

DATE: June 8, 2006

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 03-11112

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Jason Perry, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 30, 2004, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On December 8, 2005, after the hearing, Administrative Judge James A. Young 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 in concluding that 10 U.S.C. § 986 prohibited Applicant from being granted a security clearance; whether the Administrative Judge's unfavorable clearance decision under Guideline J is arbitrary, capricious or contrary to law.

Applicant argues that the Administrative Judge should have concluded that the security concerns raised under Guideline J had been mitigated, as a matter of law, because his criminal conduct is not recent and he has demonstrated he is now rehabilitated. Applicant also argues the Judge erred in concluding that his dismissal from the Air Force was the equivalent of a dishonorable discharge for the purposes of 10 U.S.C. § 986. The Board does not find Applicant's arguments persuasive.

The Administrative Judge's finding that the dismissal of an officer from a military service is the equivalent of a dishonorable discharge and, therefore, amounts to a separation from the service under dishonorable conditions, is sustainable. The Judge did not err by concluding that the circumstances of Applicant's case fell under the prohibitions of 10 U.S.C. § 986.

The application of disqualifying and mitigating conditions does not turn simply on a finding that one or more of them apply 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 that Applicant had committed four serious criminal offenses over a period of several years. As a result, Applicant had pleaded guilty at a General Court-Martial trial to two charges of conduct unbecoming an officer/gentlemen, and was sentenced to 12 months confinement, total forfeiture of all pay and allowances, and dismissal from the Air Force. The Judge weighed the mitigating evidence offered by Applicant against the 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 reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome the government's security concerns. *Compare* ISCR Case No. 02-12789 (App. Bd. May 13, 2005). Given the record that was before him, the Judge's ultimate unfavorable clearance decision under Guideline J is not arbitrary, capricious or contrary to law.

Order

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

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board