleadings are not held to the stringent standards of criminal indictments.⁽¹⁾ Furthermore, administrative pleadings are not an end in themselves, but rather a means to assist the disposition of a case on its merits rather than pleading niceties.⁽²⁾ Accordingly, 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 should not be concerned with pleading niceties.⁽³⁾

Applicant correctly notes that the Administrative Judge based his adverse decision on findings and conclusions concerning incidents of physical altercation between Applicant and his wife that go beyond the two incidents alleged in the SOR. In general, an adverse security clearance decision cannot be based on uncharged conduct.⁽⁴⁾ However, not every variance between an SOR and a Judge's findings and conclusions is fatal.⁽⁵⁾ Indeed, technical defects in an SOR can be cured if the conduct of the proceedings provide fair notice to the participants of the issues being litigated.⁽⁶⁾ There is no simple formula by which to decide when a variance between SOR allegations and the basis stated for the Administrative Judge's decision is harmful and when it is not.⁽⁷⁾ When an applicant challenges such a variance on appeal, the Board must review the case record as a whole to determine whether the applicant: (a) received fair notice of the issues being raised; (b) had a reasonable opportunity to litigate the issues raised; and (c) has demonstrated he was harmed in a prejudicial manner.⁽⁸⁾

In this case, the SOR clearly placed Applicant on notice that the government was proposing to deny or revoke his access to classified information based on concerns arising from his physical altercations with his wife. The issue of Applicant's overall history of conduct with his wife was clearly relevant to an assessment of the security significance of the two incidents alleged in the SOR. Furthermore, a review of the hearing transcript shows that Applicant was placed on adequate notice of the relevance of his conduct beyond those two incidents and he was provided a full and fair opportunity to present evidence on the subject for consideration by the Judge. Finally, Applicant has not demonstrated how he was prejudiced in any meaningful way by the Judge's actions. In view of the foregoing, the Board concludes Applicant was accorded due process, and the Judge did not act in an arbitrary and capricious manner by considering Applicant's conduct beyond the two incidents in the SOR and relying on his findings and conclusions about that conduct to make his security clearance decision.

2. Whether the Administrative Judge erred by making certain findings that are not supported by the record evidence.

Applicant contends the Administrative Judge erred by finding: (a) Applicant and his wife were mutually violent in violation of his probation; (b) it is not credible for Applicant to claim that he never lost his temper, never raised his voice, and did not respond to his wife's physical attacks except by restraining her with a soft bear hug; and (c) Applicant and his wife continued to fight within the last two years. Applicant contends the Judge's findings are not supported by the record evidence and fail to take into account the testimony of Applicant and his wife.

Although the Board must give deference to the credibility determinations by an Administrative Judge (Directive, Additional Procedural Guidance, Item E3.1.32.1), the deference owed to a Judge's credibility determinations does not immunize them from review. *See, e.g.*, ISCR Case No. 99-0435 (September 22, 2000) at p. 3. Applicant clearly disagrees with the Judge's decision not to accept at face value the testimony of Applicant and Applicant's wife.

However, the Judge was not required to accept at face value the testimony of Applicant or Applicant's wife.⁽⁹⁾ Rather, the Judge had to assess the demeanor and credibility of the witnesses and weigh their testimony in light of the record evidence as a whole. Applicant's arguments fail to demonstrate the Judge's credibility determinations are arbitrary, capricious, or contrary to law.

As the trier of fact, the Administrative Judge must draw reasonable inferences and reach reasonable conclusions that take into account the totality of the record evidence. *See, e.g.*, ISCR Case No. 99-0511 (December 19, 2000) at p. 13. The Judge's findings reflect a plausible interpretation of the record evidence in this case. Applicant's ability to argue for an alternate interpretation of the record evidence is not sufficient to demonstrate the Judge's findings are erroneous. *See, e.g.*, ISCR Case No. 99-0435 (September 22, 2000) at p. 4; ISCR Case No. 98-0620 (June 22, 1999) at p. 3.

3. Whether the Administrative Judge erred by finding a nexus between Applicant's conduct and his suitability for a security clearance. Applicant contends the Administrative Judge erred by finding the record evidence established a nexus between Applicant's conduct and his suitability for a security clearance. In support of this contention, Applicant argues he engaged in only an isolated criminal act and that such an isolated incident cannot support a conclusion that Applicant's access to classified information should be denied or revoked.

The Board rejects Applicant's premise that a single criminal act would be insufficient to support an adverse security clearance decision. Even a single criminal act may be sufficient to raise security concerns. *See, e.g.,* Criminal Conduct Disqualifying Condition 2 (E2.A10.1.2.2.) ("*A single serious crime* or multiple lesser offenses.") (emphasis added). Applicant's premise fails to take into account that although the frequency of conduct is a pertinent consideration (Directive, Item E2.2.1.3), the nature and seriousness of the conduct (Directive, Item E2.2.1.1) and the presence or absence of rehabilitation and other pertinent behavioral changes (Directive, Item E2.2.1.6) also must be considered.

The Board need not decide whether the February 1997 incident would be sufficient to justify the Administrative Judge's adverse security clearance decision. As discussed earlier in this decision, the Judge could consider the record evidence that Applicant had multiple incidents of physical altercation with his wife in addition to the February 1997 incident. Applicant's overall history of physical altercations with his wife provides a rational basis for the Judge's adverse conclusions under Guideline J and his adverse security clearance decision.

4. Whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. Applicant also contends: (a) the Administrative Judge's conclusions do not have a logical or reasonable basis in the record evidence; (b) the Judge reached adverse conclusions about matters not alleged in the SOR; (c) the Judge unfairly prejudged him because of the tendency of people to prejudge larger men when claims of spousal abuse are raised; and (d) the record evidence demonstrates many extenuating and mitigating conditions that the Judge failed to take into account. The Board construes these arguments as raising the issue of whether the Judge's decision is arbitrary, capricious, or contrary to law.

The Administrative Judge's reached conclusions that are sustainable on the record evidence and that are not arbitrary, capricious, or contrary to law. Applicant's strong disagreement with the Judge's conclusions fails to demonstrate the Judge erred.

As discussed earlier in this decision, the Administrative Judge did not err by considering the record evidence of incidents of physical altercation between Applicant and his wife that go beyond the two incidents alleged in the SOR.

There is a rebuttable presumption that quasi-judicial officials are impartial and unbiased. *See Schweiker v. McClure*, 456 U.S. 188, 195 (1982). The appealing party has a heavy burden when seeking to overcome or rebut that presumption. *See, e.g.,* ISCR Case No. 99-0007 (November 28, 2000) at p. 3; ISCR Case No. 97-0783 (August 7, 1998) at p. 2. Applicant's theory about the Judge's mental processes concerning spousal abuse cases falls short of rebutting the presumption that the Judge adjudicated Applicant's case in a fair and impartial manner. The issue is not whether the appealing party personally believes that the Administrative Judge was biased. Rather, the issue is whether the record of the proceedings below contains any indication that the Judge acted in a manner that would lead a reasonable person to question the fairness or impartiality of the Judge. Applicant fails to identify anything in the record below that indicates or suggests a basis for a reasonable person to question the fairness or impartiality of the Judge in this case.

Applicant's ability to refer to evidence favorable to him is not sufficient to demonstrate the Administrative Judge erred. As the trier of fact, the Judge had the responsibility of weighing the record evidence, both favorable and unfavorable, and decide whether the favorable evidence outweighed the unfavorable evidence or *vice versa*. *See, e.g.,* ISCR Case No. 00-0044 (December 22, 2000) at p. 3. Absent a showing that the Judge acted in a manner that is arbitrary, capricious, or contrary to law, the Board will not disturb a Judge's weighing of the record evidence. *See, e.g.,* ISCR Case No. 00-0016 (October 23, 2000) at p. 3. Applicant's arguments fail to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. *See* ISCR Case No. 98-0621 (November 23, 1999) at p. 4 ("An appealing party's disagreement with a Judge's weighing of the record evidence is not sufficient to demonstrate 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 October 5, 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. *See, e.g.*, ISCR Case No. 99-0447 (July 25, 2000) at p. 4; ISCR Case No. 99-0554 (July 24, 2000) at pp. 4-5; ISCR Case No. 98-0529 (June 15, 1999) at p. 2.

2. *See, e.g.*, *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 358 (6th Cir. 1992); *Usery v. Marquette Cement Mfg. Co.*, 568 F.2d 902, 906 (2d Cir. 1977). *See* ISCR Case No. 99-0447 (July 25, 2000) at p. 4 ("In assessing the sufficiency of an SOR, it is necessary to balance the need for fair notice to an applicant against the need to transform SOR pleadings into a game of wits in which a minor or technical misstep is decisive.").

3. *See, e.g.*, ISCR Case No. 99-0447 (July 25, 2000) at p. 4; ISCR Case No. 99-0554 (July 24, 2000) at p. 5; ISCR Case No. 95-0817 (February 21, 1997) at pp. 7-8.

4. *See, e.g.*, ISCR Case No. 97-0595 (May 22, 1998) at p. 6; ISCR Case No. 94-1159 (December 4, 1995) at p. 5.

5. *See, e.g.*, ISCR Case No. 94-0841 (February 8, 1996) at p. 3; DISCR Case No. 88-1198 (November 13, 1992) at pp. 7-8; DISCR Case No. 88-2577 (February 22, 1991) at p. 8.

6. *See, e.g.*, *Pergament United Sales, Inc. v. N.L.R.B.*, 920 F.2d 130, 134-35 (2d Cir. 1990); *Warner-Lambert Co. v. Heckler*, 787 F.2d 147, 161 (3rd Cir. 1986); *National Steel & Shipbuilding Co. v. Director, Office of Workers' Compensation Program*, 616 F.2d 420, 421 (9th Cir. 1980).

7. *See Pergament United Sales, Inc. v. N.L.R.B.*, 920 F.2d 130, 136 (2d Cir. 1990) ("[W]hether a charge has been fully and fairly litigated is so peculiarly fact-bound as to make every case unique; a determination of whether there has been a full and fair litigation must therefore be made on the record in each case.").

8. *See* DISCR Case No. 88-2577 (February 22, 1991) at p. 8.

9. *See, e.g.*, ISCR Case No. 99-0532 (February 27, 2001) at p. 7 ("A person's statements need not be accepted at face value merely because they are un rebutted."); DOHA Case No. 94-0569 (March 30, 1995) at p. 5 ("Accordingly, the Judge may find some parts of Applicant's testimony credible and other parts not credible."); *Jenkins v. Immigration and Naturalization Service*, 108 F.3d 195, 199 (9th Cir. 1997)("But, as a finder of fact, the ALJ was not required to accept or

reject the testimony of each witness *in toto*.").