DATE: October 27, 2006

In Re:

SSN:----------

Applicant for Security Clearance

ISCR Case No. 02-30369

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Esq., Deputy Chief Department Counsel

FOR APPLICANT

August Bequai, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On February 2, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision-security concerns raised under Guidelines C (Foreign Preference), B (Foreign Influence), E (Personal Conduct) and J (Criminal Conduct) pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 27, 2006, after the hearing, Administrative Judge Joan Caton Anthony denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant contends that the Administrative Judge erred as follows: (a) some of the Judge's findings of fact were insufficient or erroneous; (b) the Judge erroneously admitted or took administrative notice of some documents; and (c) the Judge's conclusions about mitigation and the "whole person" concept were arbitrary, capricious or contrary to law. After careful consideration of the issues, the Board affirms the Administrative Judge's decision.

Whether the Record Supports the Administrative Judge's Factual Findings

The Appeal Board's review of the Administrative Judge's finding of facts is limited to determining if they are supported by substantial evidence--such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record." Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence . . ." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620-21 (1966). The Board accepts a Judge's findings of fact that are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the same record, and we are required to give deference to the Administrative Judge's credibility determinations. Directive ¶ E3.1.32.1.

Applicant contends that the Administrative Judge erred by not making the following favorable findings of fact for Applicant with respect to Guidelines B and C: (1) that Applicant did not have any financial interests or business ties in the Palestinian West Bank; (2) that Applicant properly reported his foreign travels and business dealings; (3) that U.S. government agencies were fully aware of Applicant's classified work performed overseas; (4) that Applicant never participated in foreign elections or politics; and (5) that Applicant had no contact with foreign groups or agents. There is

a rebuttable presumption that the Administrative Judge considered all evidence in the record unless the Judge specifically states otherwise. *See* ISCR Case No. 99-9020 at 2 (App. Bd. June 4, 2001). The Board is not aware of record evidence indicating that any conduct with adverse security significance in these areas is in issue, and the Judge's decision indicates, for example, that "the evidence does not establish that Applicant's parents, sister, or parents-in-law are agents of a foreign power." Decision at 10. While the absence of adverse conduct in the areas specified by Applicant may be relevant to mitigation issues discussed later, that does not mean that the Judge's findings of fact are insufficient. The Board finds no error in the sufficiency of the Judge's findings concerning these five allegations.

In regard to Guideline E, Applicant challenges the Administrative Judge's finding that Applicant failed to disclose to a Department of Defense investigator that he was "detained and charged with sexual battery" in 1994. Applicant contends that he was not "detained." The record evidence indicates that Applicant received a letter directing him to report to a police station. After he reported, Applicant was advised of his rights, charged, fingerprinted, photographed, advised of his court date, and then released. Even though Applicant was not handcuffed or jailed, the Judge's characterization of Applicant's time at the police station after being advised of his rights as being "detained" is a plausible interpretation of the record evidence under the review standard stated above because Applicant was not free to leave.

Applicant challenges the Administrative Judge's finding that he "deliberately omitted material facts by failing to disclose [to Department of Defense investigators in June 2002 and April 2004] that he had received a non-judicial punishment [NJP] in January 1999."[(1)] Decision at 12. On appeal, Applicant claims that he "had not been asked about any administrative sanctions previously by DSS, and when he was asked, he was completely candid." At his hearing, Applicant admitted to falsifying his security clearance application (SF 86) that he signed in July 2001 by not revealing the NJP but insisted that he was not trying to fool the investigators and was not specifically asked in 2002 whether he left off anything from the SF 86. Hearing Transcript at 92-95. The Judge has to consider an applicant's testimony that he did not intend to lie to the investigators, but the Judge is not bound by such testimony and has to consider Applicant's state of mind testimony in light of the record evidence as a whole and Applicant's demeanor. *See* ISCR Case No. 02-22556 at 5 (App. Bd. June 7, 2004). Other record evidence included Applicant's responses to the SOR in which Applicant admitted to deliberately omitting material facts about his NJP in the interviews. Also, in a second written statement on April 19, 2004,[(2)] Applicant wrote that he "purposely" falsified Question 25 of his SF 86 of July 2001 by not mentioning the NJP that he received as an Air Force member in 1999 for falsely signing an official record in 1998 with intent to deceive. The 1998 falsification involved his deliberate omission of the 1994 sexual battery charge in a security clearance questionnaire. In his second April 19, 2004, statement Applicant also admitted that he provided false information regarding the NJP to an investigator in 2002 and to the same investigator earlier in the day on April 19, 2004.[(3)] Applicant revealed that he falsified the SF 86 and concealed the information about the NJP from the investigators because he was so ashamed of his conduct that he never told his father, a retired Army noncommissioned officer. The Judge's finding that Applicant lied to investigators in 2002 and 2004 is sustainable as a credibility determination that is consistent with a reasonable and plausible interpretation of the record evidence as a whole. *See* ISCR Case No. 03-20002 at 4 (App. Bd. June 23, 2006). Accordingly, the Board must give deference to it. Directive ¶ E3.1.32.1.

Under Guideline J, Applicant contends that his NJP did not involve criminal activity; instead it involved an administrative infraction. Applicant incorrectly characterizes the disposition of a criminal offense. The record reflects that Applicant's commander determined in the NJP proceeding that Applicant signed a false official record, a background questionnaire involving the 1994 sexual battery charge. This questionnaire falsely indicated that Applicant had not been arrested, detained, or charged. Applicant's false official statement was in violation of Article 107 of the UCMJ, 10 U.S.C. § 907, which is a federal criminal statute. Applicant subsequently made a false statement about his 1994 criminal trial to the Office of the Staff Judge Advocate, and the commander who imposed the NJP vacated the suspended punishment. Applicant should have been aware of these distinctions because he was a paralegal while on active duty.

The next issue raised by Applicant is whether the Administrative Judge properly took administrative notice or correctly admitted some documents. On appeal, Applicant contends that the Administrative Judge's decision to take administrative notice of four documents is erroneous. Appeal Brief at 18. A Judge may take administrative notice of official State Department documents and similar official federal publications. *See* ISCR Case No. 02-24875 at 2 (App.

Bd. Oct. 12, 2006). The four documents, labeled by Roman numerals, are: II, "Overview of the Middle East and North Africa" released by the Department of State, Office of the Coordinator for Counterterrorism (Apr. 27, 2005); III, Country Reports on Human Rights Practices - 2004 for Israel and the occupied territories, released by the Department of State, Bureau of Democracy, Human Rights and Labor (February 28, 2005); VII, a Congressional Research Service Issue Brief for Congress entitled "Palestinians and the Middle East Peace: Issues for the United States" (March 16, 2005); and VIII, a Congressional Research Service report for Congress entitled "Palestinian Factions" (June 8, 2005). At the hearing Applicant generally objected to these documents as irrelevant and prejudicial. He objected to Document II asserting there was no testimony about Hamas or any evidence that Applicant was involved with it. Applicant objected to Document III because it is irrelevant in that it deals with industrial espionage among the Israelis. Applicant was not as specific about the nature of his objections concerning the other two documents. Hearing Transcript at 147-148. The Judge stated that she "would review and consider the documents" in writing her decision. Decision at 2. The Judge cited the President's remarks in Document VIII at 6: "the fight against terrorists is critical to the search for peace and for Palestinian statehood." The Judge's decision also briefly discusses the West Bank, the Palestinian Authority and how their recent history and political circumstances increase the security concerns as they relate to Applicant's contacts in this turbulent area. Decision at 6-7.

Relevant and material evidence may be received subject to rebuttal, and while the Federal Rules of Evidence serve as a guide, with specific exceptions, the technical application of these rules is relaxed. Directive ¶ E3.1.19. There is no evidence suggesting that Applicant was involved with Hamas, but a review of all four documents indicates that they are relevant and material to the issue of whether Applicant's family members and Applicant would be vulnerable to coercion, exploitation, or pressure by a foreign government or non-state actors like terrorists operating in the West Bank. Directive ¶ E2.A2.1.2.6 and Decision at 10. Even under a strict application of the Federal Rules of Evidence, Applicant failed to explain how the probative value of the evidence "is substantially outweighed by the danger of unfair prejudice." *See* Fed. R. Evid. 403. As such, Applicant has not carried his burden of establishing that the Judge erred in her consideration of these four documents.

Applicant also objected to the introduction of Government Exhibits 6, 7 and 8 because none was authenticated and he wanted to cross-examine the officials who created them. Government Exhibit 6 is a *Record of Non-judicial Punishment Proceedings*, AF Form 3070 of January 1999. This document memorialized Applicant's written acceptance of NJP in lieu of a court-martial. Government Exhibit 7 is the *Record of Proceedings of Vacation of Suspended Nonjudicial Punishment*, AF Form 366 of May 1999, which executed the part of the NJP that the commanding officer imposing the NJP had suspended because Applicant made an additional false statement to a staff judge advocate regarding the 1994 incident after imposition of punishment. Both Government Exhibits 6 and 7 are signed by Applicant. Government Exhibit 8 is a Department of Justice, Immigration and Naturalization Service *Employment Eligibility Verification,* dated February 21, 2000, which also includes Applicant's signature, showing Applicant's status as a citizen. Official records (other than DoD personnel background reports of investigation) may be received and considered by the Administrative Judge without authenticating witnesses when such information is provided by an investigative agency pursuant to its responsibilities to safeguard classified information. Directive ¶ E3.1.20. Applicant offered no evidence indicating that these records did not meet the requirements of Directive ¶ E3.1.20.

Whether the Record Supports the Administrative Judge's Conclusions

Applicant contends that the Administrative Judge's decisions not to mitigate the falsifications, foreign influence and foreign preference are arbitrary, capricious or contrary to law. The burden is on Applicant to rebut, explain, extenuate or mitigate facts he admitted or that Department Counsel proved, and Applicant has the ultimate burden of persuasion in obtaining a favorable security clearance decision. Directive ¶ E3.1.15.

Concerning the falsifications, Applicant argues that the Judge was required to mitigate them because the electronic SF 86 did not allow him to describe the 1994 incident, which he considers isolated and not recent,[(4)] and Applicant subsequently corrected any erroneous information which he may have provided "unwittingly." The SOR is not concerned with the 1994 criminal charge itself. It is concerned with Applicant's failure to report the 1994 incident in a 1998 security clearance application, and Applicant's admitted (not unwitting) falsification of Question 25 of the July 2001 SF 86 when he did not disclose the NJP he accepted in 1999 for the 1998 falsification. It is likewise concerned with falsifications to investigators in 2002 and 2004. The Judge's conclusion that the 2001, 2002, and 2004 falsifications

were recent and not isolated is sustainable. Furthermore, the Judge was not required to mitigate these falsifications under Personal Conduct Mitigating Condition 3[(5)] because there is record evidence that Applicant did not reveal the NJP until the investigator confronted Applicant with it between his first and second statements on April 19, 2004.

Applicant challenges the basis for the Administrative Judge's conclusion that Applicant's admitted conduct raised security concerns under Foreign Preference Disqualifying Conditions 1 and 2.[(6)] The Judge found that Applicant, a U.S. citizen by birth and holder of an active U.S. passport, "actively sought a Palestine passport travel document to make his travel to and stay in the West Bank more convenient. In order to obtain the Palestinian document, he had to show he was of Palestinian heritage. Applicant's acquisition of the Palestine passport travel document permitted him to exercise the rights and privileges of foreign citizenship and indicated a preference for the Palestinian Authority over the U.S." Decision at 8. Applicant contends that the Judge's conclusion is arbitrary, capricious and contrary to law because the Palestinian Authority is not a nation-state and the travel document is not a passport. Applicant's appeal brief describes the Palestinian Authority Passport/Travel Document as equivalent to a "movie pass." Appeal Brief at 13. While Applicant is correct that the U.S. does not recognize the Palestinian Authority as a nation-state, his broader claim is not persuasive.[(7)] The Judge's findings and conclusions about the Palestinian Passport/ Travel Document are not arbitrary, capricious, or contrary to law.

Concerning Guideline B mitigation, Applicant contends that the Administrative Judge failed to consider his lack of foreign financial or business interests; his lack of involvement in any political overseas activities; an absence of any evidence that his overseas family members were agents or officials of any foreign government; a lack of evidence of any foreign pressure being exerted on him either by or through his family members in the West Bank; and overseas contacts that were, at best, infrequent.

Application of disqualifying and mitigating conditions does not turn simply on a finding that one or more applies to the particular facts of a case. Their application requires the exercise of sound judgment in light of the record evidence as a whole. *See* ISCR Case No. 04-08975 at 2 (App. Bd. Aug. 4, 2006). The existence 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, or *vice versa*. *See* ISCR Case No. 04-11381 at 2 (App. Bd. Aug. 23, 2006). The mere disagreement with the Judge's weighing of the evidence is not sufficient to demonstrate error without showing that it was arbitrary, capricious or contrary to law. *See* ISCR Case No. 03-22831 at 4 (App. Bd. Jan. 19, 2006). As explained earlier in this decision, the Judge specifically found no evidence indicating that Applicant's overseas family members and in-laws were agents of a foreign power. Decision at 10. Nevertheless, even assuming that none of Applicant's family members are agents of any foreign power, Applicant still had the burden of demonstrating that his family members in the West Bank were not in positions where they are likely to be exploited by a foreign power. *See* ISCR Case No. 03-22831 at 4 (App. Bd. Jan. 19, 2006) interpreting Foreign Influence Mitigating Condition 1.[(8)] As to mitigation, the burden of proof is on Applicant, not the government. In this case, the Judge reviewed applicable mitigating conditions and concluded that the security concerns posed by the presence of family members in the West Bank cannot be mitigated. The Judge specifically considered the security situation with regard to U.S. interests in the West Bank and the opportunity for pressure, coercion, etc. that results from that; the close relationship between Applicant and his family members and in-laws; the likelihood that Applicant would again travel to the area to attend to his family obligations; and Applicant's reliance on the Palestinian document to extend his stay beyond what would have been available under his American passport. The Judge's conclusion is sustainable.

Applicant points to other record evidence which he believes demonstrates his suitability for continuation of his security clearance. He claims that he has held a security clearance since 1994 with no problems. He described several statements he introduced into evidence from individuals in the private and government sectors which he says attest to his honesty, reliability, trustworthiness, and commitment to the safety and security of the United States. Applicant indicates that he has deep ties to American society, including prior U.S. military service and an honorable discharge, and is a highly qualified individual with a lengthy history of honorable service to the United States.

Even considering Applicant's whole person situation, the Administrative Judge was not required to conclude that it is clearly consistent with national security to continue Applicant's clearance. Directive ¶ E2.2. The Judge could reasonably

conclude that security concerns under Guidelines B and C preclude the granting of a clearance despite prior security clearances and work performance. *See* ISCR Case No. 00-0596 at 4 (App. Bd. Oct. 4, 2001). In this case, Applicant's conduct and circumstances under Guidelines B or C, by themselves, would have provided a sustainable basis for denying a security clearance. However, the Judge's decision ends with a discussion of the criminal significance of the falsifications. As the Judge points out, it is a felony to knowingly make a materially false, fictitious, or fraudulent statement in connection with official matters such as a security clearance investigation. *See* 18 U.S.C. §1001. The timing of the last three falsifications (2001, 2002 and 2004) indicates that Applicant's pattern is recent and not isolated. It is evident that the Judge is particularly concerned by Applicant's falsifications about his NJP, and the basis for her concern is reasonable. Falsification of a SF 86 or false statements to security investigators reflect adversely on Applicant's judgment, reliability and trustworthiness, independent of whether he could have obtained a favorable decision under one or more other Guidelines. *See* ISCR Case No. 02-20586 at 4 (App. Bd. Nov. 1, 2005); and ISCR Case No. 02-20349 at 4 (App. Bd. Jan. 12, 2004).

Order

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

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: Mark W. Harvey

Mark W. Harvey

Administrative Judge

Member, Appeal Board

1. Under Article 15 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 815, and subject to applicable regulations, a commanding officer may impose non-judicial punishment upon a member of his command to address minor offenses.

2. Government Exhibit 3.

3. The same investigator obtained two statements from Applicant on April 19, 2004. In the first statement, which was admitted as Government Exhibit 4, Applicant stated that he "personally read and reviewed" his SF 86 dated July 6, 2001and that with certain exceptions that are not pertinent to this issue, affirmed under oath that all other information was accurate and correct.

4. Personal Conduct Mitigating Condition 2: "The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily," Directive ¶ E2.A5.1.3.2; Criminal Conduct Mitigating Conditions 1and 2: "The criminal behavior was not recent," and "The crime was an isolated incident," Directive ¶ E2.A10.1.3.1 and ¶ E2.A10.1.3.2.

5. "The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts," Directive ¶ E2.A5.1.3.3. Personal Conduct Mitigating Condition 2 is inapplicable to an applicant seeking to correct a falsification, especially a more recent one in a current case. *See* ISCR Case No. 99-0557 at 4 (App. Bd. July 10, 2000) for an explanation of the differences between Personal Conduct Mitigating Condition 2 and Personal Conduct itigating Condition 3.

6. "The exercise of dual citizenship" and "Possession and/or use of a foreign passport," Directive ¶¶ E2.A3.1.2.1 and E2.A3.1.2.2.

7. Compare U.S. Citizenship and Immigration Services website at www.uscis.gov/graphics/services/asylum/ric/documentation/Palestine.htm; see also the Department of State's Reciprocity Schedule at travel.state.gov/visa/reciprocity/Country%20Folder/I/Israel_etc.htm

8. "A determination that the immediate family member(s), (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(s) in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States" (Directive ¶ E.2.A2.1.3.1).