

DATE: September 28, 2006

In Re:

SSN:-----

Applicant for Security Clearance

CR Case No. 03-10912

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT

Jeffrey L. Rhodes, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On December 22, 2003, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guidelines E (Personal Conduct) and D (Sexual Behavior), pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested the case be decided on the written record. On January 31, 2006, after considering the record, Administrative Judge Noreen A. Lynch 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 because: (a) two findings of fact were not supported by record evidence; (b) the Judge weighed or did not apply certain Personal Conduct Mitigating Conditions (PCMC) and Sexual Conduct Mitigating Conditions (SCMC) and reached conclusions that are arbitrary, capricious or contrary to law; (c) there is no evidence that Applicant falsified his response to one of the questions in the Security Clearance Application (SF 86), and it is mitigated; and (d) there is no basis for the conclusion that Applicant failed to mitigate security concerns under the "whole person" analysis.

The findings of fact that are relevant to the issues here are as follows:

Applicant is a 56-year old security officer for a defense contractor who submitted a SF 86 in August 2002. Around 1978, while serving as a church pastor, Applicant had an extramarital affair with a congregation member. When confronted, he resigned from his position. From 1997-1998, Applicant engaged in extramarital affairs with two members of his congregation. The two women were sisters. The husband of one lodged a complaint, and Applicant resigned from his post as pastor. The affairs continued after his 1997 resignation, and Applicant divorced in 1998.

Applicant received counseling in 1997 for an adjustment disorder, but in his 2002 SF 86, he responded "No" to question 19 which asked whether in the last seven years he had consulted a mental health professional or another health care provider about a mental health-related condition. When confronted by a DSS investigator about the 1978 affair, Applicant stated that he did not mention the incident because it was over and his wife was aware of the situation. [After the SOR was issued, Applicant added that he was advised by a company clerk not to mention the counseling.] Applicant claims that his affairs were matters of common knowledge among family, friends and acquaintances, and he is not vulnerable to coercion. In his response to the File of Relevant Material (FORM), Applicant expressed concern about his grandchildren learning of the reason for his departure from the ministry.

The Board is not persuaded by Applicant's claim that the Judge erred in finding that Applicant did not disclose his 1978 extramarital affair during a 2002 interview with a DSS agent and that Applicant expressed fear that someone other than himself might tell his grandchildren why he left the ministry. There is no issue of falsification involving the 1978 conduct, but the Judge's conclusion that Applicant was not forthright about revealing the 1978 affair is a reasonable inference based on the written record. Also, while Applicant offers an explanation for the concern he expressed in his Response to the FORM about what he would tell his grandchildren when asked why he left the ministry, the Judge reasonably construed his response as a factor that indicates continued vulnerability to coercion. The fact that Applicant can argue for an alternative interpretation of the evidence, by itself, is not sufficient to demonstrate error. *See* ISCR Case No. 02-15383 at 3-4 (App. Bd. Jul. 29, 2003).

With regard to the three extramarital affairs, Applicant contends that the Administrative Judge was required to mitigate them because knowledge about Applicant's affairs was widespread and, therefore, he was no longer vulnerable to coercion, exploitation or duress. *See* PCMC5⁽¹⁾ and SCMC4⁽²⁾. Moreover, he contends that while the Judge applied SCMC 2⁽³⁾ she did not weigh its significance properly, considering the amount of time that has passed.

Applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts he admitted or were proved by Department Counsel, and has the ultimate burden of persuasion on the clearance. Directive ¶ E3.1.15. The application of disqualifying or 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* 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. 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 that the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious or contrary to law.

The Administrative Judge articulated reasonable concerns that prevented her from mitigating the security significance of Applicant's conduct. Applicant had not offered proof that his affairs were matters of common knowledge and that he no longer felt vulnerable to coercion. Applicant contends that the DSS investigator did not ask him about affairs occurring before 1997. However, he did not report the 1978 affair and its consequences when the DSS investigator first interviewed him about the 1997-1998 affairs, and the Judge reasonably construed Applicant's statement about his grandchildren to also undermine the credibility of his assertions that he no longer felt vulnerable to duress. In addition to continued vulnerability, the Judge discussed the circumstances surrounding the affairs, particularly Applicant's poor judgment in the trusted role as pastor and counselor at two different churches.

The mere fact that Applicant omitted his past mental health counseling from his SF 86 is not proof, by itself, that he falsified the application. Applicant's statements about his intent and state of mind when he executed his security clearance application, including his assertion that a clerk told him that he did not need to provide the counseling information, were relevant evidence, but they were not binding on the Administrative Judge. 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 that contradicted Applicant's denials. Considering the record evidence as a whole, the Judge had a sufficient basis to conclude that the reasons offered by Applicant for omitting the counseling are not plausible. *See* ISCR Case No. 03-2281 at 2 (App. Bd. July 13, 2006). The Judge's conclusion that this falsification is not mitigated, is likewise sustainable (*E.g.*, the falsification may be considered recent, and Applicant did not acknowledge the omission until he was confronted by the DSS investigator.)

Applicant's claim that the Administrative Judge erred in her "whole person" analysis is unpersuasive. The Judge considered Applicant's conduct and circumstances under the whole person concept as described in the Directive. Directive ¶ E2.2 and Decision at 4-5. The Judge specifically articulated concerns that negatively impact several of the Adjudicative Process factors. Additionally, Applicant's SF 86 "falsification raises serious questions about his judgment, reliability and trustworthiness." *See* ISCR Case No. 01-25466 at 4 (App. Bd. Jul. 22, 2004). The Judge's conclusion that it was not clearly consistent with the national interest to grant Applicant a security clearance is sustainable.

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. "The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress," Directive ¶ E2.A5.1.3.5.
2. "The behavior no longer serves as a basis for coercion, exploitation, or duress," Directive ¶ E2.A4.1.3.4.
3. "The behavior was not recent and there is no evidence of subsequent conduct of a similar nature," Directive ¶ E2.A4.1.3.2.