

DATE: July 5, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-20538

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 9, 2004, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision--security concerns raised under Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On December 14, 2005, after the hearing, Administrative Judge Henry Lazzaro 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 E is arbitrary, capricious or contrary to law.

The Administrative Judge found that Applicant had willfully and maliciously destroyed mission-critical company and government documents as alleged in the SOR. The Judge rejected Applicant's claims that she did not willfully destroy those documents. The Judge concluded that Applicant's conduct was not mitigated. Applicant argues that the Judge's adverse clearance decision should be reversed because the Judge made multiple errors in his findings of fact; made findings of fact as to matters not alleged in the SOR; made findings of fact based upon Government Exhibits 1 and 5, rather than Applicant's testimony; failed to consider the record evidence as a whole; and misapplied the disqualifying and mitigating conditions, and the "whole person" factors. The Board does not find Applicant's arguments persuasive.

(1) The findings which Applicant complains about are either permissible characterizations on the part of the Administrative Judge or immaterial, in that they would not be reasonably likely to change the outcome of the case. Applicant has not met her burden of demonstrating that the Judge's material findings with respect to Applicant's conduct of security concern do not reflect a reasonable or plausible interpretation of the record evidence. The Board does not review a case *de novo*. Considering the record evidence as a whole, the Judge's material findings of security concern are sustainable.

(2) Applicant is entitled to receive an SOR that places her on reasonable notice of the allegations being made against her. However, an SOR is an administrative pleading that is not required to satisfy the strict requirements of a criminal indictment, and it does not have to allege every possible fact that may be relevant at the hearing. *See, e.g.*, ISCR Case No. 00-0633 at 4 (App. Bd. Oct. 24, 2003). Nor does an SOR have to indicate what arguments Department Counsel

might make at the hearing. Considering the record as a whole, the Board concludes that the SOR issued to Applicant placed her on adequate notice of the allegations being made against her. Furthermore, a review of the hearing transcript does not leave the Board with the impression that the SOR prejudiced in any identifiable way Applicant's ability to prepare for the hearing, her ability to participate in the hearing, her ability to raise objections or make arguments on her behalf, or her ability to present evidence for the Judge to consider in his case. Given the SOR allegation against Applicant and the manner in which the hearing was conducted, Applicant was on adequate notice as to the issue of security concern.

(3) In evaluating the Administrative Judge's findings, the Board is required to give deference to the Judge's credibility determination. Directive ¶ E3.1.32.1. A Judge's credibility determination is not immune from review, but the party challenging it has a heavy burden on appeal. Applicant has not met that heavy burden. Although Applicant's statements about the incident alleged in the SOR were relevant evidence, that evidence was not binding on the Judge. As the trier of fact, the Judge had to consider Applicant's statements in light of the record evidence as a whole, and the Applicant's denial of misconduct did not prevent the Judge from weighing the record evidence and making findings that contradicted Applicant's denial. *See, e.g.*, ISCR Case No. 02-18434 at 4 (App. Bd. Aug. 13, 2004). The Judge's reliance on Government Exhibits 1 and 5 was not arbitrary or capricious--given the documents had been provided in advance to the Applicant, (1) they had reasonable indicia of reliability, (2) and they had been admitted into evidence without objection from the Applicant. (3) In this case, the Judge's material findings of security concern reflect consideration of the record as a whole and are supported by substantial evidence. (4)

(4) 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 her 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 Judge considered all of the evidence presented. *See, e.g.*, ISCR Case No. 99-9020 at 2 (App. Bd. Jun. 4, 2001). The fact that Applicant's explanations and her mitigating evidence did not lead the Judge to the decision desired by Applicant does not establish error.

In his decision, the Administrative Judge made extensive findings and reached conclusions which reflected consideration of Applicant's explanations and the other mitigating evidence that was offered at the hearing. The Judge reasonably considered the disqualifying conditions, mitigating conditions and "whole person" factors, and nevertheless concluded that the evidence presented in the case was insufficient to overcome the security concerns raised by Applicant's conduct. Considering the record as a whole, the Judge's application of the relevant conditions and factors, and his weighing of the record evidence, was not arbitrary, capricious, or contrary to law.

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. Smalin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. Transcript at 9.

2. The documents were company records that had been prepared at or near the time of the incident, for business purposes unrelated to litigation at DOHA. *See generally* Fed. R. Evid. 803(6) and 807; Directive ¶¶ E3.1.19 and E3.1.20.

3. Transcript at 17.

4. *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966)). ("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.")