

DATE: July 3, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-16865

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Julie R. Edmunds, Esq., Department Counsel

#### **FOR APPLICANT**

Deborah D. Wright, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On January 14, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline F (Financial Considerations), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On October 21, 2005, after the hearing, Administrative Judge Joan Caton Anthony 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 issue on appeal: whether the Administrative Judge's unfavorable clearance decision under Guidelines F, E, and J is arbitrary, capricious or contrary to law.

Applicant argues that the Administrative Judge's unfavorable clearance decision should be reversed because Applicant has paid off or is making payments on his debts, he did not intend to falsify his security clearance application, and his criminal conduct was an isolated incident that was not recent and he has demonstrated rehabilitation. On appeal, Applicant offers additional evidence and cites to several DOHA Hearing Office decisions in which applicants in ostensibly similar circumstances were granted clearances. The Board does not find Applicant's arguments persuasive.

The Board may not consider new evidence on appeal. *See* Directive ¶ E3.1.29. Its submission does not demonstrate error on the part of the Administrative Judge. *See, e.g.*, ISCR Case No. 02-12789 at 3 (App. Bd. May 13, 2005). Similarly, the decision in another DOHA Hearing Office case does not demonstrate error by the Judge in this case. A decision by a Hearing Office Judge is not legally binding precedent on that Judge's colleagues or the Board. *See* ISCR Case No. 01-22606 at 3-5 (App. Bd. Jun. 30, 2003).

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 found that Applicant had a lengthy history of not meeting financial obligations and had engaged in financially related criminal conduct. 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 and reasonably explained why the evidence Applicant had presented in mitigation was insufficient to overcome the government's security concerns. Given the record that was before her, the Judge's unfavorable clearance decision under Guideline F is not arbitrary, capricious or contrary to law.

Applicant's statements about his intent and state of mind when he executed his security clearance application 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 falsify a statement did not preclude the Judge from weighing the record evidence and making findings that contradicted Applicant's denials. Considering the record as a whole, the Judge had a sufficient basis to find that Applicant's omission was deliberate and intentional.

Finally, given the record that was before her, the Administrative Judge was not required, as a matter of law, to conclude that Applicant's criminal conduct was isolated and not recent, or that Applicant had met his burden of demonstrating rehabilitation. Therefore, the Judge's 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: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman (Acting), Appeal Board

Signed Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board