

DATE: MAY 18, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-04509

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Eric H. Borgstrom, Esq. , Department Counsel

#### **FOR APPLICANT**

Elissa B. Katz, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On March 28, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive). Applicant elected to have the matter decided on the written record in lieu of a hearing. On October 13, 2005, Administrative Judge Thomas M. Crean denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Administrative Judge was arbitrary and capricious in failing to examine all the record evidence submitted by the Applicant; whether the Administrative Judge erred by failing to find that Applicant's falsification was not pertinent to a determination of judgment, trustworthiness or reliability; whether the Administrative Judge erred in his application of the Directive and limited application of the Guidelines; whether the Administrative Judge's adverse decision under Guideline J is supported by the record evidence; and whether the Administrative Judge erred by failing to apply the "whole person" concept.

The dispositive findings of fact by the Administrative Judge that are relevant to this appeal are as follows:

Applicant admits to being arrested and charged with possession of marijuana in 1976. There is no information concerning the disposition of this charge, and Applicant does not remember the disposition. Applicant admits he was arrested and charged with possession of marijuana and drug paraphenalia in 1989. He was found guilty of the possession of marijuana charge and sentenced to probation for one year and to pay a fine. Applicant admits he was charged with and convicted of consuming alcohol in a vehicle in 1994, and sentenced to pay a fine. Applicant admits he was charged with and convicted of driving under the influence of alcohol in 1994, and sentenced to pay a fine. Applicant admits he was charged with and convicted of driving under the influence of alcohol in November 2000. He was sentenced to pay a fine, perform community service, attend alcohol and driving classes, and his driver's license was suspended. In December 2001, Applicant was charged with and found guilty of driving with a suspended license, and sentenced to pay a fine and an additional year suspension of his driver's license. Applicant was involved in a motor vehicle accident in November 2000, which led to the driving under the influence charge. After the accident, he informed police he only consumed a few beers. He later informed security investigators that he also consumed mixed drinks at this home prior to the accident.

Applicant listed only one driving while intoxicated offense, the 2000 offense, in response to question 24 on his security clearance application. In fact, Applicant had been charged with five alcohol or drug offenses. Applicant answered "NO" to question 26 on his security clearance application asking in the last 7 years had he been arrested, charged, or convicted of any other offense not already listed on the form. In fact, Applicant has been arrested for driving on a suspended license. Applicant admitted: "When I completed my security questionnaire, I only listed the one alcohol related offense. I did not list my other alcohol or drug related offenses as I feared losing my security clearance and possibly my job." Applicant has modified his drinking habits since December 2000, and now only drinks in social settings and has not been intoxicated since his last driving under the influence offense.

Concerning Applicant's first claim of error, that the Administrative Judge failed to examine all the relevant evidence in the record, there is a rebuttable presumption that an Administrative Judge considers all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 03-15308 at 4 (App. Bd. Aug. 2, 2005). Applicant's ability to cite to record evidence in his favor, in particular Applicant's rebuttal to the DoD's File of Relevant Material which included his employment performance appraisal, letter from his manager, and his Employee Recognition Award Reimbursement, is not sufficient to overcome that rebuttable presumption in this case. Merely because a Judge does not give greater weight to record evidence cited by the appealing party, it does not follow that the Judge simply ignored that evidence. Moreover, the Judge is not required to cite or discuss every piece of record evidence. *See, e.g.*, ISCR Case No. 02-29608 at 4 (App. Bd. Dec. 17, 2003). To the extent Applicant's argument can be construed as challenging the Judge's weighing of the record evidence, it fails to establish that the Judge weighed the record evidence in a manner that is arbitrary, capricious, or contrary to law.

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 Administrative 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. Finally, the applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by the Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision. Directive ¶ E3.1.15.

Applicant argues that the record evidence in this case supports the favorable application of Personal Conduct Mitigating Conditions 1, 2, 3 and 5. For example, Applicant does not dispute that he falsified the security clearance application but argues this falsification is not pertinent to a determination of judgment, trustworthiness, or reliability, and Personal Conduct Mitigating Condition 1<sup>(1)</sup> must be applied in his favor. Applicant's appeal brief lists a number of factors that he claims the Judge should have considered under Guideline E, including, the fact that: (1) Applicant held a security clearance for 20 years without incident; (2) Applicant's manager confirms that Applicant is dedicated, loyal, honest, and trustworthy; and (3) Applicant wrote a technical manual at a time after two of the charges in the SOR had occurred.

The fact that Applicant held a security clearance for 20 years without a security violation did not preclude the Administrative Judge from concluding that Applicant's falsification of his security clearance application warranted an unfavorable security clearance decision. Falsification of a security clearance application raises serious questions about a person's judgment, reliability and trustworthiness and clearly is relevant to assessing an applicant's security eligibility notwithstanding an applicant's longevity in the defense industry. *See, e.g.*, ISCR Case No. 03-06016 at 4 (App. Bd. Jan. 11, 2005). Moreover, based on the record evidence, the Judge reasonably could conclude that Applicant did not make prompt, good-faith efforts to correct the falsification prior to being confronted with the facts. The Judge's conclusion that the security significance of Applicant's conduct could not be mitigated under Guideline E, is sustainable.

Applicant argues that the Administrative Judge completely overlooked several of the Criminal Conduct Mitigating Conditions. For example, Applicant contends that Criminal Conduct Mitigating Condition 4<sup>(2)</sup> applies to the omission of information on his security clearance application because Applicant feared losing his livelihood and ability to support

his children. Applicant also contends that the 2001 charge and guilty plea for driving on a suspended license falls within Criminal Conduct Mitigating Conditions 2-(3) and 3-(4) because "[s]elf transportation was obviously necessary for Applicant to continue to support himself and his family." Since the suspension expired some time ago, Applicant assures us that "the pressure which lead to him committing that act is no longer present in Applicant's life." The Board is not persuaded by arguments which equate the duty to adhere to legal obligation with pressure or coercion. Moreover, the various criminal acts committed by Applicant as described earlier in this decision, considered as a whole, are hardly isolated. The Administrative Judge's conclusion that none of the Criminal Conduct Mitigating Conditions applies, likewise, is sustainable.

Applicant contends that the Administrative Judge erred by not applying Guideline G (Alcohol Consumption) and Guideline H (Drug Involvement) Mitigating Conditions. The Board has held that as long as a Judge does not engage in reasoning that is arbitrary or capricious, he is permitted to make findings of mitigation under one Guideline without being required to make findings of mitigation under another Guideline in the same case. *See, e.g.*, ISCR Case No. 03-24988 at 4 (App. Bd. Nov. 15, 2005). Thus, in this respect, each Guideline may be separately considered. In this case, Applicant was not charged in the SOR with associated disqualifying conduct under either Guidelines G or H, and the Board assumes, for purposes of this appeal, that the government does not consider Applicant's conduct to be disqualifying under Guidelines G and H. Accordingly, the Judge was not required to consider the mitigating conditions of Guidelines G and H when Applicant's conduct was not considered disqualifying under them. An Administrative Judge shall make a timely written clearance decision that sets forth pertinent findings of fact, policies, and conclusions as to the allegations in the SOR. *See* Directive ¶ E3.1.25. Of course, many of the mitigating principles contained in the enumerated Guideline G and H mitigating conditions (*e.g.*, frequency and recency of the conduct) are also reflected in the Adjudicative Process and are factors that the Judge must consider in his evaluation of Applicant under the "whole person" concept. *See* Directive ¶ E2.2.

The Administrative Judge's decision acknowledged the "whole person" analysis required by the Directive. The Judge states that he took into consideration the good character information provided by Applicant, his performance evaluations, and his supervisor's evaluation. The Judge was not required to list and discuss each piece of record evidence the Applicant submitted. The Applicant has not provided evidence to the contrary. The Applicant's view that the record evidence overwhelmingly supports the conclusion that it is clearly consistent with the national interest to continue a security clearance for Applicant because he has been an outstanding performer and has diligently served his country in his twenty years of employment with a defense contractor, throughout which he has held security clearance, does not provide evidence of harmful error on the part of the Administrative Judge.

The Administrative Judge has a sustainable basis for concluding that Applicant did not sufficiently mitigate security concerns under Guideline J and Guideline E. The Administrative Judge's findings and conclusions are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contradictory evidence in the record. Applicant presents no evidence to demonstrate that the Judge's conclusions were not based on the totality of the record evidence but merely provides an alternative interpretation of the record evidence.

## Order

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

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. "The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability" (Directive ¶ E2.A5.1.3.1).
2. <sup>0</sup>"The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur" (Directive ¶ E2.A10.1.3.4).
3. <sup>0</sup>"The crime was an isolated incident" (Directive ¶ E2.A10.1.3.2).
4. <sup>0</sup>"The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life" (Directive ¶ E2.A10.1.3.3).