

DATE: July 18, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-07513

## APPEAL BOARD DECISION

### APPEARANCES

#### FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

#### FOR APPLICANT

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On May 18, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline G (Alcohol Consumption), Guideline F (Financial Considerations), Guideline J (Criminal Conduct) and Guideline H (Drug Involvement) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 14, 2006, after the hearing, Administrative Judge Charles D. Ablard 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's material findings under Guidelines G and F are sustainable; whether Applicant is entitled to a copy of the audio tape of the hearing; and whether the Administrative Judge's unfavorable clearance decision under Guidelines G and F is arbitrary, capricious or contrary to law.

(1) Applicant argues that the Administrative Judge's adverse clearance decision is predicated on errors with respect to his findings. In support of that argument, Applicant states that the Judge made several statements referring to arrests for criminal behavior "that have no basis in fact, court findings, or any evidence," and that Applicant's "financial responsibilities are completely misrepresented" and the Judge "misinterpreted the data." The Board does not find Applicant's arguments persuasive.

Applicant does not specify which findings about his criminal conduct are erroneous, or how the findings about his financial situation are a misrepresentation or misinterpretation of the evidence. The Administrative Judge found in Applicant's favor under Guideline J (Criminal Conduct) and Guideline H (Drug Involvement). Therefore, findings with respect to those two guidelines are not at issue on appeal. The Judge's other findings are permissible characterizations of the record evidence on the part of the Judge. Applicant has not met his burden of demonstrating that the Judge's material findings with respect Applicant's conduct of security concern do not 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.

(2) Applicant requests that he be provided a copy of the audio tape of the hearing. He states that he was provided a copy of the hearing transcript, but that it is "sincerely lacking comments made by [him], Department Counsel and the

Administrative Judge." Again, Applicant does not specify what comments are missing from the transcript or what part of the transcript they are missing from. The Board has reviewed the transcript and it appears to be proper on its face. Under the Directive, Applicant is entitled to receive a copy of the transcript. Directive ¶ E3.1.24. There is no requirement that he be furnished with a copy of the audio tape.

(3) 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.

In this case, the Administrative Judge made sustainable findings as to a lengthy and serious history of excessive alcohol consumption and financial problems. 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. The Judge found in Applicant's favor under Guidelines J and H. The Judge articulated a rational basis for not favorably applying any mitigating conditions under Guidelines G and F, 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 Guidelines G and F is not arbitrary, capricious or contrary to law.

### **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: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

Signed: Mark W. Harvey

Mark W. Harvey

Administrative Judge

Member, Appeal Board