

DATE: January 12, 2007

In Re:

SSN:-----

Applicant for Security Clearance

ISCR Case No. 05-03678

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 October 5, 2005, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision--security concerns raised under Guideline E (Personal Conduct), Guideline J (Criminal Conduct) and Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested the case be decided on the written record. On June 16, 2006, after considering the record, Administrative Judge Darlene Lokey Anderson 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 Guidelines E and J had not been mitigated.

In this case, the Administrative Judge made sustainable findings that Applicant had deliberately provided false information about mental health treatment, marijuana use, delinquent debts, wage garnishments, a repossession, and an unpaid judgement, in response to questions 19, 27, 34, 35, 37 and 38 of his February 2001 Security Clearance Application. She also made a sustainable finding that Applicant had deliberately provided false information about marijuana use in a June 2004 signed, sworn statement to a government investigator.⁽²⁾ Applicant contends the Judge should have concluded, as a matter of law, that the security concerns raised by his multiple falsifications were mitigated because: (a) Applicant had once been advised by a military recruiter to not disclose his prior drug use,⁽³⁾ (b) the falsifications were an isolated incident, that is not recent, and Applicant has demonstrated rehabilitation,⁽⁴⁾ and (c) Applicant has an outstanding military record. The Board does not find Applicant's contentions persuasive.

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

The Administrative Judge was not required, as a matter of law, to conclude that Applicant's reliance on a military recruiter's advice, to never disclose his past marijuana use, was sufficient to mitigate his multiple falsifications relating

to other matters. *See, e.g.*, DOHA Case No. 96-0104 at 2 (App. Bd. Apr. 29, 1997). Similarly, given the record before her, the Judge was not required to conclude, as a matter of law, that Applicant's multiple falsifications were an isolated incident, that was not recent, and that there was clear evidence of successful rehabilitation.

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 seriousness of the disqualifying conduct, and considered the possible application of relevant mitigating factors. The Judge found in Applicant's favor under Guideline F. 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 her, the Judge's ultimate unfavorable clearance decision under Guidelines E and J 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 her, 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. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

Signed: David M. White

David M. White

Administrative Judge

Member, Appeal Board

1. The Administrative Judge found in favor of Applicant under Guideline F. That favorable finding is not at issue on appeal.

2. These seven deliberate falsifications were alleged under Guideline E, in SOR ¶¶ 1.a through 1.g. In SOR ¶2.a. they

were merged to form a single Guideline J allegation of Violating 18 U.S.C. §1001, which makes falsification a felony. Accordingly, Applicant sought to mitigate the falsifications under both Guidelines. The underlying marijuana use was not listed as a separate allegation under either Guideline J or Guideline H.

3. Directive ¶ E2.A5.1.3.4 ("Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided").

4. Directive ¶¶ E2.A10.1.3.1 ("The criminal behavior was not recent"), E2.A10.1.3.2 ("The crime was an isolated incident"), and E2.A10.1.3.6 ("There is clear evidence of successful rehabilitation").