

DATE: January 29, 2007

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-00536

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 April 27, 2005, 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 June 16, 2006, after the hearing, Administrative Judge Christopher Graham denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant identifies errors on the part of the Administrative Judge. He argues that the record does not support the Judge's findings and conclusions against him. He maintains that because the Judge found some of the allegations against him to be mitigated, the Judge should have applied mitigating conditions to the remaining allegations and granted him a security clearance. We will interpret Applicant's brief as raising the following issue on appeal: whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law.

The Guideline E allegations against Applicant involve: a job termination related to drug use (SOR ¶ 1.a); falsifications on a 2002 security clearance application regarding drug use (¶ 1.d) and financial delinquencies (¶¶ 1.f and 1.g);⁽¹⁾ falsifications on a 1987 security clearance application involving drug use (¶¶ 1.b and 1.c);⁽²⁾ and falsification of a signed, sworn statement to an investigator in 2003 (¶ 1.e). The Guideline J allegation involves the behavior listed under Guideline E.

Applicant first points out that in the synopsis of the decision the Administrative Judge appeared to make a finding in Applicant's favor as to SOR ¶ 1.a and then found against him in the body of the decision. The Board has found that, in the absence of unusual circumstances, a misstatement in the synopsis of a decision is not indicative of harmful error. *See, e.g.*, ISCR Case No. 02-23336 at 3-4 (App. Bd. May 10, 2004). Applicant also finds ambiguity regarding ¶ 1.a elsewhere in the decision. The Judge unambiguously stated his findings and conclusions as to ¶ 1.a in the body of the decision. The Board does not find harmful error on that point.

Applicant argues that the allegations in SOR ¶¶ 1.b-1.e all related to the same period of drug abuse, which occurred early in his life. Because the Administrative Judge found in Applicant's favor as to ¶ 1.d due to the passage of time, Applicant maintains that the Judge should have concluded that ¶¶ 1.b, 1.c, and 1.e had been mitigated as well. The

Judge found in Applicant's favor as to ¶ 1.d because the allegation was unsubstantiated as to drug use during the past seven years. The other three falsifications involved drug use at any time. While the falsifications on Applicant's 1987 personnel security questionnaire (¶¶ 1.b and 1.c) occurred almost twenty years ago, the falsification of a statement Applicant made to an investigator (¶ 1.e) was recent, and Applicant corrected his statement only after failing a polygraph test. In discussing that behavior under Guideline J, the Judge noted that the falsifications constituted a pattern of dishonesty.

Applicant makes a general argument that three mitigating conditions apply to his case⁽³⁾ and that the Judge therefore committed error in denying him a security clearance. Except for his argument that his drug use was not recent, Applicant does not explain specifically how he thinks all three apply to his case. Nevertheless, the application of disqualifying and mitigating conditions and whole person factors does not turn simply on a finding that one or more of them apply 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. 05-01308 at 2 (App. Bd. Nov. 14, 2006). 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 that the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law.

In this case, the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct, and considered the possible application of relevant mitigating conditions and whole person factors. The Judge found in Applicant's favor under SOR ¶¶ 1.d, 1.f, and 1.g of Guideline E. However, the Judge articulated a rational basis for not favorably applying any mitigating conditions or whole person factors with respect to the allegations under Guideline J and the remaining paragraphs of Guideline E. The Judge reasonably explained why the evidence which 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 security clearance decision under Guidelines E and J is not arbitrary, capricious, or contrary to law.

Order

The decision of the Administrative Judge denying Applicant a security clearance is AFFIRMED.

Signed: Michael D. Hipple

Michael D. Hipple

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

1. The Administrative Judge found in Applicant's favor as to SOR ¶¶ 1.d, 1.f, and 1.g. Those findings are not challenged on appeal.
2. Applicant ascribed error to the fact that the Judge referred to that application as a Standard Form 86, when in fact it was a Department of Defense Form 49. That error is harmless.
3. Personal Conduct Mitigating Conditions 1, 2, and 5: Directive ¶ E2.A5.1.3.1 "The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability;" ¶ E2.A5.1.3.2 "The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily;" and ¶ E2.A5.1.3.5 "The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation or duress."