

DATE: July 3, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-15474

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Sabrina E. Redd, Esq., Department Counsel

#### **FOR APPLICANT**

Raighne Delaney, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On December 4, 2003, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision--security concerns raised under Guideline E (Personal Conduct) and Guideline D (Sexual Behavior) of Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive). On October 20, 2005, the Administrative Judge granted a motion to amend the SOR. Applicant requested a hearing. On December 19, 2005, after the hearing, Administrative Judge LeRoy F. Foreman 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 the security concerns raised under Guidelines E and D had not been mitigated. [\(1\)](#)

Applicant argues that the Administrative Judge erred in not fully explaining his rationale for finding against Applicant on each allegation in the SOR and in his weighing of Applicant's mitigating evidence. Absent those errors, Applicant would have been entitled to a favorable clearance decision. Applicant has not met his burden of demonstrating the Judge erred in concluding that the Guideline D and E allegations had not been 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 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.

Regarding Guideline E, Applicant recites his interpretation of the record evidence pertaining to his attendance at and his choice to leave an alcohol abuse program, the subject of allegations 1.a and 1.b, as well as his views of the incidents involved in the remaining allegations. Applicant argues that the Administrative Judge gave little notice to his regret of his conduct which led to the sexual conduct allegations during a difficult period of his life. Applicant also argues that in not giving sufficient weight to record evidence such as the fact that his driving under the influence charge was an isolated incident or the amount of time that had elapsed since the oral reprimand for sexual misconduct in August 1999, the Judge failed to provide an analysis under the "whole person" concept. Applicant's arguments are not persuasive in this case where the Judge's decision incorporates the Judge's determination of Applicant's credibility and his reading of the record evidence.

Regarding Guideline D, Applicant again recites his interpretation of the record evidence where it differs from the Administrative Judge's. For example, Applicant contends that he was not reprimanded for committing an indecent act as the SOR states, but for putting himself in a position where there was potential for an indecent act to be perceived. Applicant's arguments are not persuasive. However, Applicant correctly points out that the decision states the last event of sexual misconduct was in 2003 but the record evidence shows the year was 2000. The error is harmless in this case, where the Judge's decision in discussing the length of time since the events alleged and during the pending security clearance process.

Applicant also contends that the Administrative Judge subordinates Guideline D to Guideline E and does not analyze allegation 2.a as a separate issue. Based on the Judge's conclusions, Applicant's argument is not persuasive. The Judge made detailed findings of fact for each SOR allegation and explained his conclusions regarding the application of mitigating conditions under Guideline E and Guideline D. The Judge's findings demonstrate that the Judge considered all the record evidence and ultimately decided that Applicant's testimony was not credible in light of that evidence. We do not find Applicant's contention that the judge subordinated Guideline D to Guideline E to be persuasive.

The Administrative Judge articulated a rational basis for not favorably applying 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 is not arbitrary, capricious or contrary to law.

### **Order**

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

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Chairman (Acting), Appeal Board

Signed: Christine M. Kopocis

Christine M. Kopocis

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 paragraphs 1.c, 1.f, and 2.c. Those favorable findings are not at issue on appeal.