

DATE: November 29, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-09488

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 23, 2005, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision--security concerns raised under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On April 7, 2006, after the hearing, Administrative Judge Barry M. Sax 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 issue on appeal: whether the Administrative Judge's adverse clearance decision under Guidelines E and J is arbitrary, capricious or contrary to law.

Applicant argues that the Administrative Judge's adverse clearance decision should be reversed because the Applicant did not deliberately or intentionally make false statements in response to three questions on his Security Clearance Application (SOR paragraphs 1.a through 1.c). It is Applicant's contention that his omission of three felony charges, one Driving Under the Influence charge, and one failure to appear charge, occurred because he had forgotten about the incidents and misinterpreted the questions. Applicant also argues that his inconsistent explanations at the hearing ⁽¹⁾ were due to the stress that was imposed upon him in preparing a case for a security clearance that he was looking forward to receiving. The Board does not find Applicant's arguments persuasive.

Applicant's statements about his intent and state of mind when he executed his Security Clearance Application were relevant evidence, but they were not binding on the Administrative 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.

Reviewing the Administrative Judge's conclusions regarding SOR paragraph 1.d, the Board is unable to discern whether the Judge found for Applicant or against him on this portion of the SOR. Furthermore, the Judge failed to make a formal finding with respect to SOR paragraph 1.d. The Judge's failure to make findings and reach conclusions with respect to SOR paragraph 1.d was error under Directive ¶ E3.1.25. However, considering the other sustainable adverse formal findings, the Judge's error in this aspect of the case is harmless. *See* ISCR Case No. 02-07757 at 4 (App. Bd. Mar. 29,

2004).

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 Judge weighed the mitigating evidence offered by Applicant against the 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 favorably applying any mitigating conditions or whole person factors with respect to the Guideline E and J allegations, 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 E and J 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: James E. Moody

James E. Moody

Administrative Judge

Member, Appeal Board

1. SOR paragraph 1.d was added by the Administrative Judge during the hearing.