

DATE: September 20, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-00374

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Julie R. Edmunds, Esq., Department Counsel

FOR APPLICANT

Joseph J. Defrancesco, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 25, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). On January 30, 2006, after a hearing, Administrative Judge Mary E. Henry granted Applicant's request for a security clearance. Department Counsel timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raises the following issues on appeal: (a) whether the Administrative Judge's application of Personal Conduct Mitigating Condition (PCMC) 5 was erroneous and contrary to the record evidence; (b) whether the Judge's "whole person" analysis of the case was arbitrary, capricious and contrary to law; (c) whether the Judge failed to adequately address Applicant's involvement in a 1999 domestic assault incident; and (d) whether the Judge engaged in a piecemeal analysis of the case.

The Administrative Judge's findings were not challenged on appeal. Those include the following: While serving as a noncommissioned officer in the Army in November 1998, Applicant was charged with fraternization when he, as a student in a training program, became friends with a female classmate whom he later learned was an initial trainee soldier and of a lower rank than he. On a cold evening, Applicant offered to let the female student sit in his vehicle, which was not permitted under the local Army rules. He and the female student received nonjudicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ) and he was required to perform extra duties. In April 1999 Applicant's then girlfriend filed a criminal assault charge against him for hitting her. After a protracted argument, he hit her after her repeated attempts to provoke him to do so. Later, when Applicant told the woman he intended to end the relationship, she filed the assault complaint. The military police took no action on the complaint. Applicant did receive a letter of counseling as a result of the incident. In December 2000 Applicant was an Army training instructor. He met a female enlisted person who was in his battalion, but not his company or platoon. She was not his student. Applicant had one sexual encounter with this woman in a relationship that lasted three weeks. Just before their sexual encounter, Applicant learned that the woman was a student on the post, but not at his duty station. In February 2001, the Army convened a Special court-martial, charging Applicant with three violations of Article 92 (failure to obey a lawful order) of the UCMJ because of his relationship with the woman and also for giving two other female students a ride to the movies in his privately owned vehicle in a non-emergency situation. The Army alleged that Applicant unlawfully engaged in a nonprofessional relationship with the female students. Applicant pled not guilty to the charges. The Court

found him not guilty on the three specifications under Article 92 but found him guilty of disorders to the prejudice of good order and discipline on the three specifications under Article 134 of the UCMJ. The court sentenced Applicant to reduction to the rank of Private First Class and a Bad Conduct Discharge. The finding of guilty on one of the specifications was overturned on appeal, but the military appeals court affirmed the sentence. In 2002, shortly after Applicant began his first civilian employment, he received a verbal counseling about his inappropriate use of a computer. He had opened an e-mail he believed came from a friend. The e-mail contained multiple pop-ups for inappropriate websites. Applicant's employer told him not to do it again and there were no further incidents.

The Administrative Judge also found: Applicant became an Eagle Scout prior to his enlistment in the Army. He performed his Army duties with distinction, and earned numerous citations and awards. His Army performance evaluations routinely rated him successful and among the best for promotion. A witness at the hearing was a 22-year Army veteran who is also the chief executive officer at Applicant's current place of employment. This witness worked as an equal employment officer in Applicant's Army brigade and knew about Applicant's court-martial and the basis for it. In the witness's opinion, the definition of fraternization has broadened over time and infractions are handled differently among the various units in the Army. The witness felt that Applicant's punishment was more severe than others. Applicant's current supervisor and former Army platoon sergeant also testified. He concurred with the executive officer's comments about fraternization and added that, following problems with fraternization at a particular Army post where sergeants took advantage of their authority, the Army began to enforce its fraternization policies more stringently. The command at Applicant's post made an example of him when it chose to proceed with a court-martial. In the opinion of the witness, the discipline should have proceeded under Article 15. Applicant had no supervisory relationship with the students with whom he fraternized and therefore could not take advantage of his authority. Applicant's supervisor has recommended him for several jobs, including his current position. He describes Applicant as reliable, dependable, and not a security risk. Other witnesses describe Applicant as trustworthy and loyal. Applicant did not abuse his authority in the Army because he was not in charge of the soldier with whom he fraternized. Applicant's current supervisors describe him as trustworthy and loyal. He handles classified information appropriately. He is a hard worker and has a positive attitude. Applicant is now married and has matured.

The Administrative Judge concluded that Department Counsel established its case under Guideline E, in that Applicant had engaged in questionable conduct, including a pattern of rule violations while in the Army and when he inappropriately accessed pornography on his computer in his first civilian job. The Judge then concluded that PCMC 5 [\(1\)](#) applied to the case. The Judge also concluded that, while his past conduct might raise some concern about his judgment, the positive statements of confidence in him, the changes in his life and his overall work performance outweigh his past poor judgment in one type of situation. The Judge cited factors such as the fact that Applicant's violation of Army fraternization rules did not result in his abuse of authority, and the fact that knowledgeable witnesses testified as to Applicant's character. The Judge noted that those same witnesses testified that the Army's handling of Applicant's fraternization violations was unusually severe and may have been inappropriate. She concluded that the probability of his past problems recurring was eliminated because of his increased maturity and the fact that he is now married. She noted that the civilian job computer violation was an isolated incident and was over four years old. Under a "whole person" analysis, the Judge ultimately concluded that Applicant had mitigated the government's concerns under Guideline E.

Department Counsel's initial claim of error involves the Administrative Judge's application of PCMC 5 to the case. The thrust of Department Counsel's argument is that, since Personal Conduct Disqualifying Condition (PCDC) 4 [\(2\)](#) was not deemed by the Judge to be applicable to the case, PCMC 5 was wholly inapplicable. The Board has held that a determination that PCDC 4 applies in a case is not a prerequisite to an Administrative Judge's application of PCMC 5 in appropriate circumstances. *See, e.g.*, ISCR Case No. 97-0595 at 4 (App. Bd. May 22, 1998). The Board continues to so hold. However, the Board has also held that if an Administrative Judge has not made a threshold finding that there exist facts or circumstances that increase an individual's vulnerability to coercion, exploitation, or pressure, then it would not make sense for the Judge to consider whether an applicant "has taken positive steps to significantly reduce or eliminate" such vulnerability. *Id.* In this case, Department Counsel correctly points out that there was no evidence or issue as to whether Applicant's conduct made him vulnerable to coercion, exploitation, or duress. Thus, the Judge erred when applying PCMC 5 to the facts of this case. Nevertheless, the Board deems this error harmless in light of the Judge's overall decision and the record as a whole. After considering the Judge's decision in its entirety, the Board is persuaded that the application of PCMC 5 was not the substantial basis for the Judge's conclusion that Applicant had mitigated the

government's concerns under Guideline E. The Judge's ultimate decision is sustainable on grounds independent of her consideration of PCMC 5.

Department Counsel's argument regarding the Administrative Judge's "whole person" analysis (i.e., that it is not supportable by the record as a whole and that it used an analysis of the evidence that is "piecemeal") is not persuasive. There is no presumption of error below and the appealing party has the burden of demonstrating factual or legal error below. The Board does not review the record evidence *de novo* and make its own findings of fact and reach its own conclusions about a case. The Board does not have to decide whether it would make the same findings of fact and reach the same conclusions as the Administrative Judge did in this case. All the Board has to do is decide whether Department Counsel, as the appealing party, has shown that the Judge's findings of fact are not sustainable in light of the record evidence as a whole (Directive ¶ E3.1.32.1) or that the Judge's conclusions are arbitrary, capricious, or contrary to law (Directive ¶ E3.1.32.3).

The main thrust of Department Counsel's argument concerning the Administrative Judge's whole person analysis is that the Judge erroneously minimized the severity of the disqualifying conduct in this case. Department Counsel argues that the significance of the Applicant's conduct is best reflected by the fact that Applicant received a Bad Conduct Discharge. The Judge considered Applicant's discharge for bad conduct and also other evidence in the record about Applicant's military offenses such as the circumstances under which they took place, the fact that they did not involve subordinates in his direct line of command, that no abuse of authority took place, and that witnesses who had direct knowledge of Applicant's troubles with the Army indicated that Applicant's punishment was unusually severe. As pointed out by Applicant in his reply brief, there is no simple formula or rule of law on how an Administrative Judge must weigh the evidence in a case. The Board will not disturb the Judge's weighing of the evidence absent a showing that the weight assigned to particular evidence is not supported by the record or is arbitrary, capricious, or contrary to law. In this case, the Judge's evaluation of Applicant's conduct is supported by the record evidence as is her evaluation of the evidence in mitigation. The Board does not have to agree with the Judge's ultimate decision to conclude Department Counsel has not shown the Judge's conclusions are arbitrary, capricious, or contrary to law. Essentially, Department Counsel argues for an alternate interpretation of the record evidence in this case.

Department Counsel claims that the Administrative Judge engaged in piecemeal analysis when evaluating Applicant's misconduct in this case. After reviewing the Judge's decision along with the entire record in this case, the Board is satisfied that the Judge properly weighed Applicant's overall pattern of rule violations along with such Adjudicative Process Factors as the presence or absence of rehabilitation and other pertinent behavioral changes and the recency of the conduct. Directive ¶ E2.2.1.

Department Counsel asserts on appeal that the Administrative Judge failed to adequately address the 1999 criminal assault complaint made by Applicant's girlfriend. Department Counsel asserts that the Judge briefly addressed this incident in the Findings of Fact portion of the decision but completely failed to address this disqualifying conduct in the Conclusions portion of her decision. An examination of the Judge's decision indicates that Department Counsel's assertion is in error. The Judge did mention the 1999 assault incident in her Conclusions section when listing the misconduct that made certain disqualifying conditions under Guideline E applicable to the case. While it is true that the Judge did not further elaborate on the incident in the rest of her discussion, Department Counsel has failed to establish error. There is a presumption that an Administrative Judge has considered all the record evidence when making findings and reaching conclusions, unless there is an indication to the contrary. That presumption has not been overcome here.

Order

The decision of the Administrative Judge granting 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: James E. Moody

James E. Moody

Administrative Judge

Member, Appeal Board

1. "The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress" (Directive ¶ E2.A5.1.3.5).
2. "Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation, or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail" (Directive ¶ E2.A5.1.2.4).