

DATE: May 19, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-24632

## 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 December 22, 2004, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under 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 November 8, 2005, after the hearing, Administrative Judge Philip S. Howe 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 and J is arbitrary, capricious or contrary to law.

Applicant argues that the Administrative Judge's adverse clearance decision should be reversed because the Judge made multiple errors with respect to his findings, and at the hearing asked questions, or made comments, about Applicant's evidence, explanations, circumstances and/or financial decisions which indicate that the Judge departed from his role as a finder of fact and became an advocate for the government. Applicant also argues that the Judge's decision does not reflect consideration of the record in the context of the whole person concept. <sup>(1)</sup> The Board does not find Applicant's arguments persuasive.

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 his burden of demonstrating that the Administrative Judge's material findings with respect 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.

There is a rebuttable presumption that an Administrative Judge is impartial and unbiased, and a party seeking to rebut that presumption has a heavy burden of persuasion on appeal. *See, e.g.*, ISCR Case No. 02-08032 at 4 (App. Bd. May 14, 2004). The issue is not whether Applicant personally believes that the Judge was biased or prejudiced against Applicant. Rather, the issue is whether the record of the proceedings below contains any indication that the Judge acted in a manner that would lead a reasonable person to question the fairness and impartiality of the Judge. *See, e.g.*, ISCR Case No. 01-04713 at 3 (App. Bd. Mar. 27, 2003). Bias is not demonstrated merely because the Judge made adverse findings or reached unfavorable conclusions in a case. *See, e.g.*, ISCR Case No. 94-0954 at 4 (App. Bd. Oct. 16, 1995). Moreover, even if an appealing party demonstrates error by the Judge, proof of such error standing alone does not demonstrate the Judge was biased. *See, e.g.*, ISCR Case No. 98-0515 at

5 (Mar. 23, 1999). Applicant points to several examples of statements and questions by the Judge which were inconsistent with the decorum normally anticipated in the courtroom. While these comments were gratuitous and at times harsh, they do not rebut the presumption that the Judge ultimately decided the case on anything other than the record evidence. After reviewing the record and the Judge's decision, the Board concludes that Applicant has not met his heavy burden of persuasion on the issue of bias.

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). The fact that Applicant's explanations and his 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 which reflected consideration of Applicant's explanations and the other mitigating evidence that was offered at the hearing. The Judge reasonably considered such "whole person" factors as, the Applicant's age, the circumstances surrounding the conduct, Applicant's motivation, and the likelihood of continuance or recurrence, 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 Section 6.3 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: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman (Acting), 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

1. Directive ¶¶ E2.2.1.1 through E2.2.1.9.