

DATE: November 9, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-00225

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Jennifer I. Campbell, Department Counsel

#### **FOR APPLICANT**

A. Bates Butler III, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On January 24, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline D (Sexual Behavior), 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 February 28, 2006, after the hearing, Administrative Judge Mary E. Henry 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 the following issues on appeal: whether the Administrative Judge's findings are supported by substantial evidence; and whether the Administrative Judge's unfavorable clearance decision under Guidelines E and J is arbitrary, capricious, or contrary to law.

Applicant argues that the Administrative Judge's adverse findings are not supported by substantial evidence. In support of this argument, Applicant contends that the Judge made an erroneous adverse credibility determination with respect to Applicant's testimony and gave too much weight to a police report that contained a police officers eyewitness account of Applicant's conduct. The Board does not find Applicant's argument persuasive.

Although an administrative judge's credibility determination is not immune from review, the party challenging that determination has a heavy burden on appeal. After reviewing the record, the Board concludes Applicant has not met that burden. The Judge had the opportunity to consider Applicant's explanation about the circumstances of the conduct in question. The Judge was not bound, as a matter of law, to accept or reject Applicant's explanation. The Judge considered Applicant's explanation in light of the record evidence as a whole, and concluded there was a sufficient basis to find that Applicant's version of the events was not credible. The Judge's determination in that regard is sustainable.

Similarly, 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. After reviewing the record, the Board concludes that the Judge's weighing of the police report in the context of the record

evidence as a whole is sustainable.

The Board's review of an 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 such 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, (1966). The findings which Applicant complains about are permissible characterizations of the record evidence on the part of the Judge. The Judge's material findings with respect Applicant's conduct of security concern 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. *See, e.g.*, ISCR Case No. 96-0461 at 3 (App. Bd. Dec. 31, 1997).

In this case, the Administrative Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct and considered the possible application of relevant mitigating conditions. The Judge found in favor of the Applicant under Guideline B and with respect to several of the allegations under Guidelines J and E. However, the Judge reasonably explained why the evidence Applicant had presented in mitigation was insufficient to overcome all of the government's security concerns. Given the record that was before her, the Judge's unfavorable clearance decision under Guidelines J and E is 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: James E. Moody

James E. Moody

Administrative Judge

Member, Appeal Board

1. The Administrative Judge found in favor of Applicant under Guideline D and with respect to SOR paragraphs 2.a, 2.b, 2.c, and 3.a. Those favorable findings are not at issue on appeal.