

DATE: October 13, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-26197

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Daniel F. Crowley, Esq., Department Counsel

FOR APPLICANT

Francis J. Flanagan, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On April 11, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guidelines K (Security Violations), M (Misuse of Information Technology Systems), and E (Personal Conduct), pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On March 22, 2005, after the hearing, Administrative Elizabeth M. Matchinski denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30. [\(1\)](#)

Applicant raised three issues on appeal: (1) whether the Administrative Judge's findings are supported by substantial evidence; (2) whether the Administrative Judge failed to give sufficient weight to mitigating conditions; and (3) whether the Administrative Judge's unfavorable clearance decision under the "whole person" concept is arbitrary, capricious, or contrary to law. The Board resolves all three issues against Applicant.

1. Whether the Administrative Judge's findings are supported by substantial evidence

Applicant argues that the Administrative Judge made inconsistent findings, and that favorable findings were supported by greater evidence. The Judge concluded that Applicant's security violations were isolated, and stated that Applicant "can be counted on to properly handle classified information in the future." Witness testimony cited by the Judge described Applicant as a "security fanatic" and noted his "subsequent positive discharge of his security responsibilities." Applicant's appeal highlights lengthy quotations from the Judge's decision that support her conclusion that Applicant is rehabilitated in the areas of security violations, and the misuse of Information Technology Systems, as well as the personal conduct that pertained to the security violations, under Guidelines K, M and E, respectively.

The Administrative Judge, however, found against Applicant with respect to deliberately lying during a 2003 security investigation about classified information stored on his computer. The Judge concluded:

Alleged under Guideline E, the government proved Applicant impeded the company's preliminary inquiry into a suspected compromise of classified information, an investigation required under ¶ C1.3.4.1. of the NISPOM. When questioned by security personnel who had been tasked with sanitizing the affected computers, Applicant repeatedly denied that he had downloaded the confidential document to his hard drive. His fear that he could lose years of data or

the fact that he did not know the security manager for special programs does not justify his deliberate false statements. Rumors that security was scrubbing hard drives clean could have been dispelled by an inquiry of security personnel into any processes, such as the trusted download, which could have extracted data without loss to his work product. Moreover, the security manager tasked with sanitizing Applicant's computer was accompanied by the array project's technical lead, a coworker of Applicant's. Had Applicant concerns about the security manager's need-to-know, he could have called security. Applicant's "snap decision" to lie, albeit made to protect his work product rather than to impede security, had the same effect as planned concealment. Applicant's desktop computer was not properly sanitized and confidential material was therefore left vulnerable to compromise.

Applicant was also not completely forthcoming with his employer's FSO when he was interviewed in mid-April 2003. He claimed to have no recall if he had been asked in March 2003 whether he had downloaded the email and attachment to his hard drive. His repeated failure to cooperate with the security investigation is inconsistent with his obligations as a cleared employee under the NISPOM and his employer's rules. In addition to falling under DC E2.A11.1.2.2 of Guideline K, his deliberate misrepresentations raise very significant personal conduct (Guideline E) concerns. While DC E2.A5.1.2.3. *Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination*, addresses specifically false statements made in the context of personnel security background investigations and Applicant's false statements were made in the context of a company investigation into a suspected security violation, it raises similar judgment and trustworthiness concerns. There is a sufficient pattern of dishonesty in his efforts to conceal from company security personnel that he had downloaded confidential material to his hard drive to apply DC E2.A5.1.2.5. *A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the activity*. He also exercised extremely poor judgment within the context of Guideline E (see DC E2.A5.1.2.1. *Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances*) in violating his obligation to ensure that the confidential information was properly secured.

Decision at 9-10.

Ultimately, the Administrative Judge gave Applicant credit for acknowledging he mishandled the classified email, but concluded that she was not persuaded that Applicant was "sufficiently reformed of his deliberate false statements." She then resolved the personal conduct security concerns against Applicant.

The fact that Applicant can argue for an alternative interpretation of the evidence alone is not sufficient to demonstrate error. See DISCR OSD Case No. 92-0390 at 3 (App. Bd. June 16, 1993). Cf. *American Textile Mfr. Inst. v. Donovan*, 452 U.S. 490, 523 (1981) (possibility of drawing two inconsistent conclusions from evidence does not mean agency's findings and conclusions are not supported by the substantial evidence). An Administrative Judge "has broad latitude and discretion in writing a decision to decide an applicant's case" and the "Board does not have to agree with the Administrative Judge's findings" to affirm them. ISCR Case No. 03-07075 at 5 (App. Bd. Dec. 2, 2005).

The arguments challenging the Administrative Judge's findings of fact are not persuasive. "The Appeal Board's review of the Administrative Judge's finding of facts 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." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing 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 (1966). In evaluating the Judge's finding, we are required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

The findings which Applicant complains about are permissible characterizations of the record evidence on the part of the Administrative Judge. The Judge's material findings with respect Applicant's conduct of security concern reflect a reasonable or plausible interpretation of the record evidence. Considering the record evidence as a whole, the Board does not find Applicant established that the Judge erred with respect to her conclusions that Applicant made a deliberately false statement during a 2003 security investigation about classified information stored on his computer, and that Applicant was not rehabilitated.

2. Whether the Judge failed to give sufficient weight to mitigating conditions

Applicant objects to the greater weight that the Administrative Judge gave to Applicant's false statements during the security investigation as opposed to the evidence of reform and rehabilitation, which focused on his subsequent strict compliance with security requirements, and his acknowledgment of responsibility for his misconduct.

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." ISCR Case No. 04-08975 at 2 (App. Bd. Aug. 4, 2006) (citing 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*." ISCR Case No. 04-11381 at 2 (App. Bd. Aug. 23, 2006). "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." ISCR Case No. 05-03939 at 2 (App. Bd. Sep. 1, 2006). In this case, "the Administrative Judge reasonably weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct and circumstances, and considered the possible application of relevant mitigating conditions." ISCR Case No. 04-08975 at 2 (App. Bd. Aug. 4, 2006). The Judge "reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome the government's security concerns." ISCR Case No. 04-11381 at 2 (App. Bd. Aug. 23, 2006). Given the record that was before her, the Judge's ultimate unfavorable clearance decision under Guideline E is not arbitrary, capricious, or contrary to law.

3. Whether the Judge's unfavorable clearance decision under the "whole person concept" is arbitrary, capricious, or contrary to law

Applicant's appeal emphasizes that the Administrative Judge failed to discuss and give sufficient weight to numerous facts and circumstances that mitigated the security concerns. The Judge's decision reasonably discussed the most relevant adjudicative factors listed in Directive ¶¶ E2.2.1.1 to E2.2.1.9. The analysis of an applicant's security eligibility includes numerous potential facts, factors and conditions. A Judge must consider applicable Adjudicative Guidelines disqualifying or mitigating condition(s), if any, along with the record evidence as a whole and any pertinent general factors. ISCR Case No. 02-21927 at 7 (App. Bd. Dec. 30, 2005) (citing Directive, Section 6.3 and ¶ E2.2.1)). Then the Judge must decide what weight can reasonably be given to the applicable disqualifying or mitigating condition. *Id.* (citing ISCR Case No. 02-05110 4-6 (App. Bd. Mar. 22, 2004)). When a Judge reasonably concludes that no particular Adjudicative Guidelines disqualifying or mitigating conditions apply to the specific facts of a case, "the Judge still must evaluate the applicant's security eligibility under the general factors of Directive, Section 6.3 and [¶] E2.2.1 (which refers to the 'whole person' concept)." *Id.* (citing ISCR Case No. 03-11448 at 3-4 (App. Bd. Aug. 10, 2004)). The Judge conducted a reasonable analysis, commenting positively and negatively on various aspects of Applicant's situation. The Judge's decision articulated a rational basis for her conclusions, consistent with her whole person analysis. The Judge's analysis, conclusions and decisions are not arbitrary, capricious, or contrary to law.

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: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

Signed: Mark W. Harvey

Mark W. Harvey

Administrative Judge

Member, Appeal Board

1. The Administrative Judge found in favor of Applicant under Guidelines K, M and E as it pertained to ¶ 3.b of the statement of reasons (SOR). Those favorable findings are not at issue on appeal.