

DATE: June 5, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-23362

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) declined to grant Applicant a security clearance. On June 10, 2004, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline J (Criminal Conduct) and Guideline G (Alcohol Consumption), of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended)(Directive). Applicant requested a hearing. On January 5, 2006, after the hearing, Administrative Judge Barry M. Sax denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Administrative Judge's adverse clearance decision under Guidelines G and J is arbitrary, capricious or contrary to law.

Applicant argues that the Administrative Judge's adverse clearance decision should be reversed because the Judge made errors with respect to his findings. Applicant also argues that the Judge should have concluded that the security concerns raised under Guidelines G and J had been mitigated, as a matter of law, because Applicant's last criminal incident occurred in 2001, his conduct does not indicate a pattern, he has demonstrated he is now rehabilitated, and he has held a clearance for many years without a problem. The Board does not find Applicant's arguments persuasive.

The findings which Applicant challenges are either permissible characterizations by the Administrative Judge or harmless error, in that they would not be reasonably likely to change the outcome of the case. Applicant has not met his burden of demonstrating that the Administrative Judge's material findings with respect Applicant's conduct of security concern do not reflect a reasonable or plausible interpretation of the record evidence. The Board does not review a case *de novo*. Considering the record evidence as a whole, the Judge's material findings of security concern are sustainable.

The application of disqualifying and mitigating conditions does not turn simply on a finding that one or more of them applies to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 01-14740 at 7 (App. Bd. Jan.15, 2003). Thus, the presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. An applicant's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or

reached conclusions in a manner that is arbitrary, capricious, or contrary to law.

In this case, the Administrative Judge made sustainable findings as to a lengthy and serious history of criminal conduct and excessive alcohol consumption. That history involved seven alcohol-related criminal incidents between 1970 and 2001. The Judge weighed the mitigating evidence offered by Applicant against the length and seriousness of the disqualifying conduct and considered the possible application of relevant mitigating conditions. The Judge articulated a rational basis for not favorably applying any mitigating conditions in this case, and reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome the government's security concerns. Given the record that was before him, the Judge's ultimate unfavorable clearance decision under Guidelines G and J is not arbitrary, capricious or contrary to law.

Order

The decision of the Administrative Judge denying Applicant a clearance is AFFIRMED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman (Acting), Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board