

DATE: May 16, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-04549

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Richard A. Stevens, Esq., Department Counsel

#### **FOR APPLICANT**

Dale P. Kelberman, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 21, 2004, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline H (Drug Involvement) and Guideline E (Personal Conduct), of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended)(Directive). Applicant requested a hearing. On November 15, 2005, after the hearing, Administrative Judge Matthew E. Malone 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 erred by concluding that the security concerns raised under Guidelines H and E had not been mitigated.

Applicant argues that the Administrative Judge should have concluded that the security concerns raised under Guideline H had been mitigated, as a matter of law, because Applicant's drug use was isolated, aberrational and not recent, and Applicant has demonstrated that he would not use drugs in the future. In support of his argument, Applicant cites to several Hearing Office decisions in which applicants with ostensibly similar cases were granted clearances. Applicant also argues that the Judge should have concluded that the security concerns raised under Guideline E had been mitigated, as a matter of law, because Applicant's multiple falsifications were isolated incidents that were not recent, and they were due in part to inadequate advice by authorized personnel. Applicant also argues that he subsequently provided the correct information in a prompt, good-faith manner before being confronted with the facts. The Board does not find Applicant's arguments on appeal persuasive.

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 improper or illegal drug use by a 50 year old Applicant who was familiar with the security clearance process. That history included illegal marijuana use--sometimes on a weekly basis--from 1973 to September 2001. It also included the illegal purchase of marijuana and its use while holding a security clearance. Additionally, the Judge found Applicant had provided false, misleading, or incomplete information about his marijuana use on three different security clearance applications and that he had a security clearance denied by another government agency. 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 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 is not arbitrary, capricious or contrary to law.

Applicant's statements about his intent, his state of mind, and his beliefs when he executed his security clearance applications were relevant evidence, but they were not binding on the Administrative Judge. *See, e.g.*, ISCR Case No. 01-19278 at 6-7 (App. Bd. Apr. 22, 2003). As the trier of fact, the Judge had to consider Applicant's statements in light of the record evidence as a whole, and Applicant's denial of any intent to falsify a statement did not preclude the Judge from weighing the record evidence and making findings that contradicted Applicant's denials. The security concerns raised by Applicant's disqualifying conduct were not necessarily mitigated by Applicant's subsequent disclosures to the government. *See* ISCR Case No. 01-19513 at 5 (App. Bd. Jan. 22, 2004). The federal government need not wait until an applicant actually mishandles or fails to properly handle or safeguard classified information before it can deny or revoke access to such information. *See Adams v. Laird*, 420 F. 2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). Applicant's overall history of improper drug use and his falsification of multiple security clearance applications provide a sufficient rational basis for the Judge's unfavorable security clearance decision.

Lastly, the decision in another DOHA Hearing Office case does not demonstrate error by the Judge in this case. A decision by a Hearing Office Judge is not legally binding precedent on that Judge's colleagues in other cases, and the cited cases are not legally binding precedent on the Board. *See* ISCR Case No. 01-22606 at 3-5 (App. Bd. Jun. 30, 2003).

### 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 Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board