

DATE: October 5, 2006

In re:

SSN: -----

Applicant for Trustworthiness Determination

ADP Case No. 04-11978

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) proposed to deny or revoke access to automated information systems in ADP-I and ADP-II sensitivity positions for Applicant. On August 12, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision - security concerns raised under Guidelines E (Personal Conduct) and J (Criminal Conduct) pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested the case be decided on the written record. On April 14, 2006, after considering the record, Administrative Judge Noreen A. Lynch denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30. [\(1\)](#)

Applicant raised the following issue on appeal: whether the Administrative Judge's adverse clearance decision under Guidelines J and E is arbitrary, capricious, or contrary to law. Applicant argues that the Judge's adverse clearance decision should be reversed because the Judge failed to conclude, as a matter of law, that Applicant's conduct had been mitigated. Applicant also asserts that he is an asset to his organization and should receive a second chance. Applicant's arguments are not persuasive.

Applicant contends that the Administrative Judge should have found that Applicant's conduct was mitigated because: (1) he no longer associates with persons involved in criminal activities; (2) his misconduct was isolated and not recent; and (3) he apologized for his mistakes. Applicant's contentions that the Judge erred in her application or weighing of his mitigating evidence lack merit.

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." ISCR Case No. 04-08975 at 2 (App. Bd. Aug. 4, 2006) (citing 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*." ISCR Case No. 04-11381 at 2 (App. Bd. Aug. 23, 2006). "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." ISCR Case No. 05-03939 at 2 (App. Bd. Sept. 1, 2006). "In this case, the Administrative Judge reasonably weighed the mitigating evidence offered by Applicant

against the seriousness of the disqualifying conduct and circumstances, and considered the possible application of relevant mitigating conditions." ISCR Case No. 04-08975 at 2 (App. Bd. Aug. 4, 2006). The Judge "reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome the government's security concerns." ISCR Case No. 04-11381 at 2 (App. Bd. Aug. 23, 2006).

Applicant asserts that he should receive a clearance because he is an asset to his organization, and deserves a second chance. The Administrative Judge's Findings of Fact note that Applicant "has performed his duties quite well. He earned recognition in his two years of service. His supervisor rating indicated 'exceeds or meets standards.'" The Judge's Conclusions indicate Applicant "has gained the respect of various employers and colleagues" and has remained "gainfully employed and responsible" resulting in a favorable mitigating conclusion of "clear evidence of successful rehabilitation" under Guideline J. *See* Directive ¶ E2.A10.1.3.6. In addition to consideration as part of her analysis of Applicant's criminal conduct under Guideline J, the Judge properly considered Applicant's good employment history, and support of his colleagues as part of her whole person analysis. ⁽²⁾

Applicant's concern that the Judge did not fully articulate in her decision the information his character witnesses provided is without merit. A Judge is not required to mention or discuss each piece of record evidence. ISCR Case No. 04-08134 at 3 (App. Bd. May 16, 2005). There is a rebuttable presumption that a Judge "considered all the record evidence, unless the Judge specifically states otherwise." *Id.*

To the extent that Applicant argues that an unfavorable decision will adversely impact his employment situation, the "possibility that an unfavorable security clearance decision could have adverse consequences for an applicant's job situation is not relevant or material to an evaluation of the security significance of that applicant's conduct." ISCR Case No. 04-08975 at 2 (App. Bd. Aug. 4, 2006) (citing ISCR Case No. 02-11570 at 8 (App. Bd. May 19, 2004)).

Given the record that was before her, the Judge's ultimate unfavorable clearance decision under Guidelines J and E is not arbitrary, capricious, or contrary to law.

Order

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

Signed: Michael Y. Ra'anan

Michael Y, Ra'anan

Administrative Judge

Chairman, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

Mark W. Harvey

Mark W. Harvey

Administrative Judge

Member, Appeal Board

1. The Administrative Judge found in favor of Applicant under Guideline J as it pertained to paragraphs 2.a through 2.c

of the statement of reasons (SOR). Those favorable findings are not at issue on appeal.

2. "[E]valuation of an applicant's security eligibility must include consideration of all available information in light of the 'whole person' concept. *See* Directive [¶] E2.2.1. The Administrative Judge's obligation to apply pertinent provisions of the Adjudicative Guidelines does not diminish the Judge's obligation to evaluate an applicant's security eligibility in light of the 'whole person' concept. Those two obligations are complementary, not exclusive, in nature." ISCR Case No. 02-09389 at 4 (App. Bd. Dec. 29, 2004).