

DATE: June 9, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-17708

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT

Kathleen E. Voelker, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On November 16, 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 22, 2005, after the hearing, Administrative Judge Charles D. Ablard 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 adverse clearance decision under Guidelines J is sustainable. ⁽¹⁾

Applicant argues that the Administrative Judge's adverse clearance decision is not sustainable and should be remanded because the Judge indicated in the synopsis and conclusions section of his decision that Applicant had pled guilty to a 2001 misdemeanor charge of Soliciting Prostitution, in Texas, when in fact Applicant had pled *nolo contendere* to the charge. The Board does not find Applicant's argument persuasive.

The Board does not review a Judge's decision against a standard of perfection. *See, e.g.*, ISCR Case No. 95-0319 at 3 (App. Bd. Mar. 18, 1996). It reviews a decision as a whole, rather than focusing on isolated sentences or passages in it, to discern what the Judge meant. *See, e.g.*, ISCR Case No. 02-29608 at 3-4 (App. Bd. Dec. 17, 2003).

In his answer and his signed, sworn statement to the government's investigator, Applicant stated he had pled guilty to the 2001 charge, and gave an explanation about the incident. ⁽²⁾ At the hearing, Applicant introduced a copy of the Judgement of Reduction for the charge, which showed the entry of a *nolle contendere* plea, and that the Texas Judge had heard the evidence relating to the charge, if any, and adjudged Applicant guilty of the offense. ⁽³⁾ In the findings of fact section of his decision, the Administrative Judge found Applicant had entered a plea of *nolo contendere* to the charge, and in the conclusions section noted that, since the charge was a misdemeanor, Applicant was not bound by the doctrine of collateral estoppel. ⁽⁴⁾ Under Texas law, the legal effect of a *nolo contendere* plea is the same as a plea of guilty, except that it may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the prosecution was based. ⁽⁵⁾ That is, a *nolo contendere* plea constitutes an admission to every

element of the offense.

Accordingly, given the record in this case, there was sufficient evidence⁽⁶⁾ to support an adverse finding as to the matter of security concern--that Applicant had committed the 2001 offense at issue.

The Applicant was responsible for presenting evidence to rebut, explain, extenuate or mitigate facts that the Department Counsel proved or that Applicant admitted, and the Applicant also had the ultimate burden of persuasion as to obtaining a favorable security clearance decision. Directive ¶ E3.1.15. The Administrative Judge had to consider the record evidence as a whole, both favorable and unfavorable, evaluate the facts and circumstances of Applicant's past conduct and current circumstances in light of pertinent provisions of the Directive, and decide whether Applicant had met his burden of persuasion under Directive ¶ Item E3.1.15. In deciding whether Applicant met this burden of persuasion, the Judge reasonably could consider whether Applicant presented evidence that was indicative of extenuation, mitigation, changed circumstances, or reform and rehabilitation. *See, e.g.*, ISCR Case No. 02-05110 at 6 (App. Bd. ar. 22, 2004); and Directive ¶ E2.2.1.6. There is a rebuttable presumption that the Administrative Judge considered all of the evidence presented. *See, e.g.*, ISCR Case No. 99-9020 at 2 (App. Bd. Jun. 4, 2001). In his decision, the Judge made findings which reflected consideration of the nature of Applicant's plea, the circumstances of Applicant's conduct, and Applicant's explanations and the other mitigating evidence that was offered at the hearing. The fact that Applicant's explanations and his mitigating evidence did not lead the Judge to the ultimate decision desired by Applicant is of no moment. Considering the record as a whole, there is sufficient evidence to support the Judge's overall adverse clearance determination, given a legal standard that requires the Judge to err on the side of national security.

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 Christine Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge found in favor of Applicant with respect to SOR paragraph 1.b. That favorable finding is not at issue on appeal.
2. Answer at 1; Government Exhibit 5 at 5.
3. Applicant's Exhibit F at 1.

4. Decision at 3-4.

5. *Tex. Code Crim. Proc. Ann.* § 27.02(5). DOHA administrative proceedings, which are inherently executive determinations by the U.S. government as to whether an individual should have access to classified information, are not really analogous to collateral civil court lawsuits for monetary damages or injunctive relief growing out of criminal incidents. Moreover, the Board has previously noted that compliance with state law is not required because security clearance adjudications are conducted by the Department of Defense pursuant to federal law. *See* U.S. Constitution, Art. VI, Cl. 2 (Supremacy Clause). *See, e.g., ISCR Case No. 00-0423* at 3 (App. Bd. Jun. 8, 2001).

6. The Appeal Board's review of the Administrative Judge's findings is limited to determining if they are supported by substantial evidence--such relevant evidence as a reasonable mind might accept as adequate to support 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, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966)). In evaluating the Administrative Judge's findings, the Board is also required to give deference to the Administrative Judge's credibility determinations. Directive ¶ E3.1.32.1.