

DATE: March 1, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-18242

## APPEAL BOARD DECISION

### APPEARANCES

#### FOR GOVERNMENT

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

#### FOR APPLICANT

Michael J. Zimmar, 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 H (Drug Involvement), 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 July 22, 2005, after the hearing, Administrative Judge Michael J. Breslin 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 erred by concluding that the security concerns raised by Applicant's history of drug involvement and the falsification of her security clearance application had not been mitigated.

Applicant contends the Judge should have concluded that the security concerns raised by her prior drug use and the falsification of her security clearance application had been mitigated because: (1) she has abstained from such drug use for the last seven years, (2) her job performance and character references are excellent, (3) she has demonstrated that she would not use drugs in the future, (4) she did not intend to falsify her security clearance application, (5) the information has now been fully disclosed, and (6) she has had a clearance for over 26 years with no security violations or compromise of classified information. Applicant also argues that the Judge erred in the application of the "whole person" concept as evidenced by the fact that he did not give "full and complete consideration [to] Applicant's numerous exhibits (other than being alphabetically named) since no discussion was made in the decision." The Board does not find Applicant's contentions persuasive.

The application of disqualifying and mitigating conditions does not turn simply on a finding that one or more of them applies 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 a lengthy and serious history of improper or illegal drug use that included: (a) marijuana use--sometimes on a daily basis--over a period of approximately four years, (b) the purchase of marijuana, (c) marijuana use as an adult, while employed as a security officer for a defense contractor, and (d) an instance of relapse, after a discontinuation of use. Additionally, the Judge found Applicant had provided false, misleading, or incomplete information about her marijuana use on her security clearance application. The Judge considered the possible application of relevant mitigating conditions and "whole person" factors, articulated a rational basis for not applying them in this case, and 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 him, the Judge's ultimate unfavorable clearance decision is sustainable.

Applicant's statements about her intent and state of mind when she executed her 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 her security clearance application 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 disqualifying conduct 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. Jun. 14, 2002). Additionally, there is a rebuttable presumption that the Administrative Judge considered all the record evidence unless he specifically states otherwise. *See, e.g.*, DOHA Case No. 96-0228 at 3 (App. Bd. Apr. 3, 1997). The Judge is not required to cite or discuss every piece of record evidence. *See, e.g.*, DISCR Case No. 90-1596 at 5 (App. Bd. Sep. 18, 1992).

Applicant's argument that she has held a security clearance for many years without any problems does not demonstrate the Judge erred. The federal government need not wait until an applicant actually mishandles or fails to properly handle or safeguard classified information before it can deny or revoke access to such information. *See Adams v. Laird*, 420 F. 2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). Applicant's overall history of improper drug use and her falsification of her security clearance application provide a sufficient rational basis for the Judge's unfavorable security clearance decision.

Finally, the favorable record evidence cited by Applicant is not sufficient to demonstrate the Administrative Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 02-28041 at 4 (App. Bd. Jun. 29, 2005). There is sufficient record evidence to support the Judge's conclusions. 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

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board