

DATE: September 28, 2006

In Re:

SSN: -----

Applicant for Trustworthiness Determination

ADP Case No. 03-14873

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Jason Perry, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) proposed to deny or revoke access to automated information systems in ADP-I and ADP-II sensitivity positions for Applicant. On November 18, 2004, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision--security concerns raised under Guideline F (Financial Considerations), Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested the case be decided on the written record. On March 23, 2006, after considering the record, Administrative Judge Darlene Lokey Anderson denied Applicant's request for a security clearance.⁽¹⁾ Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Administrative Judge's adverse clearance decision under Guidelines E and J is arbitrary, capricious or contrary to law.

Applicant argues that the Administrative Judge's adverse clearance decision should be reversed because the Applicant did not deliberately or intentionally make false statements in a response to three questions on her Public Trust Position Application. It is Applicant's contention that the omissions occurred because she had forgotten about the incidents in question and, in any event, she had subsequently provided correct information. Applicant also argues that the Judge should have concluded that the security concerns⁽²⁾ raised under Guidelines E and J had been mitigated, as a matter of law, because the disqualifying conduct was a series of isolated incidents, it is not recent, and the Applicant has since demonstrated rehabilitation. The Board does not find Applicant's arguments persuasive.

Applicant's statements about her intent and state of mind when she executed the document in question were relevant evidence, but they were not binding on the Administrative Judge. *See, e.g.*, ISCR Case No. 01-19278 at 6-7 (App. Bd. Apr. 22, 2003). 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 provide false information did not preclude the Judge from weighing the record evidence and making findings that contradicted Applicant's denials. The security concerns raised by Applicant's falsification were not necessarily mitigated by Applicant's subsequent disclosures to the government. *See* ISCR Case No. 01-19513 at 5 (App. Bd. Jan. 22, 2004). Similarly, such concerns were not necessarily mitigated by Applicant's favorable professional and work record. *See, e.g.*, ISCR Case No. 01-01642 at 6 (App. Bd. June 14, 2002).

The application of disqualifying and mitigating conditions and whole person factors 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 Judge weighed the mitigating evidence offered by Applicant against the length and seriousness of the disqualifying conduct, and considered the possible application of relevant mitigating conditions and whole person factors. The Judge found in Applicant's favor under Guideline F. However, the Judge articulated a rational basis for not favorably applying any mitigating conditions or whole person factors with respect to the Guideline E and J allegations, and reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome the government's security concerns. Given the record that was before her, the Judge's ultimate unfavorable clearance decision under Guidelines E and J is not arbitrary, capricious or contrary to law.

Order

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

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

Signed: Mark W. Harvey

Mark W. Harvey

Administrative Judge

Member, Appeal Board

1. The Administrative Judge found in favor of Applicant under Guideline F. That favorable finding is not at issue on appeal.

2. The Administrative Judge found that Applicant had deliberately provided false information in response to three questions on her Public Trust Position Application, executed in August 2002. The Judge also found that, in 1990-1991, Applicant had forged a stolen check and a savings account withdrawal slip, and executed several bad checks.