

DATE: September 18, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-12548

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Department Counsel

FOR APPLICANT

Donald G. Gilpin, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On September 29, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline H (Drug Involvement) and Guideline E (Personal Conduct), of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended)(Directive). Applicant requested a decision based on the written record. On March 14, 2006, after considering the record, Chief Administrative Judge Robert Robinson Gales 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 erred by concluding that the security concerns raised under Guidelines H and E had not been mitigated.

Applicant argues that the Administrative 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, Applicant has demonstrated that he would not use drugs in the future, and Applicant provided clear evidence of rehabilitation. Applicant also argues that the Judge should have concluded that the security concerns raised under Guideline E had been mitigated, as a matter of law, because Applicant subsequently provided the correct information about his drug use in a prompt, good-faith manner before being confronted with the facts. The Board does not find Applicant's arguments persuasive.

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 specifically considered the recency of Applicant's drug abuse and the extent of his rehabilitation. He made sustainable findings as to a lengthy and serious history of improper or illegal drug use by a 49-year-old Applicant who was familiar with the security clearance process. That history included illegal marijuana use on

a regular basis from 1985 to 2001. It also included use while holding a "Q" security clearance granted by the Department of Energy. Additionally, the Judge found Applicant had provided false, misleading, or incomplete information about his marijuana use on his security clearance applications and in his first interview with a government investigator. The Directive does not define "recent," and there is no "bright-line" definition of what constitutes "recent" conduct. ISCR Case No. 03-02374 at 4 (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). Accordingly, it was not arbitrary, capricious or contrary to law for the Judge to conclude that Applicant's drug use was not 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. 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 Guidelines H and E is not arbitrary, capricious or contrary to law.

The federal government need not wait until an applicant actually mishandles or fails to properly handle or safeguard classified information before it can deny or revoke access to such information. *See Adams v. Laird*, 420 F. 2d 230, 238-239 (D.C. Cir. 1969). In this case, Applicant's

overall history of improper drug use and his multiple falsifications provide a sufficient rational basis for the Judge's unfavorable security clearance decision.

Order

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

Signed: Jeffrey D. Billett

Jeffrey D. Billett

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