

DATE: February 20, 2007

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-12148

## APPEAL BOARD DECISION

### APPEARANCES

#### FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

#### FOR APPLICANT

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 10, 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 June 16, 2006, after the hearing, Administrative Judge Juan J. Rivera 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 Judge's adverse clearance decision under Guidelines E and J is arbitrary, capricious or contrary to law.

Applicant argues that the Judge's adverse clearance decision should be reversed because the Applicant did not deliberately or intentionally provide false information in response to questions 21, 26, 27, and 28 of his Security Clearance Application, dated June 10, 2002. It is Applicant's contention that his omission of adverse information about his prior criminal conduct and drug use occurred because he misread or misunderstood the questions. Applicant also argues that he subsequently disclosed the relevant information in an October 10, 2002, signed, sworn statement to a government investigator, but that document ". . ." was not presented during the hearing; therefore the judge was unable to see that [Applicant] had already acknowledged the errors that [he] had made on the clearance application."<sup>(1)</sup> In support of this latter argument, Applicant encloses a copy of the October 10, 2002 statement with his brief. Applicant also offers new evidence in the form of additional explanations relating to the circumstances of his prior criminal conduct and drug use. The Board does not find Applicant's arguments persuasive.

The Board may not consider new evidence on appeal. *See* Directive ¶ E3.1.29. And such evidence does not demonstrate error on the part of the Judge. *See, e.g.*, 05-00609 at 2 (App. Bd. Nov. 24, 2006). A review of the record indicates that the October 10, 2002 statement, which Applicant claims was not submitted to the Judge, was in fact admitted into evidence at the hearing, without objection from the Applicant, as Government Exhibit 2, and considered by the Judge in reaching his decision.<sup>(2)</sup>

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 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. *See, e.g.*, ISCR Case No. 04-09488 at 2 (App. Bd. Nov. 29, 2006). The security concerns raised by Applicant's falsification were not necessarily overcome by Applicant's subsequent disclosures to the government. *See* ISCR Case No. 01-19513 at 5 (App. Bd. Jan. 22, 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. *See, e.g.*, ISCR Case No. 04-08934 at 2 (App. Bd. Aug. 17, 2006).

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 conclusion that Applicant had intentionally provided false or misleading information on his Security Clearance Application is sustainable, and the Judge's ultimate unfavorable clearance decision under Guidelines E and J is not arbitrary, capricious or contrary to law. *See, e.g.*, ISCR Case No. 04-09488 at 2-3 (App. Bd. Nov. 29, 2006).

### **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: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: Williams S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. Applicant's Brief at 2.

2. Government Exhibit 2; Transcript at 17 and 22-23; Decision at 2 and 4.