

DATE: October 23, 2000

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 00-0016

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Chief Department Counsel

FOR APPLICANT

Dan Cron, Esq.

Administrative Judge Kathryn M. Braeman issued a decision, dated June 9, 2000, 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 that follow the Board affirms the Administrative Judge's decision.

The 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 or not the Administrative Judge erred by not viewing the disposition of Applicant's criminal case as the equivalent of an acquittal for purposes of mitigation; (2) whether the Judge erred by concluding that Applicant had failed to present clear evidence of successful rehabilitation; and (3) whether the Administrative Judge considered all of the record evidence.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) to Applicant dated January 26, 2000. The SOR was based on Guideline J (Criminal Conduct). Applicant responded to the SOR by Answer dated February 18, 2000 and requested a hearing.

A hearing was held on May 15, 2000. At the hearing, Department Counsel presented evidence that Applicant pled guilty to a charge of Abuse of a Child, a third degree felony in the state of Applicant's residence. The evidence also established that Applicant was granted a conditional discharge and was placed on supervised probation for one year. Applicant introduced evidence of his superior job performance and his rehabilitation efforts which led to successful completion of his probation.

The Administrative Judge issued a written decision, dated June 9, 2000, 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 Judge's adverse security clearance decision.

Appeal Issues

1. Whether the Judge erred by not viewing the disposition of Applicant's criminal case as the equivalent of an acquittal for purposes of mitigation. The record evidence established that after Applicant's guilty plea to one count of Abuse of a Child, the court did not enter an adjudication of guilt but instead entered a conditional discharge order and then placed Applicant on probation for one year. The court also required Applicant to spend alternating weekends in jail for a twelve-week period. Applicant was required to successfully complete parenting classes and other requirements of the state social services agency. The criminal case against Applicant was finally dismissed on February 17, 2000.

In her decision the Administrative Judge correctly noted that acquittal is a basis for mitigation in cases brought under the Criminal Conduct Guidelines. (1) She went on to state that she would not apply the mitigation guideline in this case because it did not include a "conditional discharge" as a basis for mitigation.

On appeal, Applicant asserts that the Administrative Judge improperly failed to consider the disposition of the criminal case as a factor in mitigation. The essence of his argument is that the state's granting a dismissal of the charges against Applicant after providing him with a conditional discharge was, in effect, an acquittal of the Applicant since it involved a "setting free from the charge of an offense by verdict, sentence, or other legal process." Applicant's argument lacks merit.

The term "acquittal" as it is commonly understood in legal terms connotes an adjudication on the merits of a criminal case that results in a finding of not guilty. Applicant's case is significantly different. Here, Applicant admitted to the underlying criminal conduct. The court's method of disposition involved essentially a deferred adjudication of guilt and an ultimate dismissal conditioned upon Applicant's successful completion of lengthy, supervised probation. The court also required Applicant to serve jail time and receive counseling in this case. While no formal conviction resulted, Applicant's admissions and the actions of the court were clearly inconsistent with a disposition of acquittal. A person who is acquitted of a criminal charge is not required to serve jail time or be placed on probation. The Board will not construe the term "acquittal" as it is used in the Adjudicative Guidelines in a manner that deviates from the commonly understood meaning of the term. Applicant has failed to demonstrate that the Judge erred on this point.

2. Whether the Administrative Judge erred by concluding that Applicant had failed to establish clear evidence of successful rehabilitation. In her decision, the Administrative Judge noted the following: (a) that in March 1998 Applicant successfully completed a six-week parenting workshop; (b) in May 1998 Applicant received a Certificate of Completion for attending 39 hours of a violence prevention parent training program; (c) after Applicant and his wife attended a community college intervention program for 17 months, the college staff determined they could terminate their attendance; (d) in December 1999 a licensed clinical social worker evaluated Applicant's 18 months of psychotherapy by stating he had made "great progress addressing both personal and family issues;" and (e) the judge in Applicant's criminal case issued an Order and Certificate of Satisfactory Discharge in February 2000 and in May 2000 dismissed the criminal case against Applicant as he had successfully completed his probationary period.

While noting Applicant's successful completion of his numerous probation requirements and his considerable efforts regarding rehabilitation, the Administrative Judge ultimately concluded that Applicant had not demonstrated clear evidence of successful rehabilitation, and thus his criminal conduct could not be mitigated on that basis. (2) She noted that the therapist said only that Applicant had made "great progress" in addressing personal and family issues. The Judge concluded that the fact that the children of the family were returned to Applicant and his wife did not establish clear evidence of successful rehabilitation. The Judge also noted that no evidence was presented concerning a favorable prognosis for Applicant or any indication that Applicant's conduct was not likely to recur.

On appeal, the Applicant asserts that the Administrative Judge failed to give adequate weight to the findings of the state judge who oversaw the care and custody of Applicant's children. Applicant notes that state judge made a specific finding that Applicant demonstrated that he was capable of caring for his children free of abuse and neglect. This finding, according to Applicant, constituted clear evidence of his rehabilitation and supports an ultimate finding in favor of the Applicant on his security clearance.

Applicant's argument fails to demonstrate that the Administrative Judge erred. The weight to be assigned to any particular portion of evidence is a matter within the province of the Administrative Judge and that weighing process will not be disturbed on appeal absent a demonstration that the Judge's weighing of the evidence was arbitrary, capricious, or

contrary to law. *See, e.g.*, ISCR Case No. 99-0554 (July 24, 2000) at p. 6. Here, it was the Administrative Judge's responsibility to review the evidence concerning the state judge's actions and evaluation in the context of the entirety of the record evidence, which includes both evidence that tends to support the proposition that Applicant has clearly rehabilitated himself and evidence (or the lack thereof) that detracts from the proposition. On this record, the Board is not convinced that the Administrative Judge reached a conclusion concerning the issue of "clear evidence of successful rehabilitation" is arbitrary, capricious, or contrary to law.

Applicant's second appeal argument focuses on the evidence of rehabilitation and cites this as an adequate justification for a favorable clearance decision. In general, the mere presence or absence of any Adjudicative Guideline or Mitigating 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. The totality of the record in this case and the contents of the Judge's decision indicate that she fulfilled this requirement.

3. Whether the Administrative Judge considered all the record evidence. Department Counsel construes Applicant's appeal brief as raising the issue of whether or not the Administrative Judge considered all of the evidence in the record before rendering her decision. Clearly such an issue was not raised by Applicant explicitly but arguably such an argument was raised by implication.

Nothing in case record and the Judge's decision overcomes the presumption that the Administrative Judge considered all the evidence. Indeed, the litany of findings made by the Judge concerning Applicant's efforts at rehabilitation shows that the Judge gave due consideration to the evidence favoring Applicant.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating that the Administrative Judge committed error. Accordingly, the Board affirms the Judge's June 9, 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. Under numbered subparagraph E2.A10.1.3.5. of the Adjudicative Guidelines, "Acquittal" is listed as a condition that could mitigate security concerns.

2. "There is clear evidence of successful rehabilitation" is a mitigating condition found at subparagraph E2.A10.1.3.6. of the Adjudicative Guidelines.

