

DATE: October 19, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-03412

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT

Vincent P. Deandrea, Jr., Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On May 9, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline M (Use of Information Technology Systems) and Guideline E (Personal Conduct), of Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive). Applicant requested a hearing. On March 16, 2006, after the hearing, Administrative Judge Charles D. Ablard granted Applicant's request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Administrative Judge committed harmful error in admitting into evidence the expert testimony and expert report of Applicant's witness; and whether the Judge's application of Guideline M Mitigating Condition 1 and his mitigation of the security concerns under Guideline M and Guideline E, and his whole-person analysis were arbitrary, capricious, and unsupported by the record evidence. The Board affirms the Judge's favorable security clearance decision.

Department Counsel's arguments lack merit. With regard to the first issue raised, Department Counsel contends that Applicant gave him short notice of Applicant's intent to call an expert witness and particularly short notice of the expert report Applicant intended to offer into evidence. However, Department Counsel could have requested a continuance, but did not do so. Department Counsel argued at the hearing against the admission of the expert report into evidence because the Rule 26 of the Federal Rules of Civil Procedure (FRCP) would require submission of the notes used by the expert to prepare his report along with the report itself. He repeated this interpretation of FRCP 26 in his appeal brief. The FRCP are not binding in decisions issued under the Directive, and it was not error for the Administrative Judge to admit the report without submission of the notes. Moreover, the report was largely repetitive of the expert testimony to which Department Counsel did not object. ⁽¹⁾

With regard to Department Counsel's arguments on mitigation, the Administrative Judge had substantial evidence on which to base his conclusions. The expert witness testified that in his opinion Applicant had not misused his computer since he was terminated and would not do so in the future. The Judge gave a rational explanation for his application of Mitigating Condition 1 ⁽²⁾ and his conclusions regarding mitigation under Guideline M and Guideline E. The Judge likewise stated a reasonable and factually supported basis for his favorable conclusions under the whole-person concept. The unfavorable evidence cited by Department Counsel is not sufficient to demonstrate the Judge's conclusions were

arbitrary, capricious, or unsupported by the record evidence. As the trier of fact, the Judge had to weigh the evidence as a whole and decide whether the favorable evidence outweighed the unfavorable evidence, or *vice versa*. Department Counsel's disagreement with the Judge's weighing of the record evidence is not sufficient to demonstrate the Judge weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. The Board need not agree with the Judge's decision to conclude that it is sustainable. *See, e.g.*, ISCR Case No. 04-09684 at 3 (App. Bd. July 6, 2006).

Order

The Administrative Judge's favorable security clearance decision is AFFIRMED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: David M. White

David M. White

Administrative Judge

Member, Appeal Board

1. The Judge did exclude that portion of the proffered expert opinion to which Department Counsel objected on the basis that it was beyond the witness' expertise.

2. "The misuse was not recent or significant;" Directive ¶ E2.A13.1.3.1.