

DATE: May 5, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-08346

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Stephanie C. Hess, Esq., Department Counsel

#### **FOR APPLICANT**

Scott M. Badami, Esq., Anna C. Ursano, Esq

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On March 26, 2004, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive). Applicant requested a hearing. On October 21, 2005, after the hearing, Administrative Judge Leroy F. Foreman 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 issues on appeal: whether the Administrative Judge erred by failing to apply Guideline E Mitigating Condition 2 (MC2)<sup>(1)</sup>; whether the Administrative Judge failed to consider properly the passage of time; whether the Administrative Judge failed to give adequate weight to Applicant's previous maintenance of a security clearance; whether the Administrative Judge's conclusion that Applicant lacked candor is sustainable.

The Administrative Judge found:

Applicant served in the Marines from 1967 to 1971, at which point he joined the U.S. Army Reserve and subsequently served there ever since. Applicant is now an E-7. Applicant started a career as a corrections officer. In 1982, he was dismissed from a job as a county correctional officer for: fraternizing with an inmate, using the public address system to intimidate an inmate, illegally depositing funds in an inmate canteen fund and attempting to conceal the deposit by altering records. Applicant denied the allegations. Applicant originally offered a story regarding an anonymous visitor's contribution to the fund. However, in his answer to the SOR and at the hearing, Applicant admitted making the contribution out of compassion for an old friend. He denied altering the records.

In 1986, Applicant began work as a state correction officer. In 1990, he received two letters of counseling, one for bumping an inmate and one for a breach of security. (Letters of counseling were not regarded as disciplinary actions, rather they were considered training tools). In 1991, he was suspended for seven days for sleeping on duty. Applicant denied the charge in his answer to the SOR, but admitted it at the hearing. The supervisor who reported Applicant at the time now supports his application for a security clearance. In 1992, Applicant was suspended for three days for harsh treatment of an inmate. In 1993, he received a letter of counseling for unnecessary physical contact with an inmate. In 1994, Applicant was suspended for one day for sexual harassment. Ultimately, an Administrative Law Judge found

Applicant had committed breach of the peace rather than sexual harassment. Applicant was reprimanded in 1994 for using unnecessary force against an inmate and failing to report the incident. In 1996, Applicant was again reprimanded for use of unnecessary force against an inmate. In 1999, Applicant was reprimanded for using profanity or racial epithets, although an Administrative Judge later found him not guilty in that instance.

Applicant was promoted in April 2000. In September 2000, Applicant disciplined an inmate and then signed his supervisor's name to the notice of inmate violation without notifying the supervisor. Applicant's explanation for the event is inconsistent with the evidence. In October 2000, Applicant was demoted back to the grade he had held prior to April 2000. Applicant retired in May 2002 and received a citation for his high integrity and ability.

The Administrative Judge concluded that Applicant's history was covered under Guideline E, Disqualifying Conditions 1-(2), 4-(3), and 5-(4). The Judge also considered Applicant's lack of candor and failure to take responsibility for his conduct on the issues of rehabilitation and likelihood of recurrence (the Judge explicitly noted that it is improper to base an adverse decision on uncharged conduct but proper to consider it for matters such as rehabilitation and likelihood of future rule violations). On the other hand, the Judge applied Guideline E, Mitigating Condition 5-(5) and discussed various elements related to the whole person concept.(6)

By its plain language Guideline E, Mitigating Condition 2-(7) does not apply to the issues in Applicant's case. Applicant's other challenges to the Administrative Judge's decision are unpersuasive. The Judge's analysis follows reasonably from his unchallenged findings of fact.

Accordingly, Applicant has not met his burden of establishing error.

### 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

1. Directive ¶ E2.A5.1.3.2. "The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily."

2. Directive ¶ E2.A5.1.2.1. "Reliable, unfavorable information provided by associates, employers, coworkers, neighbors,

and other acquaintances."

3. Directive ¶E2.A5.1.2.4. "Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail."

4. Directive ¶E2.A5.1.2.5. "A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency."

5. Directive ¶E2.A5.1.3.5. "The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress."

6. Directive ¶E2.2.1.1. "The nature, extent, and seriousness of the conduct;" ¶E2.2.1.2. "The circumstances surrounding the conduct, to include knowledgeable participation;" ¶E2.2.1.3. "The frequency and recency of the conduct;" and ¶E2.2.1.4. "The individual's age and maturity at the time of the conduct."

7. Directive ¶E2.A5.1.3.2. "The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily."