

DATE: February 28, 2007

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In Re:

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SSN: --

Applicant for ADP I/II/III Position

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ADP Case No. 05-04768

## APPEAL BOARD DECISION

### APPEARANCES

#### **FOR GOVERNMENT**

James B. Norman Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) proposed to deny or revoke access to automated information systems in ADP-I/II/II sensitivity positions for Applicant. On October 12, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision--trustworthiness concerns raised under Guideline H (Drug Involvement), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct), pursuant to Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On July 12, 2006, after considering the record, Administrative Judge Philip S. Howe, denied Applicant's request for a trustworthiness designation. Applicant submitted a timely appeal pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge erred in not admitting into evidence a report by a psychiatrist pertaining to Applicant's prognosis for further drug use (Applicant's Attachment 1); and whether the Judge's use of that un-admitted document in his decision is arbitrary, capricious, or contrary to law. We remand the case to the Judge.

### **Whether the Record Supports the Administrative Judge's Factual Findings**

#### **A. Facts**

The Judge made the following findings:

Applicant is a registered pharmacist who became addicted to a narcotic pain killer following dental treatment. Her prescription having run out, Applicant took pills from her employer's stocks. She had no authority to take these drugs and, upon discovery, her employer fired her. Applicant's illegal drug usage occurred from July 2002 until November 2003. She was arrested by the local police and charged with theft. However, the record contains no evidence as to the disposition of the case, except that Applicant was placed on probation by her state regulatory agency. As of the date of the decision, she was still on probation.

Applicant enrolled in a rehabilitation program, which she successfully completed. She participates in a continuing care program, including Alcoholics/Narcotics Anonymous meetings and she submits random urine samples for drug tests.

#### **B. Discussion**

The Appeal Board's review of the Judge's finding of facts is limited to determining if they are supported by substantial evidence--such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record." Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620-21, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966)). In evaluating the Judge's findings, we are required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1

The Judge's findings of fact are not challenged on appeal.

### **Whether the Record Supports the Administrative Judge's Ultimate Conclusions.**

An Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Appeal Board may reverse the Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3. Our scope of review under this standard is narrow and we may not substitute our judgment for that of the Judge. We review matters of law *de novo*.

In this case, the Applicant submitted a written response to the SOR, which response did not include the written statement by the psychiatrist at issue on appeal. Instead, she submitted this document in response to the File of Relevant Material as Applicant's Attachment 1. Department Counsel objected to the admission of Attachment 1 on the grounds that, had Applicant submitted the report in response to the SOR, he would have been able to have requested a hearing for the purposes of cross examining the psychiatrist. Department Counsel asked that Attachment 1 not be admitted into evidence or, in the alternative, be assigned little weight. The Judge sustained Department Counsel's objection to Attachment 1 stating in his decision: "I uphold the objection and do not admit the psychiatrist handwritten statement into evidence." Decision at 2. The Judge then cited to Attachment 1 in the Conclusions section of his decision stating: "Her psychiatrist in his submission attached to Applicant's FORM Response diagnosed her with chemical dependency." Decision at 5.

In DOHA proceedings, the Federal Rules of evidence serve only as a guide. They may be relaxed by the Judge (with one exception not applicable to this appeal<sup>(1)</sup>) in order to permit the development of a full and complete record by the parties. Directive ¶ E3.1.19. By design, the DOHA process encourages Judges to err on the side of initially admitting evidence into the record, and then to consider a party's objections when deciding what weight to give to that evidence. Because DOHA proceedings are conducted before impartial, professional fact-finders, there is less concern about the potential prejudicial effect of specific items of evidence than there is in judicial proceedings conducted before a lay jury.

The document at issue was relevant in evaluating possible mitigation of the trustworthiness concerns raised by Applicant's drug-related conduct. While it is understandable that Department Counsel would want an opportunity to cross examine the psychiatrist, we have examined the record and conclude that there is no reason to believe that Applicant was attempting to obtain an unfair advantage by submitting the document as she did. The Judge should have admitted the document into evidence, and then considered Department Counsel's objection in deciding what weight should be given to the exhibit. Having denied admission of the document, it was arbitrary and capricious for the Judge to then rely on part of it in reaching his conclusions.

The error is not harmless and no argument has been presented to sustain the decision on other grounds. The case is remanded to the Judge with instruction that he reopen the record, admit Applicant's Attachment 1 into evidence, allow Department Counsel the opportunity to submit rebuttal evidence, and allow both parties the opportunity to submit additional arguments.

### **Order**

The case is REMANDED to the Judge.

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

**Separate Opinion of Member James E. Moody**

I agree with my colleagues that the Judge should have admitted the full report from Applicant's psychiatrist, as it was relevant to an evaluation of possible mitigating conditions (*see, e.g.*, Directive ¶ E2.A8.1.3.4) as well as to an analysis of the whole person. However, after examining the record evidence as a whole, I conclude that the psychiatrist's report, even if taken into account, would not reasonably be likely to change the outcome of the case, given the extent of the misconduct alleged under Guidelines E and J. *See* ISCR 01-23362 (App. Bd. Jun. 5, 2006); ISCR Case No. 03-09915 (App. Bd. Dec. 16, 2004); ISCR Case No. 01-11192 (App. Bd. Aug. 26, 2002). Therefore I conclude that the Judge's error is harmless. I would affirm the decision.

Signed: James E. Moody

James E. Moody

Administrative Judge

Member, Appeal Board

1. *See* ISCR Case No. 01-23356 at 7-8 (App. Bd. Nov. 24, 2003)(addressing the exception that is established by Directive ¶ E3.1.20).