

DATE: December 31, 2002

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-12214

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

**FOR APPLICANT**

*Pro Se*

Administrative Judge Burt Smith issued a decision dated June 20, 2002, in which he concluded that it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed.

The Board has jurisdiction on appeal under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

Applicant's appeal presents the following issues: 1. Did the Administrative Judge err in his findings of fact; and 2. Did the Administrative Judge err by not finding that Applicant mitigated the act of embezzlement from his employer. For the reasons that follow, the Board affirms the Administrative Judge's adverse security clearance decision.

**Procedural History**

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, dated January 7, 2002. The SOR was based of Guideline F (Financial Considerations) Guideline E (Personal Conduct) and Guideline J (Criminal Conduct). Applicant requested a hearing which was held on April 30, 2002. Subsequently the Administrative Judge issued an unfavorable decision. The case is before the Board on Applicant's appeal from that decision.

**Scope of Review**

On appeal, the Board does not review a case *de novo*. Rather, the Board addresses the material issues raised by the parties to determine whether there is factual or legal error. There is no presumption of error below, and the appealing party must raise claims of error with specificity and identify how the Administrative Judge committed factual or legal error. See Directive, Additional Procedural Guidance, Item E3.1.32. See, e.g., ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (discussing reasons why party must raise claims of error with specificity).

When an Administrative Judge's factual findings are challenged, the Board must determine whether "[t]he Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge." Directive, Additional Procedural

Guidance, Item E3.1.32.1. The Board must consider not only whether there is record evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings. *See, e.g.,* ISCR Case No. 99-0205 (October 19, 2000) at p. 2.

When a challenge to an Administrative Judge's rulings or conclusions raises a question of law, the Board's scope of review is plenary. *See* DISCR Case No. 87-2107 (September 29, 1992) at pp. 4-5 (citing federal cases).

### Appeal Issues<sup>(1)</sup>

1. Did the Administrative Judge err in his findings of fact? Applicant does not dispute the Administrative Judge's findings that Applicant was addicted to gambling and that he embezzled more than \$49,000 from his employer from November 1997 until January 1999. Applicant challenges the Judge's findings that Applicant only confessed to the embezzlement when he was caught and that his involvement with Gambler's Anonymous was a result of his being caught. Applicant asserts that the evidence shows that he joined Gambler's Anonymous and then voluntarily confessed to the embezzlement before he was caught by his employer. Applicant argues that the timing of these events was critical to a determination of the extent of his reform. The Administrative Judge's challenged findings of fact represent a sustainable reading of the record evidence. Applicant's ability to present an alternative interpretation of the record is not sufficient to demonstrate that the Judge erred.

2. Did the Administrative Judge err by not finding that Applicant mitigated the act of embezzlement from his employer? Applicant makes several arguments in support of his claim that he mitigated the act of embezzling funds from his employer. Applicant argues that (a) he has been successfully rehabilitated; (b) he has overcome his gambling addiction and is no longer subject to pressure; and (c) his period of recovery exceeds those found in other case histories in which DOHA has granted security clearances.

Applicant argues that he has been successfully rehabilitated. In support of this argument, he cites his history of holding increasingly responsible positions (including at the Pentagon on September 11, 2001), his long work history, his holding positions of trust, and his success with Gambler's Anonymous. Applicant argues that his situation is covered by Criminal Conduct Mitigating Condition E2.A10.1.3.6.<sup>(2)</sup> Applicant's arguments are unpersuasive. Applicant's ability to cite to evidence from the record in his favor is not enough to demonstrate that the Administrative Judge erred. The Judge must consider the record evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. The Board will not disturb a Judge's weighing of the evidence unless there is a showing the Judge acted in a manner that is arbitrary, capricious, or contrary to law. The Administrative Judge explicitly considered the cited Criminal Conduct Mitigating Condition, however, he did not find it dispositive in this case. Considering the record as a whole, the Board is not persuaded that the Administrative Judge erred in his analysis of Applicant's rehabilitation.

Applicant argues that he has overcome his gambling addiction and is therefore not subject to pressure to commit additional acts of embezzlement because of it. He argues that Criminal Conduct Mitigating Condition E2.A.10.1.3.3.<sup>(3)</sup> should have been applied by the Judge. Applicant's argument is unpersuasive. While the Administrative Judge found for Applicant with regard to his gambling, this favorable finding did not mandate a finding that the acts of embezzlement were also mitigated. The Judge concluded that the gambling was a separate matter from the calculated act of embezzlement. This conclusion was reasonably supported by the record evidence. Applicant has not demonstrated that the Administrative Judge erred on this matter.

Applicant cites several DOHA cases, and argues that his period of recovery and rehabilitation exceeds that of other individuals granted clearances. Although decisions by Hearing Office Judges may be cited as persuasive authority, they are not binding on other Hearing Office Judges in other cases nor are they binding on the Appeal Board. Furthermore many of the cases cited by Applicant are factually distinguishable from Applicant's case. Applicant's reliance on decisions in other DOHA cases fails to demonstrate the Judge's decision in arbitrary, capricious, or contrary to law.

### Conclusions

Applicant has failed to demonstrate the Administrative Judge erred. Therefore, the decision below is affirmed.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

1. The Administrative Judge's favorable findings under SOR paragraphs 1, 2, and 3.b. are not at issue on appeal.
2. "There is clear evidence of successful rehabilitation."
3. "The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life."