

DATE: January 26, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-03849

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 6, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline H (Drug Involvement), Guideline E (Personal Conduct), Guideline F (Financial Considerations), and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested the case be decided on the written record. On June 20, 2006, after considering the record, Administrative Judge Roger C. Wesley 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 issue on appeal: whether the Administrative Judge erred by concluding that the security concerns raised under Guidelines H, E and F had not been mitigated.

(1) 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. *See, e.g.*, 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*. 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. The Board does not review a case *de novo*.

(2) Applicant argues that the Judge should have concluded that the security concerns raised under Guideline H had been mitigated, as a matter of law, because Applicant's drug use was not recent, he has demonstrated rehabilitation, and he never used drugs while holding a security clearance. The Board does not find Applicant's arguments persuasive.

The Judge made sustainable findings as to a lengthy and very serious history of improper or illegal drug use by a 55-year-old Applicant. That history included illegal marijuana, hashish, and cocaine use, sometimes on a weekly basis, from 1972 to 1999. As a result of that illegal drug use, Applicant had been terminated from his employment, lost his house to non-judicial foreclosure, and had been forced to file for bankruptcy. Applicant had requested his case be

decided on the written record, so the Judge did not have an opportunity to evaluate Applicant's credibility in the context of a hearing. Moreover, as the Judge noted, there was no evidence as to completion of a treatment program, and Applicant had concealed significant information about his prior drug problems during the security clearance process. The Directive does not define "recent," and there is no "bright-line" definition of what constitutes "recent" conduct. ISCR Case No. 03- 02374 at 5 (App. Bd. Jan. 26, 2006). The Judge is required to evaluate the record evidence as a whole and reach a reasonable conclusion as to the recency of an applicant's conduct. ISCR Case No. 03- 02374 at 4 (App. Bd. Jan. 26, 2006). It was not arbitrary, capricious or unlawful for the Judge to conclude that Applicant's drug use was recent. *See generally, e.g.*, ISCR Case No. 03-22912 at 2 (App. Bd. Dec. 30, 2005). The Judge considered the totality of Applicant's circumstances. The Judge weighed the mitigating evidence offered by Applicant against the length and seriousness of the disqualifying conduct and considered the possible application of relevant mitigating conditions and whole person factors. The Judge articulated a rational basis for not applying any mitigating conditions in this case, and reasonably explained why the evidence which the 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 clearance decision under Guideline H is not arbitrary, capricious or contrary to law.

(3) Applicant argues that the Judge's adverse clearance decision under Guideline E should be reversed because the Applicant did not deliberately or intentionally make false statements on his Security Clearance Applications and in a signed, sworn statement to a government investigator. Applicant contends that the omissions were the result of forgetfulness, lack of knowledge, or

Applicant's belief that the information was not serious enough to warrant inclusion. The Board does not find Applicant's argument persuasive.

Applicant's statements about his intent and state of mind when he executed the documents in question were relevant evidence, but they were not binding on the Judge. *See, e.g.*, ISCR Case No. 01-19278 at 6-7 (App. Bd. Apr. 22, 2003). As the trier of fact, the Judge had to consider Applicant's statements in light of the record evidence as a whole, and Applicant's denial of any intent to provide false information did not preclude the Judge from weighing the record evidence and making findings that contradicted Applicant's denials. In this case, the Judge made sustainable findings that Applicant had omitted information of obvious security concern, relating to Applicant's prior drug use, and arrests for drug, alcohol, and serious traffic offenses. Applicant had admitted to the omissions in his Answer to the SOR. Applicant had given as his reason for the omissions, his concern about losing his job and his belief that no one would check the records. Given the record that was before him, the Judge's conclusion that Applicant's omissions were deliberate and intentional is sustainable, and the Judge's ultimate unfavorable clearance decision under Guideline E is not arbitrary, capricious or contrary to law.

(4) Finally, Applicant argues that the Judge should have concluded that the security concerns raised under Guideline F had been mitigated, as a matter of law, because Applicant's unpaid debts had been accumulated prior to 1998, he had paid off all of the debts that were open, and the only remaining unpaid debts were closed accounts or debts that did not otherwise appear on Applicant's credit report. The Board does not find Applicant's arguments persuasive.

In this case, the Judge made sustainable findings that Applicant had a lengthy history of financial problems including the loss of his house through non-judicial foreclosure and a bankruptcy, attributable to illegal drug use. At the time the case was submitted for decision, Applicant still had substantial unpaid debt. In light of the foregoing, the Judge reasonably concluded that Applicant's financial problems were still ongoing. *See* ISCR Case No. 03-26213 at 2 (App. Bd. Aug. 23, 2006). Moreover, it was not arbitrary or capricious for the Judge to conclude that Applicant's reliance on his creditor's unwillingness to pursue the collection of debts amounted to a good-faith effort at debt resolution. *See, e.g.*, ISCR Case No. 02-32606 at 5 (App. Bd. Jan. 21, 2004). Again, the Judge reasonably weighed the mitigating evidence offered by Applicant against the length and seriousness of the disqualifying conduct and considered the possible application of relevant mitigating conditions. The Judge articulated a rational basis for not applying the potential mitigating conditions in this case, and reasonably explained why the evidence which the 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 clearance decision under Guideline F is sustainable. Thus, the Administrative Judge did not err in denying Applicant a clearance. [\(2\)](#)

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, 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 Judge found in favor of Applicant with respect to SOR paragraphs 1.a through 1.f. Those favorable findings are not at issue on appeal.
2. In his decretal paragraph, the Judge, after holding against Applicant under Guidelines E, G, and F, states that he grants Applicant a clearance. Viewed in light of the decision as a whole, this is clearly a typographical error.