

DATE: November 16, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-08824

## APPEAL BOARD DECISION

### APPEARANCES

#### FOR GOVERNMENT

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

#### FOR APPLICANT

John L. Tison, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On May 31, 2005, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision--security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On May 31, 2006, after the hearing, Administrative Judge James A. Young 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 erred by concluding that the security concerns raised under Guideline F had not been mitigated; whether the Administrative Judge erred in concluding Applicant's falsification of his security clearance application was deliberate; and whether the Administrative Judge erred in concluding the security concerns raised under Guideline E had not been mitigated.<sup>(1)</sup>

(1) Applicant contends that the Administrative Judge erred in concluding that the security concerns raised by his history of financial difficulties had not been mitigated. In support of that contention, Applicant argues that he is making regular payments to his creditors on each of his debts and the creditors are accepting those payments. It is Applicant's position that his actions constitute a formal payment plan--in the form of a contract based upon an offer and acceptance, as contemplated in the case of *Carlill v. Carbolic Smoke Ball Company* 1 Q.B. 256 (C.A. 1893).<sup>(2)</sup> The Board does not find this argument persuasive.

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. 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 found that Applicant had a lengthy history of not meeting financial obligations,

due in substantial part to living beyond his means. At the time the case was submitted for decision, Applicant had paid off several of his debts and was making payments on the remainder of them. However, the Applicant still had outstanding debts of significant amounts and had not corrected underlying factors that had contributed to his financial problems. In light of the foregoing, the Judge could reasonably conclude that Applicant's financial problems were still ongoing. *See* ISCR Case No. 03-26213 at 2 (App. Bd. Aug. 23, 2006). 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. He gave the Applicant partial credit under the relevant mitigating conditions and found in Applicant's favor with respect to some of the allegations. The Judge articulated a rational basis for not fully applying the 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. The Board does not review a case *de novo*. The favorable record evidence cited by Applicant is not sufficient to demonstrate the Administrative Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 02-28041 at 4 (App. Bd. June 29, 2005). Given the record that was before him, the Judge's ultimate unfavorable clearance decision under Guideline F is sustainable.

(2) Applicant argues that he did not deliberately falsify his security clearance application by failing to disclose adverse information of about his indebtedness. Rather, he contends that the omission of the information in question was unintentional and was mitigated by his subsequent disclosures. The Board does not find this argument persuasive.

The Administrative Judge had the opportunity to consider Applicant's explanation for why he failed to disclose the information in question. The Judge was not bound, as a matter of law, to accept or reject Applicant's explanation. The Judge considered Applicant's explanation in light of the record evidence as a whole, and concluded there was a sufficient basis to find that Applicant's omissions were deliberate and intentional. Therefore, Judge's finding of deliberate falsification is sustainable. *See* Directive ¶ E3.1.32.1.

Finally, the security concerns raised by Applicant's falsification were not necessarily mitigated, as a matter of law, by Applicant's subsequent disclosures to the government. *See* ISCR Case No. 01-19513 at 5 (App. Bd. Jan. 22, 2004). Given the record that was before him, the Administrative Judge's unfavorable security clearance decision under Guideline E is sustainable.

### 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: James E. Moody

James E. Moody

Administrative Judge

Member, Appeal Board

1. The Administrative Judge found in favor of Applicant with respect to SOR paragraphs 1.c and 1.d. Those favorable findings are not at issue on appeal.
2. Applicant's Brief at 2.