DATE: December 11, 2006

In re:

SSN: ----

Applicant for Security Clearance

ISCR Case No. 03-00577

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Richard A. Stevens, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On October 25, 2004, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision-security concerns under Guideline G (Alcohol Consumption), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct), of Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive). Applicant requested a hearing. On May 19, 2006, after the hearing, Administrative Judge Mary E. Henry denied Applicant's request for a security clearance.[(1)] Applicant timely appealed[(2)] pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

The Administrative Judge made extensive findings of fact which need not be repeated in detail here. They will be cited as necessary in addressing material issues raised by Applicant on appeal. Applicant asserts two errors in the Judge's findings of fact. First, he states that both the SOR and the Judge's findings incorrectly state that he had to serve five days in jail in connection with his 2002 Driving Under the Influence (DUI) conviction in California. Applicant has misread the statements in question. He was sentenced to serve five days in jail, which was suspended for five years on probation with credit for one day actually served. Both the SOR and the findings of fact reflect that the sentence included five days of confinement, not that Applicant was required to actually serve that sentence. The Judge commented on this in connection with her determination that this court action reflected a criminal conviction of some type, although not further identified in the evidence as a felony or misdemeanor. Imposition of confinement distinguishes the action as criminal, as opposed to civil, in nature, so this aspect of the sentence was correctly cited and material to the determination of whether the Government evidence established criminal conduct under Guideline J. Applicant further asserts that the Judge mischaracterized his 1995 DUI incident in Puerto Rico, while on active duty as commanding officer of a Navy warship, as criminal behavior because he was allowed to remain in command after being awarded a punitive letter of reprimand at a non-judicial punishment (NJP) proceeding. Although the offense was handled through non-judicial proceedings, it is the underlying criminal offense,[(3)] not the nature of the disposition, which is material to the Guideline E and Guideline J security concerns. The Judge's two challenged findings of fact are supported by substantial evidence.

Applicant further asserts that the Judge's Guideline E finding against him under ¶ 2.e of the SOR is inconsistent with her findings in his favor under ¶¶ 2.c and 2.d. We review a Judge's conclusions to determine if they are arbitrary, capricious or contrary to law.[(4)] The Government, in its reply brief, concedes this claim that the conclusions were inconsistent.

Both parties' positions reflect a misunderstanding of the actual Guideline E findings and conclusions reached by the Judge. The SOR, in ¶¶ 2.c, 2.d, and 2.e, alleged that Applicant deliberately provided false information on three different matters during his January 27, 2000 interview with an authorized Department of Defense security investigator.[(5)] The Judge found for Applicant under ¶¶ 2.c and 2.d because she could not find sufficient evidence of deliberate falsification in the absence of any testimony from the investigator concerning the actual content of their discussion, and without any admission by Applicant that he had deliberately falsified information concerning the 1995 events during that particular interview. The Judge then specifically found, "[t]he government also established its case under Guideline E, allegations 2.e. and 2.f." She then discussed the allegation under ¶2.e, that Applicant violated airport security rules by entering the baggage handling area, in connection with ¶ 2.f alleging his September 1998 loss of security documents, in a San Francisco airport lounge while awaiting an overseas flight, in violation of security regulations. She accordingly found, "PC DC E2.A5.1.2.5. (*A pattern of dishonesty or rules violations . . .*) applies." Decision at 10.

Some confusion concerning the Administrative Judge's findings and conclusions is evident from the respective positions of the parties in their appeal briefs. SOR ¶ 2.e reads:

e. During a January 27, 2000 interview with an authorized investigator for the Department of Defense, you falsified material facts in that you stated you had not been arrested for any felony or misdemeanor offenses; whereas in truth you deliberately failed to disclose your arrest, as set forth below:

(1) You were arrested on December 18, 1999, in Norfolk, Virginia, and charged with (1) Assault Police Officer, a felony, (2) Escape with Force, a felony, and (3) Enter a Restricted Area. You were found guilty of the reduced charge of Assault, a misdemeanor, for Count (1) and were sentenced to 12 months in jail, suspended, you were required to serve four weekends in jail, and pay court costs of $146.00. You were found guilty of the reduced charge of Escape Without Force, a misdemeanor, for Count (2) and were sentenced to 12 months in jail, suspended, and pay court costs of $22.00. You were found guilty of Count (3) and were sentenced to six months in jail, suspended, and pay court costs of $2.00.

This paragraph thus alleges both the falsification and, for the first time in the SOR, the underlying criminal conduct which was later incorporated in the Guideline J (Criminal Conduct) allegations by reference back to this statement. In his response to the SOR, Applicant wrote, "I deny (I am not aware of this)," next to the first part of the paragraph, and "I admit (misdemeanor, see discussion)," next to subparagraph e.(1).

As noted above, the Administrative Judge considered the admitted December 1999 violation of airport security rules together with his September 1998 violation of security regulations by losing "security documents"[(6)] in an airport VIP lounge, finding that, "a pattern of dishonesty or rules violations . . ." applied. She found for Applicant, based on mitigating circumstances, with respect to the Guideline J (Criminal Conduct) concerns arising out of the same incident. Her finding that the cited Guideline E disqualifying condition applies based on the pattern of rules violations, even though criminal aspects of the incident were mitigated, is sustainable.

A plain reading of the Judge's decision also indicates that she found Applicant deliberately failed to disclose his December 1999 felony arrest during the January 2000 interview, as alleged in the first part of ¶ 2.e. The record supports her conclusion in this regard, and it is not inconsistent with her findings that the government offered insufficient proof of deliberate falsification concerning the two other questions involving Applicant's 1995 DUI and the resulting non-judicial punishment alleged under ¶¶ 2.c and 2.d. The investigator was not called to testify concerning the specific questions and answers at the January 27, 2000 interview. However, Applicant's very different explanations at the hearing concerning his non-disclosure of the 1995 and 1999 events, as contained in his March 16, 2000 sworn statement, provide sufficient basis for the Judge's different conclusions.

Concerning his failure(s) to disclose the 1995 DUI and NJP in his August 13, 1999 security clearance application and January 27, 2000 (as well as February 1 and 2, 2000)[(7)] DSS agent interview(s), Applicant said:

As mentioned, this was an isolated incident. My Commodore recommended I not discuss this with anyone, he was trying to protect my reputation and I still remained [sic] my 1 of 4 ranking as a CO for the entire time of my tour as a CO. This was a very embarrassing point in my career. When questioned about it I felt it was covered by a previous investigation. There was no intent to hide anything with regard to this incident, I feel it is in the very distant past and

that it was an isolated incident, one that I have tried to put behind me and move on.

Government Exhibit 3 at 3. His explanation in that same sworn statement for not disclosing the December 1999 arrest and January 2000 conviction during the DSS agent interview(s) was:

Concerning the arrests in Dec 99 and my conviction in Jan 2000, I omitted this information because first, I felt that I was unjustly charged and although the punishment was lenient I should not have pleaded guilty. I pleaded guilty at the recommendation of my wife to just put the whole incident behind, rather than drag it out. I felt that this incident could hurt my future employment and wanted to keep it from the investigation.

Government Exhibit 3 at 5-6. This clearly establishes that he knew his month-old arrest and two-day old conviction on these charges was something he was being asked to disclose during the interview but chose not to because of it's security clearance and employment ramifications. Additional testimony from the investigating agent, or other evidence, was not necessary to show deliberate falsification concerning these virtually contemporaneous events. Accordingly, the Judge's conclusion that the evidence showed deliberate falsification concerning these matters is not inconsistent with her finding that the government had not sufficiently proven Applicant's intent to deceive the agent during the interview concerning the earlier events. Furthermore, that conclusion is neither arbitrary and capricious nor otherwise contrary to law.

Next Applicant asserts the Judge erred by failing to apply Personal Conduct Mitigating Conditions 2 and 3[(8)] to mitigate her findings that Applicant deliberately and falsely denied his 1995 DUI and NJP in responding to pertinent questions on his 1999 Security Clearance Application. In support of this assertion Applicant states that he voluntarily corrected this "mistake" during his January 2000 security interview, and on his May 2002 Security Clearance Application. As noted above, Applicant admitted in a sworn March 2000 statement that he had not voluntarily disclosed this information during any of the three earlier security interviews during January and February of that year, only admitting it in March when confronted again by the investigating agent. Mitigating Condition 2 is not applicable to the facts of this case since it requires the falsification to have been an isolated incident, not recent, and that the correct information be voluntarily provided.[(9)] itigating condition 3 requires a good-faith effort to correct the falsification before being confronted. Referring to Applicant's sworn admissions in March 2000, previously quoted, the Board sustains the Judge's determination that Mitigating Condition 3 was not applicable to Applicant's conduct.

Finally, Applicant asserts that the Judge erred by failing to consider live testimony and letters submitted by active duty and retired Naval officers concerning his record of service and their opinions of his character and security clearance worthiness. A review of the record and decision show that the Judge considered all of this evidence, and apparently gave it considerable weight. She not only discussed the quality and importance of many aspects of his naval service, but found sufficient evidence to mitigate security concerns arising from multiple DUI offenses under both Guidelines G and J, and from the 1999 Norfolk airport crimes under Guideline J, as incidents that were "not likely to recur." Other than the evidence provided by these character witnesses, there is very little if anything in the record to support such mitigation. Since the record clearly shows that none of these character witnesses knew about or condoned falsifying a security clearance application, the Judge rationally found these concerns were not mitigated by this evidence under Guideline E, the related Guideline J allegation, or the whole person concept. Moreover, the opinion of a witness concerning an Applicant's clearance worthiness is not binding on the Judge, particularly when, as here, the witness was not informed of all the conduct and security concerns under consideration.

The Judge's findings of fact were 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. The Judge's conclusions were not arbitrary, capricious or contrary to law. Applicant has failed to demonstrate any harmful error.

Order

The decision of the Administrative Judge denying and revoking Applicant's clearance is AFFIRMED.

Signed: Jeffery D. Billet

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

Signed: David M. White

David M. White

Administrative Judge

Member, Appeal Board

1. Directive ¶ 3.2 provides: "An unfavorable clearance decision denies any application for a security clearance and revokes any existing security clearance, thereby preventing access to classified information at any level and the retention of any existing security clearance."

2. The Judge found for Applicant under Guideline G, on ¶¶ 2.c and 2.d under Guideline E, and on ¶¶ 3.a through 3.c under Guideline J. Those findings were not appealed by the Government.

3. In this case, a violation of Article 111 of the Uniform Code of Military Justice, concerning which he elected to neither appeal nor submit a statement for inclusion in his military records.

4. An Administrative Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Appeal Board may reverse or remand the Judge's decision to grant, deny or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. Our scope of review under this standard is narrow and we may not substitute our judgment for that of the Judge. We may not set aside a Judge's decision "that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency . . ." *Motor Vehicle Mfrs. Ass'n.*, 463 U.S. at 42.

5. ¶ 2.c involved denying any alcohol-related arrests despite the 1995 DUI incident; ¶ 2.d involved denying commission of any military offenses despite the resultant 1995 NJP; and ¶ 2.e involved denying arrest for any felony or misdemeanor offenses despite having been arrested the previous month for felony Assault of a Police Officer, felony Escape with Force, and entering a restricted area at the Norfolk airport, and despite having pled guilty to, and been sentenced on, related lesser offenses only two days before this interview.

6. While no Guideline K Security Violation allegations were brought by the Government in the SOR, the record reflects Applicant admitted to leaving two documents marked "Confidential" which he was carrying in connection with an exercise to be conducted overseas ,in an airport VIP lounge. The documents were returned to the Navy by airport personnel.

7. Government Exhibit 3, at 2.

8. Directive ¶ E2A5.1.3.2. "The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily;" Directive ¶ E2A5.1.3.3. "The individual made prompt, good-

faith efforts correct the falsification before being confronted by the facts."

9. Moreover, the Board has held that Personal Conduct Mitigating Condition 3, not Mitigating Condition 2, is the proper guideline to consider when a case involves disclosures by an Applicant that are corrections of an earlier falsification. *See* ISCR Case No. 97-0289 at 3 (App. Bd. Jan. 22, 1998).