

DATE: February 15, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-10302

## APPEAL BOARD DECISION

### APPEARANCES

#### FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

#### FOR APPLICANT

Lynne M. Giachetti, Esq., Iacullo, Martino & Marzello

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 20, 2004, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline J (Criminal Conduct) and Guideline H (Drug Involvement), pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 3, 2005, after the hearing, Administrative Judge Kathryn Moen Braeman 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 made sustainable findings of fact; whether the Administrative Judge failed to consider the passage of time; whether the Administrative Judge should have considered Applicant's arrest an isolated incident; whether revocation of Applicant's clearance was arbitrary, capricious or contrary to law in light of the whole person concept. We affirm the Judge's decision to deny or revoke Applicant's clearance.

#### **A. Pertinent factual findings by the Administrative Judge:**

Applicant is married and 43 years old. He has held a security clearance since 1995. Applicant is a senior engineer with a base pay of \$75,000 per year.

In the summer of 2001 Applicant started to sell marijuana in bags worth \$100. He had sold one pound and had a \$2000 profit by December when police searched his home and found five to six pounds of marijuana. Applicant was arrested and charged with Possession of Controlled Dangerous Substance with Intent to Distribute and Possession/Distribution of Controlled Dangerous Substance in Public Housing. In April 2002, Applicant pled guilty to Possession of Controlled Substance and received a sentence of two years probation and fines of over \$1,000. He complied with the terms of his sentence. Applicant testified that if he had not been arrested he would have continued to sell the remaining five pounds of marijuana. Applicant never disclosed his arrest and conviction to his security office. Applicant knew that drug involvement was incompatible with a security clearance. Applicant disclosed the arrest and conviction for the first time to the Office of Personnel Management Investigative Service in December 2002.

Applicant has three alcohol related convictions in the period from 1982 to 1991. Applicant has two convictions for

driving without a valid license in the period 1993 to 1994.

In 1997, Applicant was arrested for assault and making a terroristic threat. He then violated a restraining order which led to a guilty plea. In 1999, Applicant was arrested for Domestic Violence/Simple Assault in January and then Domestic Violence/Simple Assault and Terroristic Threats in April. The 1999 arrests involved his conduct toward his girlfriend. They attended four sessions of court-ordered counseling. Subsequently they married and they do not fight anymore.

Applicant's job performance has consistently met or exceeded expectations over many years.

## **B. Discussion**

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, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966). In evaluating the Administrative Judge's findings, we are required to give deference to the Administrative Judge's credibility determinations. Directive ¶ E3.1.32.1.

Applicant challenges the Judge's finding that Applicant failed to disclose his 2001 arrest and 2002 conviction to his security office and that his first disclosure was in December 2002. Applicant argues that the Judge failed to consider Applicant's testimony that he relied on his understanding from his company's manual that he was obliged to report incidents which occurred on company grounds. Applicant's argument is not persuasive. Applicant's testimony was evidence which the Judge had to consider, but it was not binding on the Judge who had to weigh the testimony in light of the record as a whole.

## **C. Whether the Record Supports the Administrative Judge's Ultimate Conclusions.**

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 the Administrative 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 Administrative Judge. We may not set aside an Administrative 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. We review matters of law *de novo*.

Applicant's challenge to the Administrative Judge's conclusion that Applicant's arrest and conviction were not mitigated due to the passage of time is not persuasive. The Board has declined to set a "bright-line" definition of what constitutes recent conduct. Rather, the Board has indicated the matter requires an Administrative Judge to evaluate the record evidence as a whole and reach a reasonable conclusion as to the recency of an applicant's conduct. This case does not persuade the Board that it should adopt any "bright-line" definition for what constitutes "recent" conduct.

Applicant's claim that the 2001 arrest and 2002 conviction regarding marijuana should have been found mitigated as an isolated incident is also unpersuasive. Applicant has a long history of entanglements with law enforcement. Furthermore, the marijuana-related conduct was serious, and involved multiple transactions and occurrences over several months.

Applicant's contention that the Administrative Judge's analysis should have found his conduct mitigated under the whole person concept is not tenable given the Judge's sustainable findings of fact. Applicant's most recent criminal misconduct was very serious and is set against a backdrop of a long history of criminal conduct. Applicant's reliance on his job performance is misplaced. The Board has held that security clearances adjudications are not limited to an applicant's job performance or his conduct during duty hours. ISCR Case No. 03-00763 at (App. Bd. Jan 19, 2005). The Judge was not

obligated to conclude that Applicant's most recent misconduct was mitigated.

**Order**

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

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, 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