

DATE: December 11, 2006

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 05-11392

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

B. Daniel Lynch, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On December 19, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision--security concerns raised under Guideline H (Drug Involvement), 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 July 31, 2006, after the hearing, Administrative Judge Marc E. Curry denied Applicant's request for a security clearance. 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 H and E had not been mitigated. [\(1\)](#)

Applicant argues that the Administrative Judge should have concluded that the security concerns raised under Guidelines H and E had been mitigated, as a matter of law, because Applicant's drug use was isolated, aberrational, and not recent, and Applicant has demonstrated that he would not use drugs in the future. In support of that argument, Applicant contends the Judge engaged in a piecemeal analysis of the record and erred in his application of the whole person concept. The Board does not find Applicant's arguments persuasive.

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 lengthy and serious history of improper or illegal drug use by a 57-year-old Applicant who was familiar with the security clearance process. That history included illegal marijuana use two to three times a year from 1974 to 2002. It also included the illegal purchase of marijuana and the use of marijuana while holding a security clearance. The Directive does not define "recent," and there is no "bright-

line" definition of what constitutes "recent" conduct. ISCR Case No. 03- 02374 at 5 (App. Bd. Jan. 26, 2006). The Judge is required to evaluate the record evidence as a whole and reach a reasonable conclusion as to the recency of an applicant's conduct. ISCR Case No. 03- 02374 at 4 (App. Bd. Jan. 26, 2006). Accordingly, it was not arbitrary, capricious or unlawful for the Judge to conclude that Applicant's drug use was recent. *See generally, e.g.* ISCR Case No. 03-22912 at 2 (App. Bd. Dec. 30, 2005). The Judge considered the totality of Applicant's circumstances. 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 conditions and whole person factors. The Judge articulated a rational basis for not applying any mitigating conditions 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 under Guidelines H and E is not arbitrary, capricious or contrary to law.

Order

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

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

Signed: James E. Moody

James E. Moody

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.