

DATE: July 25, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-12911

## 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) declined to grant Applicant a security clearance. On April 26, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline J (Criminal Conduct), Guideline E (Personal Conduct) and Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 21, 2006, after the hearing, Administrative Judge LeRoy F. Foreman denied Applicant's request for a security clearance. [\(1\)](#) 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 Guideline J had not been mitigated.

Applicant argues that the Administrative Judge should have concluded that the security concerns raised under Guideline J had been mitigated, as a matter of law, because Applicant's last criminal incident occurred in 2001, he was acquitted of some of the charges, and he has demonstrated he is now rehabilitated. Applicant also argues that certain statements in the Judge's decision indicated bias against the Applicant. The Board does not find Applicant's arguments persuasive.

There is a rebuttable presumption that an Administrative Judge is impartial and unbiased, and a party seeking to rebut that presumption has a heavy burden of persuasion. *See, e.g.*, ISCR Case No. 02-08032 at 4 (App. Bd. May 14, 2004). The issue is not whether Applicant personally believes the Judge was biased or prejudiced against Applicant. Rather, the issue is whether the record contains any indication the Judge acted in a manner that would lead a reasonable person to question the fairness and impartiality of the Judge. *See, e.g.*, ISCR Case No. 01-04713 at 3 (App. Bd. Mar. 27, 2003). Bias is not demonstrated merely because the Judge made adverse findings or reached unfavorable conclusions. *See, e.g.*, ISCR Case No. 94-0954 at 4 (App. Bd. Oct. 16, 1995). Moreover, even if an appealing party demonstrates error by the Judge, proof of such error, standing alone, does not demonstrate the Judge was biased. *See, e.g.*, ISCR Case No. 98-0515 at 5 (App. Bd. Mar. 23, 1999). After reviewing the record and the Judge's decision, the Board concludes that Applicant has not met his heavy burden of persuasion on the issue of bias. Applicant fails to identify anything in the record that indicates or suggests a basis for a reasonable person to question the fairness or impartiality of the Judge.

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 made sustainable findings as to a serious history of criminal conduct. That history involved multiple incidents of domestic violence and related misconduct between 1999 and 2001. 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 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 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 (Acting), Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge found in Applicant's favor under Guidelines E and F. Those favorable findings are not at issue on appeal.