Date: August 16, 2023

In the matter of:	)	
-----	)	ISCR Case No. 21-00263
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Lachlan McKinion, Esq.
Dan Meyer, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On June 28, 2021, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline E (Personal Conduct) of the National Security Adjudicative Guidelines (AG) in Appendix A of Security Executive Agent Directive 4 (effective Jun. 8, 2017) and DoD Directive 5220.6 (January 2, 1992, as amended) (Directive). Applicant requested a hearing. Prior to the hearing, the SOR was amended to include an allegation under Guideline J (Criminal Conduct). On June 9, 2023, Defense Office of Hearings and Appeals Administrative Judge Braden M. Murphy denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

The SOR, as amended, alleges under Guidelines J and E that Applicant was indicted in about August 2016 for conspiracy, bank fraud, wire fraud, money laundering, false statements, aiding and abetting and causing an act to be done, and uttering a forged instrument. He pleaded guilty in April 2017 to bank fraud and false statements and was sentenced to 12 months and one day confinement on each count, concurrent, followed by 24 months of supervised release and

ordered to pay restitution of about $337,000. In addition, the SOR alleged under Guideline E that Applicant was terminated from Federal employment in May 2017 following the foregoing arrest, and that he falsified statements made to a Government investigator in October 2019, denying that he engaged in any of the conduct to which he pleaded guilty. The Judge found against Applicant on the indictment and plea allegations, and the cross-alleged Guideline J allegations, and for Applicant on the falsification and termination allegations. In general, the Judge concluded that Applicant failed to mitigate the security concerns posed by his criminal behavior and personal conduct issues related to his indictment and conviction in Federal district court.

On appeal, Applicant's counsel asserts that the Judge failed to consider all of the evidence, failed to properly apply the mitigating conditions and whole person factors, and made factual errors resulting in harmful error.

Applicant is in his mid-50s and holds bachelor's and master's degrees. In about 2011, Applicant started a nonprofit organization, a basketball program for about 20 or 30 underprivileged youths. He currently works in the defense industry for a company supporting Government contracts. He was previously employed by another government agency until May 2017, which was soon after his Federal felony indictment, arrest, and guilty plea to bank fraud and false statements. Remaining counts of conspiracy, wire fraud, money laundering, and uttering a forged instrument were dismissed. The Judge found that Applicant was friends with a woman whose son was in Applicant's basketball program. Applicant's friend was facing foreclosure for a property she owned. In October 2013, Applicant created and filed fabricated certificates of satisfaction with the city Recorder of Deeds for two liens on the woman's property. She then sold the home and received about $337,000 in proceeds that should have been paid to the lender to satisfy the property's two outstanding mortgages. After the sale, the woman split the proceeds with Applicant, ostensibly as a loan which he deposited into his bank account. Applicant allegedly failed to disclose the loan or gift on his Government financial disclosure form, and when he was interviewed by Federal law enforcement authorities, denied preparing, filing, or knowing about the false certificates of satisfaction, or defrauding the mortgage lender.

Upon advice of counsel, Applicant pleaded guilty to one count each of Federal bank fraud and false statements and was sentenced in July 2017 to confinement, followed by supervised probation, a forfeiture money judgment, and an order to pay restitution of about $337,000. At the hearing, Applicant asserted that although he pleaded guilty on the advice and urging of his attorney, he initially intended to proceed to trial and expected to be found not guilty. However, he also acknowledged his guilt before the Federal District Court judge by admitting that he was pleading guilty knowingly and voluntarily and accepted full responsibility for what he did with an understanding of the possible punitive consequences. Decision (Dec.) at 6. Prior to his appearance before the Federal judge, he received a copy of the indictment, a "Statement of Offense," and letter from the U.S. Attorney's Office detailing the terms of the plea agreement. He acknowledged

stipulating to the Statement of Offense and signed it under penalty of perjury. *Id*. at 5. The Statement of Offense includes an admission that he filed false certificates of satisfaction with the city Recorder of Deeds. It also states he "caused the creation" of the two "phony" certificates and he acknowledged that his friend received proceeds from the sale that should have gone to the bank. He acknowledged that the $50,000 loan he received from his friend was part of those proceeds and the $170,000 he received. *Id*. at 6. Applicant claimed in the hearing that, of the $170,000 in proceeds he received from the sale, $120,000 went to the basketball program for travel expenses, and he used $35,000 "for himself ('for what I wanted')." *Id*. at 7.

At his hearing and during an interview with a Government security investigator, Applicant denied responsibility for the conduct despite his guilty pleas and admissions to the conduct in writing and in Federal court. The Judge found that Applicant engaged in the scheme to defraud his friend's mortgage lender and took the proceeds that should have been paid to the bank. The Judge found that Applicant's conduct, including the element of dishonesty, and poor judgment were sufficient to implicate AG ¶¶ 15, 16(e), (g), and 31(b). He noted that "Applicant has had (and continues to have) difficulty accepting full responsibility and acknowledging that he committed any crimes, either generally or specifically," but that "he also did not intend to give false information in his interview." *Id*. at 12. The Judge also held that:

> However, this was not a single act of poor judgment or lack of impulse control. This was a scheme, one that required planning and malice aforethought, and several steps to accomplish it. At each one of those steps, Applicant could have pulled back and decided not to proceed. He did not do that.
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> . . . .
>
> Further, the mitigating effect of the age of the conduct is undercut by Applicant's continued insistence that he didn't do it and that he would have been found not guilty at trial. He pleaded guilty to the two charges and did so with considered advice from legal counsel. He professed to be surprised that he went to jail at all – when he received less than the recommended term of 24 to 30 months. He claims not to have been involved either with the creation of the phony certificates of satisfaction or with filing them with the city, contrary to the specifics of the Statement of Offense, which he acknowledged, accepted voluntarily, and signed. He asserted that the basketball team got $120,000 of the money he received, when the evidence says he deposited it into his own back account. These assertions undercut his acceptance of responsibility for his actions. They undercut a showing that he is fully rehabilitated. And they undercut his credibility since he professes innocence that I simply do not believe. . . . I also conclude that he has never accepted full, unequivocal, unconditional responsibility for what he did – and for

what he pled guilty to. This lack of acceptance of responsibility significantly undercuts any claim of rehabilitation, even ten years on. [*Id*. at 13-14.]

On appeal, Applicant's counsel claims the Judge committed harmful error as the decision is factually incorrect in parts; the Judge did not consider all available evidence; did not properly apply the mitigating conditions under Guideline E; and failed to apply the whole-person factors, thus rendering the decision arbitrary, capricious, and contrary to law.

In particular, counsel asserts that facts cited in the Judge's decision are inaccurate and not supported by evidence, including:

(1) Applicant was never charged with money laundering. Appeal Brief at 14; Dec. at 4.

(2) There is no evidence to support the Judge's finding that "Applicant used $35,000 for himself ('for what I wanted')." Appeal Brief at 14; Dec. at 7.

(3) Applicant never started a nonprofit organization despite the Judge's finding that "[i]n about 2011, Applicant started a nonprofit organization (NPO), a basketball program for about 20 or 30 underprivileged youths." Appeal Brief at 14-15; Dec. at 4.

(4) Applicant took responsibility for his actions despite the Judge's finding that, "I also conclude that he has never accepted full, unequivocal, unconditional responsibility for what he did – and what he pled guilty to." Appeal Brief at 15; Dec. at 14.

These assertions of factual errors are specious, and in themselves contradicted by the record. First, allegations involving money laundering are found throughout the record, including in the SOR, Federal Bureau of Investigation (FBI) case file report, and the personal subject interview that Applicant adopted and certified as accurate. The Grand Jury Indictment uses the term "monetary transactions" and cites to 18 U.S.C. ¶ 1957 in two of the six counts alleged. This statute is described by the U.S. Department of Justice as one of the Federal statutes "proscribing money laundering" enacted with the "passage of the Money Laundering Control Act, codified at 18 U.S.C. ¶¶ 1956 and 1957."[1]

Next, the Judge's finding that Applicant used $35,000 for himself is found in Applicant's testimony:

So, like I said, [$]120,000 of it went to the nonprofit organization. [$]50,000 of it initially I had planned to use, but I ended up using [$]35,000 **for what I wanted**

[1] United States Department of Justice, Justice Manual 9-105-000 – Money Laundering, https://www.justice.gov/jm/jm-9-105000-money-laundering (2023).

> because I gave her, you know, half of the check like $15,000, and the FBI knew that. [Tr. at 53, emphasis added].

With respect to counsel's claims that Applicant never started a non-profit organization, the hearing transcript shows the following:

> Department Counsel: You started [the B . . . Basketball Program] in 2011, is that correct?
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> Applicant: That's correct.
>
> Department Counsel: And why did you start the program?
>
> Applicant: There was a need. I had coached AAU basketball before and the kids in those communities were kind of left out because of the pricing. And I just wanted to add an academic piece to it and give the kids an opportunity to play and be seen on a national level and get the opportunity to get scholarships and go to college. [Tr. at 72-73.]

To the extent that counsel is challenging whether Applicant started a "non-profit organization" or the "basketball program" within the existing non-profit organization, we find that distinction constitutes no meaningful difference and, at most, is harmless error.

Finally, counsel takes issue with the Judge's conclusion that Applicant did not accept "full, unequivocal, unconditional responsibility for what he did – and what he pled guilty to," which counsel argues is not supported by the record. Applicant consistently obfuscated his position with respect to his responsibility for the crimes charged; he accepted full responsibility for certain crimes in the plea agreement and allocution statement to the Federal District Court Judge during sentencing, yet he denied that responsibility during his security clearance hearing. During cross examination, Applicant admitted that he signed the Statement of Offense under penalty of perjury, and that it was true and correct.

> Applicant: I, you know, did what I was advised to do.
>
> Department Counsel: Okay. But you maintain your innocence today?
>
> Applicant: I mean, like I said, I have to go with, you know, that right there. So, that – me maintaining my innocence, that's the Catch-22 that I find myself in, right? So, to maintain my innocence would go against the very thing that have me sitting right here right now, right? So, had I come into the investigation and said, okay,

> Statement of Offense – I'm not even sure, you know, what it says. I would have to go through and read it, dah-dah-dah-dah-dah, okay, yeah, yeah, yeah, that's it. I signed it. Okay. I accept responsibility that I signed it. [Tr. at 91.]

In contravention to his pleas in Federal court, Applicant claimed throughout the hearing that he signed the plea agreement under duress, at the urging of his attorney, or with the hope that he would receive a lenient sentence. Tr. at 91, 110, 113, 114-120. Applicant also wrongly claimed to a Government security investigator that he "insisted that he was not guilty of the charges and requested to go to trial to defend himself." GE 2 at 6. The record clearly shows that Applicant failed to take "full, unequivocal, unconditional responsibility" for his crimes at the hearing and throughout his security investigation processing, despite his inconsistent plea and admissions before a Federal District Court Judge. The Appeal Board is required to give deference to a judge's credibility determinations. Directive ¶ E3.1.32.1. We find no reason not to give such deference in this case. Furthermore, we conclude that the Judge's material findings of security concern are based upon substantial evidence or constitute reasonable conclusions that could be drawn from the evidence. *See, e.g.*, ISCR Case No. 17-03191at 2-3 (App. Bd. Mar. 26, 2019).

The Board has long held that the doctrine of collateral estoppel applies in these proceedings and precludes applicants from contending they did not engage in the criminal acts for which they were convicted. By claiming he did not commit the charges of which he was convicted and by raising theories of coercion and duress that constitute legal defenses to the criminal charges, Applicant is seeking to relitigate his felony conviction. The Board applies the doctrine of collateral estoppel and finds no merit in this assignment of error. *See, e.g.*, ISCR Case No. 19-01699 at 7 (App. Bd. Aug. 25, 2022).

Applicant's remaining contentions that the Judge failed to consider all available evidence, did not properly apply the mitigating conditions under Guideline E, and failed to apply the whole-person factors are not supported by the record and we find no merit in these assertions. The Judge found against Applicant on the factually uncontroverted indictment and guilty plea under both guidelines after discussing the relevant security concerns and mitigating conditions, and in consideration of the nine whole-person factors. The decision is consistent with a complete and thorough evaluation of the evidence, mitigating conditions, and whole-person factors. None of Applicant's arguments are enough to rebut the presumption that the Judge considered all of the record evidence or to demonstrate the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. Moreover, the Judge complied with the requirements of the Directive in his whole-person analysis by considering all evidence of record in reaching his decision. *See, e.g.*, ISCR Case No. 21-01365 at 4 (App. Bd. Feb. 17, 2023). To the extent that Counsel re-argues the case in his brief, the Appeal Board does not review cases *de novo*. *See, e.g.*, ISCR Case No. 22-01187 at 2 (App. Bd. Feb. 13, 2023).

Applicant failed to establish that the Judge committed any harmful error. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The decision is sustainable on the record. "The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). *See also*, AG ¶ 2(b): "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

Order

The decision is **AFFIRMED**.

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Chair, Appeal Board

Signed: Gregg A. Cervi
Gregg A. Cervi
Administrative Judge
Member, Appeal Board

Signed: Allison Marie
Allison Marie
Administrative Judge
Member, Appeal Board