

DATE: February 16, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-14712

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 1, 2004, DOHA issued a Statement of Reasons (SOR) advising Applicant of the basis for that decision-security concerns raised under Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (January 2, 1992, as amended (Directive)). Applicant requested a hearing. On July 14, 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: (a) whether the Administrative Judge committed error when he found that Applicant had been convicted of attempting to carry a weapon on board an aircraft in December 2001; (b) the Administrative Judge erred by concluding that Applicant's criminal act was recent; and (c) the Administrative Judge erred by not properly evaluating Applicant's motives in attempting to carry a weapon on board a commercial aircraft.

The Administrative Judge found that: In December 2001, in the wake of 9/11, Applicant, a retired police officer, was arrested for attempting to carry a dangerous weapon- a large, knife-like object-on board a commercial aircraft. An initial prosecution resulted in a hung jury. Subsequently, Applicant reached an agreement with prosecutors consisting of a plea of guilty, deferral for one year of a sentence to probation, 100 hours of community service and several other conditions. Applicant complied with the terms of the deferred sentencing agreement, and the indictment in the case was dismissed with prejudice. On appeal, Applicant complains that the Administrative Judge erred by stating on several occasions in his decision that Applicant had been "convicted" of the offense. Applicant claims that the Judge's misstatement of fact denies him "core Constitutional freedoms," and he requests that the references to his "conviction" be stricken from the Judge's decision.

(a) Applicant's claim that the Administrative Judge committed a fact-finding error has merit. There is no evidence in the record to support the Judge's findings that the ultimate disposition of Applicant's case was a conviction. To the contrary, the record evidence and one of the Judge's own findings support Applicant's claim that as a result of a deferred sentencing and his satisfaction of the terms of his plea agreement, the case indictment was vacated. The Board concludes, however, that this error on the part of the Judge is harmless. Applicant never denied the fact that he committed the act for which he was prosecuted and never denied that he knew the act was wrong. The gravamen of the Judge's decision was that Applicant committed the conduct and was arrested for it as alleged in the SOR. A reading of

the Judge's decision as a whole convinces the Board that the disposition of the case, as perceived by the Judge, did not have a material effect upon the Judge's conclusions or the ultimate outcome of the case. Applicant's assertion on appeal that his freedoms under the Constitution have been denied lacks specificity. Therefore, the Board will not consider this argument. Concerning the relief Applicant requests, the Board does not have the authority to strike language from an Administrative Judge's decision.

(b) Applicant's arrest took place more than three years prior to the hearing in this case. Applicant notes that the Administrative Judge's decision describes Applicant's criminal act as an isolated one. He then notes that the Judge found that the act was "recent" and asserts that a finding of recency contradicts the finding that the incident was isolated. To the extent Applicant relies on the notion that a determination whether an act is recent is necessarily linked to a determination of whether the act is isolated, Applicant's argument fails. "Isolated" and "recent" are generally independent concepts. The Board need not agree with the Judge's resolution of this particular issue to conclude that, under the facts of this case, the Judge's resolution of the issue of the recency of Applicant's conduct is sustainable.

(c) Applicant asserts that he carried the weapon on board the aircraft because he believed there was a high risk of a bad event taking place during the holiday season and just after the attacks on the United States. He appears to be arguing that either the Administrative Judge did not consider this evidence of motive or the Judge did not accord it proper weight in favor of Applicant. Neither argument establishes error on the part of the Judge. A review of the Judge's decision clearly indicates that he discussed the matter of Applicant's motives in committing the criminal act. The fact that the Judge did not find the evidence of motive particularly mitigating and did not accord it the weight Applicant believes it should have does not constitute error. The Administrative Judge is responsible for weighing the record evidence. Absent a showing that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law, that weighing will not be disturbed on appeal. Applicant has not made such a showing.

On appeal, Applicant has failed to establish harmful error. Thus, the Administrative Judge did not err in denying Applicant a clearance.

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: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Concurring Opinion of Administrative Judge Michael Y. Ra'anan

I have no substantive difference from my colleagues on this case.

The Board is operating under a new Operating Instruction (OI-17), which I interpret as having no impact on the substance of Appeal Board decisions. The Board decision here uses the short format authorized in OI-17. The Board decision is somewhat more expansive than my reading of the short format laid out in the attachment to OI-17.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board