

DATE: September 13, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 05-02373

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Peregrine D. Russell-Hunter, Chief Department Counsel

#### **FOR APPLICANT**

Henry L. Young, Personal Representative

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On July 29, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline J (Criminal Conduct), Guideline G (Alcohol Consumption) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On March 28, 2006, after the hearing, Administrative Judge Matthew E. Malone 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 issues on appeal: whether the Administrative Judge erred by concluding that the security concerns raised by Applicant's history of criminal conduct and alcohol consumption had not been mitigated; and whether the Administrative Judge erred in concluding that Applicant had deliberately falsified material facts on her security clearance application and in a statement to a government investigator.

Applicant contends the Administrative Judge should have concluded that the security concerns raised by her criminal conduct and alcohol consumption were mitigated. In support of that contention, Applicant essentially reargues her case with respect to the evidence she presented below and provides additional explanations as to the circumstances and dispositions of several of the criminal incidents at issue. Applicant also contends that she did not deliberately falsify material facts on her security clearance application and in a statement to a government investigator. In support of that contention, Applicant argues that the omission of material information was due to confusion or forgetfulness. The Board does not find Applicant's contentions persuasive.

The Board may not consider new evidence on appeal. *See* Directive ¶ E3.1.29. Accordingly, we may not consider Applicant's additional explanations, and they do not demonstrate error on the part of the Judge.

The Applicant has not met her burden of demonstrating that the Judge erred in concluding that the security concerns presented by her criminal conduct and alcohol consumption had not been mitigated. Although Applicant strongly disagrees with the Judge's conclusions, she has not established that those conclusions are arbitrary, capricious, or contrary to law. *See* Directive ¶ E3.1.32.3.

Applicant's statements about her intent and state of mind when she executed her security clearance application, and when she was interviewed by the government agent, were relevant evidence, but they were not binding on the Administrative 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 falsify material facts did not preclude the Judge from weighing the record evidence and making findings that contradicted Applicant's denials.

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.

In this case, 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 factors. The Judge found in Applicant's favor with respect to one of the SOR allegations. However, the Judge 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 J, G, and E is not arbitrary, capricious or contrary to law.

Finally, the favorable record evidence cited by Applicant is not sufficient to demonstrate the Administrative Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 02-28041 at 4 (App. Bd. Jun. 29, 2005). The Board does not review a case *de novo*. Given the record that was before him, the Judge's ultimate unfavorable clearance decision is sustainable. Thus, the Administrative Judge did not err in denying Applicant a clearance.

### Order

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

Signed: Jeffrey D. Billet

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. The Administrative Judge found in favor of Applicant with respect to SOR paragraph 2.a. That favorable finding is not at issue on appeal.