

DATE: December 6, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-07018

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated March 22, 2004, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline J (Criminal Conduct) and Guideline E (Personal Conduct). Administrative Judge Elizabeth M. Matchinski issued an unfavorable security clearance decision, dated April 27, 2005.

Applicant appealed the Administrative Judge's unfavorable decision. The Board has jurisdiction under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

The following issues have been raised on appeal: (1) whether Applicant is prejudiced in pursuing his appeal because transcripts of his 1996 trial are not in evidence; (2) whether Applicant was denied a fair and impartial hearing because his case was adjudicated based, in part, on matters not alleged in the SOR; (3) whether the Administrative Judge failed to base her findings and conclusions on record evidence; (4) whether certain findings of fact made by the Administrative Judge are not supported by the record evidence; (5) whether the Administrative Judge misapplied certain provisions of the Adjudicative Guidelines; (6) whether the Administrative Judge erred by concluding the facts and circumstances of Applicant's filing of a Chapter 7 bankruptcy petition in November 2001 demonstrated poor judgment, unreliability, and untrustworthiness under Guideline E (Personal Conduct); and (7) whether the Board should withhold final adjudication as to Guideline E (Personal Conduct) to allow Applicant to seek a clear resolution of whether he is required to make court-ordered restitution. For the reasons that follow, the Board affirms the Administrative Judge's decision.

Scope of Review

On appeal, the Board does not review a case *de novo*. Rather, the Board addresses the material issues raised by the parties to determine whether there is factual or legal error. There is no presumption of error below, and the appealing party must raise claims of error with specificity and identify how the Administrative Judge committed factual or legal error. Directive, Additional Procedural Guidance, Item E3.1.32. *See also* ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (discussing reasons why party must raise claims of error with specificity).

When the rulings or conclusions of an Administrative Judge are challenged, the Board must consider whether they are: (1) arbitrary or capricious; or (2) contrary to law. Directive, Additional Procedural Guidance, Item E3.1.32.3. In

deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See, e.g.*, ISCR Case No. 97-0435 (July 14, 1998) at p. 3 (citing Supreme Court decision). In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. Compliance with state or local law is not required because security clearance adjudications are conducted by the Department of Defense pursuant to federal law. *See* U.S. Constitution, Article VI, clause 2 (Supremacy Clause). *See, e.g.*, ISCR Case No. 00-0423 (June 8, 2001) at p. 3 (citing Supreme Court decisions).

When an Administrative Judge's factual findings are challenged, the Board must determine whether "[t]he Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge." Directive, Additional Procedural Guidance, Item E3.1.32.1. The Board must consider not only whether there is record evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings, and whether the Judge's findings reflect a reasonable interpretation of the record evidence as a whole. Although a Judge's credibility determination is not immune from review, the party challenging a Judge's credibility determination has a heavy burden on appeal.

When an appeal issue raises a question of law, the Board's scope of review is plenary. *See* DISCR Case No. 87-2107 (September 29, 1992) at pp. 4-5 (citing federal cases).

If an appealing party demonstrates factual or legal error, then the Board must consider the following questions:

Is the error harmful or harmless? *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine);

Has the nonappealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds? *See, e.g.*, ISCR Case No. 99-0454 (October 17, 2000) at p. 6 (citing federal cases); and

If the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded? (Directive, Additional Procedural Guidance, Items E3.1.33.2 and E3.1.33.3).

Appeal Issues

Discussion and resolution of the issues raised on appeal will be facilitated by a summary of the Administrative Judge's material findings and conclusions.

In 1996, Applicant was convicted in state court of scheme to defraud in the first degree. Prior to sentencing, the trial judge granted a motion to set aside the verdict and dismissed the charge against Applicant. Applicant's conviction was reinstated by a state appellate court. In July 2001, Applicant was sentenced to a conditional discharge, with several conditions (including an order to pay restitution of more than \$2.2 million in monthly payments as recommended by the probation department after investigation and approval by the court). In September 2001, Applicant agreed in writing to abide by the conditions of the conditional discharge. Applicant made no effort to pay of the court-ordered restitution at the time because he had financial problems. In November 2001, Applicant filed for Chapter 7 bankruptcy. Applicant's bankruptcy counsel advised him to include the court-ordered restitution debt in the bankruptcy petition, but informed him that the debt might not be discharged in bankruptcy. The county probation office later filed a letter with the bankruptcy court to indicate it intended to oppose any action to discharge Applicant's court-ordered restitution. In February 2002, Applicant was granted a Chapter 7 discharge of the debts dischargeable under the law. Applicant was notified by the bankruptcy court that as a general rule, debts, penalties, forfeitures, or criminal restitution obligations are not discharged in a Chapter 7 bankruptcy. In a June 2003 interview with a Defense Security Service investigator, Applicant acknowledged that he had not made any payments on the court-ordered restitution, and expressed the belief

that the county probation office's request for payments of \$200 a month was premature because the county had not talked with him to arrange for a fair payment. As of the date of the hearing, Applicant had not made any payments on the court-ordered restitution despite having a base annual salary of \$60,000. Applicant did not intend to begin making payment on the restitution debt until he is ordered to do so by court order. In October 2004, a state court issued to Applicant a certificate of relief from disabilities that relieved him of all disabilities and bars to employment because of his felony conviction.

The Administrative Judge concluded that the criminal conduct that resulted in Applicant's 1996 conviction was fraudulent in nature, systematic, ongoing for about four years, and involved a clear breach of fiduciary duty to his clients. The Judge also concluded that application of Criminal Conduct Disqualifying Condition 1 ⁽¹⁾ and Criminal Conduct Disqualifying Condition 2 ⁽²⁾ was warranted. Although the Judge noted Applicant's criminal conduct was not recent and fell under Criminal Conduct Mitigating Condition 1, ⁽³⁾ the Judge concluded that mitigating condition should not be considered in isolation from the record evidence as a whole. The Judge further concluded the state certificate of relief from disabilities issued in October 2004 was not binding on her in making a security clearance decision. The Judge decided that Applicant's failure to make payments toward the court-ordered restitution reflected adversely on him because: (a) Applicant was on notice that Chapter 7 bankruptcy discharges do not generally cover court-ordered restitution; (b) Applicant has sought to blame the state probation department for not negotiating payment terms despite the fact that the sentencing conditions do not require the probation department to conduct such a negotiation; and (c) Applicant has not sought a legal ruling as to the dischargeability of the restitution ordered by the state court. The Judge further concluded that Applicant has failed to show any remorse for the conduct that resulted in his 1996 conviction, but rather seeks to attribute his conviction to overly stringent state securities laws, an overzealous prosecutor, an appeals court that got the evidence wrong, and inadequate legal representation on appeal. The Judge finally concluded that Applicant is not fully rehabilitated from his very serious violations of the fiduciary relationship he had with his investment clients.

1. Whether Applicant is prejudiced in pursuing his appeal because transcripts of his 1996 trial are not in evidence. Applicant asserts that he is prejudiced in pursuing his appeal because transcripts of his 1996 trial are not in evidence. This claim of procedural prejudice is not well founded. At the hearing, the Administrative Judge informed Applicant that although the facts and circumstances of Applicant's conduct were relevant to an adjudication of his security eligibility, he could not challenge the validity of his criminal conviction. The Judge's ruling was a correct statement of the applicable law. Applicant is collaterally estopped from challenging the validity of his felony conviction in these proceedings. ⁽⁴⁾ Not only was Applicant collaterally estopped from challenging the validity of his felony conviction at the hearing below, he is collaterally estopped from challenging its validity on appeal. Applicant argues that the transcripts of his 1996 trial would support his hearing testimony -- given in response to a question posed to him -- that he did not engage in certain kinds of conduct that constituted overt wrongdoing on his part. For all practical purposes, Applicant's appeal arguments on this point seek to collaterally attack the validity of his felony conviction. Since Applicant is not legally entitled to challenge the validity of his felony conviction, his reliance on the transcripts of his 1996 trial is misplaced. ⁽⁵⁾

2. Whether Applicant was denied a fair and impartial hearing because his case was adjudicated based, in part, on matters not alleged in the SOR. Applicant contends he was denied a fair and impartial hearing because his case was not adjudicated solely on the matters that were alleged in the SOR, but matters that went beyond the SOR allegations. In support of this claim of error, Applicant argues: (a) the SOR did not allege Criminal Conduct Disqualifying Condition 1 or Criminal Conduct Disqualifying Condition 6, and Department Counsel did not cite either disqualifying condition in his opening statement; (b) there was a pre-trial understanding with Department Counsel that Applicant based his decision on what documents to enter into evidence, and Department Counsel did not inform him before the hearing that Department Counsel would ask him questions about the facts and circumstances surrounding his conduct that went beyond the single 1996 felony conviction; (c) the Administrative Judge erred by overruling Applicant's objection to Department Counsel's cross-examination; (d) Department Counsel's closing statement offered a new theory of the case that was different from the theory of the case presented in Department Counsel's opening statement; and (e) the Judge jumped to unwarranted conclusions about matters not alleged in the SOR. For the reasons that follow, the Board concludes these contentions fail to demonstrate the Judge erred.

Applicant is entitled to receive an SOR that places him on reasonable notice of the allegations being made against him. However, an SOR is an administrative pleading that is not required to satisfy the strict requirements of a criminal indictment, and it does not have to allege every possible fact that may be relevant to a case.⁽⁶⁾ Nor does an SOR have to indicate what arguments Department Counsel might make at the hearing. Considering the record as a whole, the Board concludes that the SOR issued to Applicant placed him on adequate notice of the allegations being made against him. Furthermore, a review of the hearing transcript does not leave the Board with the impression that the SOR prejudiced in any identifiable way Applicant's ability to prepare for the hearing, his ability to participate in the hearing, his ability to raise objections or make arguments on his behalf, or his ability to present evidence for the Judge to consider in his case.

An Administrative Judge must apply pertinent provisions of the Adjudicative Guidelines.⁽⁷⁾ The Judge's obligation to apply pertinent Adjudicative Guidelines disqualifying or mitigating conditions does not turn on whether they are alleged in the SOR or cited by either party at the hearing, but rather whether the record evidence as a whole warrants their application. Accordingly, the Judge did not err by considering whether to apply Criminal Conduct Disqualifying Condition 1 and Criminal Conduct Disqualifying Condition 6 in this case.

Whether Applicant and Department Counsel reached an understanding before the hearing about the scope of the hearing is a matter that the Board will not speculate about. Absent the submission of any documents or on-the-record statements about any purported understanding between Applicant and Department Counsel for the Administrative Judge to consider at the hearing, Applicant's assertion about such a pre-hearing understanding is a proffer of new evidence, which the Board cannot consider on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29.

Even making allowances for Applicant's *pro se* status, the Board does not read the hearing transcript as containing any statement by Applicant that would reasonably place the Administrative Judge on notice that Applicant was objecting to Department Counsel's cross-examination of him. Absent such an objection by Applicant, the Judge cannot be faulted for allowing Department Counsel to cross-examine Applicant.

An appeal is not intended to review the opening and closing arguments by either party. Moreover, the Board does not have supervisory jurisdiction over Department Counsel. The Board need not decide whether Department Counsel's opening and closing arguments were consistent or not because Applicant has not articulated any cogent reason or argument for how the Administrative Judge committed factual or legal error based on Department Counsel's opening and closing arguments.

Finally, Applicant's claim that the Administrative Judge jumped to unwarranted conclusions about matters not alleged in the SOR is predicated on his erroneous theory that an SOR must allege every fact that might be relevant to a Judge's decision.

3. Whether the Administrative Judge failed to base her findings and conclusions on record evidence. Applicant also asserts: (a) the Administrative Judge relied on Department Counsel's unsupported allegations and *ad hominem* characterizations of Applicant in making her findings of fact; (b) the Judge ignored the mitigating evidence presented by Applicant; (c) the Judge mischaracterized the record evidence; (d) the Judge erred by not accepting Applicant's testimony about the sequence of events; (e) the Judge ignored evidence favorable to Applicant; and (f) the Judge's decision is indifferent to the evidence and gives more weight to Department Counsel's arguments than to the record evidence. The Board construes these assertions as raising the issue of whether the Judge failed to base her findings and conclusions on record evidence.

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise.⁽⁸⁾ That presumption is not rebutted merely because a party disagrees with the Judge's weighing of the record evidence or some of the Judge's findings of fact. Neither Applicant's strong disagreements with the Judge's findings of fact nor his disappointment that the Judge did not find some of his evidence to be persuasive or entitled to as much weight as he thought it deserved are sufficient to rebut the presumption that the Judge considered the record evidence and based her findings of fact on a good faith evaluation of the record evidence as a whole.

There is no rule of law that compels an Administrative Judge to be bound by the testimony of an applicant or any other witness. A Judge has the authority and obligation to assess the credibility of all witnesses who testify before the Judge,

and to consider such testimony in light of the record evidence as a whole. Accordingly, the Judge was not required, as a matter of law, to accept Applicant's testimony as binding on her.

4. Whether certain findings of fact made by the Administrative Judge are not supported by the record evidence.

Applicant challenges certain factual findings made by the Administrative Judge. Specifically, Applicant contends: (a) the Judge erred by finding he is not addressing his obligation to make court-ordered restitution; (b) the Judge erred by finding he is unrepentant and not rehabilitated; and (c) the Judge erred by finding he is not in compliance with the terms of his conditional discharge. ⁽⁹⁾

There is sufficient record evidence in this case to permit the Administrative Judge to find that Applicant is not addressing his obligation to make court-ordered restitution. That challenged finding reflects a reasonable interpretation of the record evidence as a whole. There is no dispute that Applicant has not made any payments toward his court-ordered restitution. The Judge was not compelled, as a matter of law, to accept Applicant's interpretation of the facts and circumstances pertaining to his unpaid court-ordered restitution, or his explanation as to why he was not making payments toward that court-ordered restitution.

Similarly, there is sufficient record evidence in this case to permit the Administrative Judge to find that Applicant is unrepentant and not rehabilitated. Applicant's strong disagreement with that finding is not sufficient to demonstrate it is erroneous. Applicant's statements about his intent and state of mind, as well as his explanations for his actions, were relevant evidence that the Judge had to consider, but they were not binding on the Judge.

During the proceedings below and on appeal, Applicant has denied that he is not in compliance with the terms of his conditional discharge. The absence of any adjudication of that issue by a state court or state agency of competent jurisdiction did not preclude the Administrative Judge from considering the record evidence in this case and making a finding about the matter for purposes of evaluating Applicant's security eligibility. Similarly, Applicant's right to seek advice of counsel in connection with deciding how he wants to deal with the conditional discharge *vis-a-vis* a state court or the state probation department did not preclude the Judge from considering the record evidence about the facts and circumstances of the conditional discharge and reaching reasonable conclusions about the matter for purposes of evaluating Applicant's security eligibility in these proceedings. Considering the record as a whole, there is sufficient record evidence to permit the Judge to find that Applicant is not in compliance with the terms of his conditional discharge, and to conclude that Applicant's failure to comply with the terms of his conditional discharge reflects adversely on his security eligibility.

5. Whether the Administrative Judge misapplied certain provisions of the Adjudicative Guidelines. Applicant also challenges the Administrative Judge's application of provisions of the Adjudicative Guidelines, arguing: (a) given the substance of SOR paragraph 1.a, the Judge erred by applying Criminal Conduct Disqualifying Conditions 1 and 2; (b) the Judge referred to Personal Conduct Disqualifying Condition 6 in "prejudicial and ominous language" ⁽¹⁰⁾; (c) the Judge failed to explain how she concluded Criminal Conduct Disqualifying Condition 1 applies based on his single conviction of a Class E felony; (d) the Judge did not explain how she concluded Criminal Conduct Disqualifying Condition 2 applies; and (e) the Judge should have concluded his criminal conduct was mitigated under Criminal Conduct Mitigating Conditions 1, 2, and 6, and Adjudicative Guidelines, Items E2.2.1.4 and E2.2.1.9. ⁽¹¹⁾

Applicant's felony conviction provided the Administrative Judge with a rational basis for applying Criminal Conduct Disqualifying Conditions 1 ⁽¹²⁾ and 2. ⁽¹³⁾ Applicant's arguments to the contrary lack merit.

Applicant's challenge to the Administrative Judge's reference to Personal Conduct Disqualifying Condition 6 ⁽¹⁴⁾ is not persuasive. The Board does not review individual sentences of a Judge's decision in isolation. ⁽¹⁵⁾ Furthermore, Applicant's assertion that the Judge's reference to that disqualifying condition uses "prejudicial and ominous language" fails to raise a claim of error with sufficient specificity to allow the Board address it in any meaningful manner.

The Administrative Judge noted that Applicant's criminal conduct was not recent (Criminal Conduct Mitigating Condition 1), but gave a reasonable explanation why she concluded that the passage of time was not sufficiently mitigating in this case. It was not arbitrary or capricious for the Judge to not apply Criminal Conduct Mitigating

Condition 2, ⁽¹⁶⁾ given her finding that Applicant's criminal conduct was systematic and ongoing over a period of about four years. Given the Judge's findings and conclusions about Applicant's lack of rehabilitation (which reflect a reasonable interpretation of the record evidence as a whole), it was not arbitrary or capricious for the Judge to not apply Criminal Conduct Mitigating Condition 6 ⁽¹⁷⁾ and Adjudicative Guidelines, Item E2.2.1.9. ⁽¹⁸⁾

Applicant's argument concerning Adjudicative Guidelines, Item E2.2.1.4 ⁽¹⁹⁾ does not demonstrate the Administrative Judge erred. Given the record evidence in this case, the Judge was not compelled to conclude, as a matter of law, that Applicant's criminal conduct was extenuated or mitigated by his age (mid-twenties) and maturity at the time.

6. Whether the Administrative Judge erred by concluding the facts and circumstances of Applicant's filing of a Chapter 7 bankruptcy petition in November 2001 demonstrated poor judgment, unreliability, and untrustworthiness under Guideline E (Personal Conduct). Applicant challenges the Administrative Judge's conclusion that the facts and circumstances of his filing of a Chapter 7 bankruptcy petition in November 2001 demonstrated poor judgment, unreliability, and untrustworthiness under Guideline E (Personal Conduct). In support of this challenge, Applicant asserts that his filing with the bankruptcy court was a legitimate filing and that such a legitimate filing cannot be deemed to show questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty or unwillingness to comply with rules and regulations.

Given the record evidence in this case, the Administrative Judge properly noted that Applicant included the court-ordered restitution in his bankruptcy petition on the advice of his lawyer. Furthermore, a review of the bankruptcy petition Applicant filed (Government Exhibit 7) does not indicate or suggest any basis for Applicant to believe that exclusion of the court-ordered restitution from the petition was required or even legally permissible. To the contrary, Government Exhibit 7 contains language that indicates the person filing for bankruptcy should list penalties owed to a state or local government. Standing alone, Applicant's listing of the court-ordered restitution in his bankruptcy petition does not provide a sufficient basis for any adverse finding or conclusion as to his judgment, reliability, or trustworthiness under Guideline E (Personal Conduct). Whether or not Applicant's court-ordered restitution was dischargeable under federal bankruptcy law is factually and legally independent of whether he had a good-faith basis, or legal obligation, to list it in his bankruptcy petition.

The Administrative Judge's findings and conclusion under Guideline E (Personal Conduct) go significantly beyond the language of SOR paragraph 2.a. The Board need not decide whether the variance between the Judge's findings and conclusions under Guidelines E and the language of SOR paragraph 2.a is fatal. ⁽²⁰⁾ Even if the Board were to conclude -- solely for purposes of deciding this appeal -- that the variance reflects legal error by the Judge, such a conclusion would not warrant reversal or remand. The Judge's findings and conclusions about Applicant's unpaid court-ordered restitution provide rational support for her unfavorable conclusions under Guideline J (Criminal Conduct). The legality of Applicant's listing of the court-ordered restitution in his bankruptcy petition did not preclude the Judge from considering the record evidence (unrelated to the filing of the bankruptcy petition) of Applicant's unpaid court-ordered restitution when assessing his criminal conduct under Guideline J and deciding whether or not Applicant had presented evidence sufficient to warrant a finding of reform and rehabilitation.

7. Whether the Board should withhold final adjudication as to Guideline E (Personal Conduct) to allow Applicant to seek a clear resolution of whether he is required to make court-ordered restitution. Finally, Applicant argues that if his nonpayment of court-ordered restitution is of concern to the Department of Defense, he should be allowed the opportunity to obtain a clear resolution of whether he is required to make court-ordered restitution before a final adjudication of his case under Guideline E (Personal Conduct) is made. The Board construes this argument as raising the issue of whether the Board should withhold final adjudication as to Guideline E to allow Applicant the opportunity to seek in another forum a clear resolution of whether he is required to make court-ordered restitution.

Given the Board's resolution of the sixth appeal issue, this appeal issue is moot. Moreover, Applicant is not entitled to any delayed or deferred adjudication of his security eligibility. ⁽²¹⁾ Finally, the authority of the Department of Defense to make a security clearance decision in Applicant's case based on relevant, available information is not conditioned or dependent on the actions or inactions of Applicant *vis-a-vis* resolving or otherwise pursuing his dispute with the state probation department.

Conclusion

The Board affirms the Administrative Judge's decision because Applicant has not demonstrated error below that warrants remand or reversal.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. "Allegations or admission of criminal conduct, regardless of whether the person was formally charged" (Directive, Adjudicative Guidelines, Item E2.A10.1.2.1).
2. "A single serious crime or multiple lesser offenses" (Directive, Adjudicative Guidelines, Item E2.A10.1.2.2).
3. "The criminal behavior was not recent" (Directive, Adjudicative Guidelines, Item E2.A10.1.3.1).
4. *See, e.g.*, ISCR Case No. 99-0116 (May 1, 2000) at p. 2 (citing federal cases and prior Board decisions).
5. Applicant's reliance on his understanding of the opinion of the state trial judge as to his personal culpability is an attempt to collaterally attack the validity of his 1996 conviction.
6. *See, e.g.*, ISCR Case No. 00-0633 (October 24, 2003) at p. 4; ISCR Case No. 99-0710 (March 19, 2001) at pp. 2-3.
7. *See* Directive, Section 6.3 and Additional Procedural Guidance, Item E3.1.25.
8. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2.
9. Applicant also seeks to revise his hearing testimony and offers several paragraphs of factual assertions in support of his "revised testimony." Applicant's attempt to revise his hearing testimony constitutes a proffer of new evidence, which the Board cannot consider. *See* Directive, Additional Procedural Guidance, Item E3.1.29.
10. Applicant's brief lists the citation for Personal Conduct Disqualifying Condition 5 (Directive, Adjudicative Guidelines, Item E2.A5.1.5), which was not cited in the decision below. A comparison of Applicant's argument with the text of the decision below leads the Board to construe Applicant's argument as referring to Personal Conduct Disqualifying Condition 6 (Directive, Adjudicative Guidelines, Item E2.A5.1.6), which was cited in the decision below.

11. Applicant also asks the Board to not give weight to Department Counsel's concerns about Criminal Conduct Disqualifying Condition 5. The Board reviews an Administrative Judge's decision, not arguments made by Department Counsel at the hearing.
12. "Allegations or admissions of criminal conduct, regardless of whether the person was formally charged" (Directive, Adjudicative Guidelines, Item E2.A10.1.2.1).
13. "A single serious crime or multiple lesser offenses" (Directive, Adjudicative Guidelines, Item E2.A10.1.2.2).
14. "Association with persons involved in criminal activity" (Directive, Adjudicative Guidelines, Item E2.A5.1.2.6).
15. *See, e.g.*, ISCR Case No. 03-05645 (September 15, 2004) at p. 5.
16. "The crime was an isolated incident" (Directive, Adjudicative Guidelines, Item E2.A10.1.3.2).
17. "There is clear evidence of successful rehabilitation" (Directive, Adjudicative Guidelines, Item E2.A10.1.3.6).
18. "The likelihood of continuation or recurrence" (Directive, Adjudicative Guidelines, Item E2.2.1.9).
19. "The individual's age and maturity at the time of the conduct."
20. *See, e.g.*, ISCR Case No. 00-0633 (October 24, 2003) at p. 4 (noting that there is no simple formula for deciding when a variance between SOR allegations and the stated basis for an Administrative Judge's decision is harmful or when it is not harmful, and indicating some of the considerations that go into a making such a decision).
21. *See, e.g.*, ISCR Case No. 94-1220 (December 29, 1995) at p. 3.