

DATE: May 20, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-07245

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

John D. Morgan, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated February 20, 2004, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline F (Financial Considerations), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct). Administrative Judge Robert Robinson Gales issued an unfavorable security clearance decision, dated December 29, 2004.

Applicant appealed the Administrative Judge's unfavorable decision. The Board has jurisdiction under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

The following issues have been raised on appeal: (1) whether the Administrative Judge demonstrated bias against Applicant; (2) whether the Administrative Judge failed to discuss or consider relevant aspects of the case; and (3) whether certain findings of fact and conclusions by the Administrative Judge are erroneous. For the reasons that follow, the Board affirms the Administrative Judge's 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. Directive, Additional Procedural Guidance, Item E3.1.32. *See also* ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (discussing reasons why party must raise claims of error with specificity).

When the rulings or conclusions of an Administrative Judge are challenged, the Board must consider whether they are: (1) arbitrary or capricious; or (2) contrary to law. Directive, Additional Procedural Guidance, Item E3.1.32.3. In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to

a mere difference of opinion. *See, e.g.*, ISCR Case No. 97-0435 (July 14, 1998) at p. 3 (citing Supreme Court decision). In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. Compliance with state or local law is not required because security clearance adjudications are conducted by the Department of Defense pursuant to federal law. *See* U.S. Constitution, Article VI, clause 2 (Supremacy Clause). *See, e.g.*, ISCR Case No. 00-0423 (June 8, 2001) at p. 3 (citing Supreme Court decisions).

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 the same record. 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, and whether the Judge's findings reflect a reasonable interpretation of the record evidence as a whole. Although a Judge's credibility determination is not immune from review, the party challenging a Judge's credibility determination has a heavy burden on appeal.

When an appeal issue 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).

If an appealing party demonstrates factual or legal error, then the Board must consider the following questions:

Is the error harmful or harmless? *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine);

Has the nonappealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds? *See, e.g.*, ISCR Case No. 99-0454 (October 17, 2000) at p. 6 (citing federal cases); and

If the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded? (Directive, Additional Procedural Guidance, Items E3.1.33.2 and E3.1.33.3).

Appeal Issues

1. Whether the Administrative Judge demonstrated bias against Applicant. Applicant contends the Administrative Judge demonstrated bias by making an erroneous finding about Applicant's job performance, and by erroneously finding Applicant's misconduct occurred over a period of nine months. This claim of error is unpersuasive.

First, Applicant bases his claim of bias, in part, on a proffer of new evidence on appeal. The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. Apart from the prohibition against new evidence on appeal, Applicant cannot fairly claim the Judge made an erroneous finding about Applicant's job performance based on a proffer of evidence that was not before the Judge.

Second, there is a rebuttable presumption that an Administrative Judge is fair and impartial, and a party seeking to rebut that presumption has a heavy burden of persuasion on appeal. ⁽¹⁾ Bias involves partiality for or against a party, predisposition to decide a case or issue without regard to the merits, or other indicia of a lack of impartiality. ⁽²⁾ Bias is not demonstrated merely because a Judge found against the appealing party. ⁽³⁾ Moreover, bias is not demonstrated merely because a party can demonstrate a Judge committed a factual or legal error. ⁽⁴⁾ The standard is not whether a party personally believes a Judge was biased or prejudiced against that party, but rather whether the record of the proceedings below contains any indication that the Judge acted in a manner that would lead a reasonable, disinterested person to question the fairness and impartiality of the Judge. ⁽⁵⁾ Accordingly, Applicant's claims of factual error by the Judge do not raise any colorable claim of bias.

2. Whether the Administrative Judge failed to discuss or consider relevant aspects of the case. Applicant contends the Administrative Judge erred by failing to discuss or consider relevant aspects of the case such as: (a) Applicant's

unrebutted testimony that he has never encountered an experience like the one that he went through in connection with the investment scam; (b) the record evidence showing Applicant has successfully rehabilitated himself; and (c) other record evidence favorable to Applicant.

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. ⁽⁶⁾ A Judge has broad latitude and discretion in writing a security clearance decision, ⁽⁷⁾ and there is no legal requirement that a Judge specifically discuss and mention each and every piece of record evidence when making a decision. ⁽⁸⁾ Applicant's ability to argue for an interpretation of the record evidence favorable to him is not sufficient to rebut or overcome the presumption that the Judge considered all the record evidence. Viewing the Judge's decision in its entirety, the Board concludes it reflects a reasonable consideration of the record evidence as a whole.

3. Whether certain findings of fact and conclusions by the Administrative Judge are erroneous. The Administrative Judge found the following: Applicant was a victim of an investment scam that resulted in him eventually paying in excess of \$250,000 to the people running the scam. In an effort to generate cash needed to pursue the supposed investment, Applicant depleted his financial assets, borrowed more than \$120,000 from friends, cashed in insurance policies, refinanced his home, wrote checks on accounts with insufficient funds, kited checks, forged his wife's name on checks written against her account, and embezzled \$3,800 (nearly all the funds) from a nonprofit civic organization for which he was the interim treasurer. Applicant was later charged with second degree theft. As the result of a negotiated plea agreement, the charge was reduced to third degree theft. In October 2002, Applicant was convicted of the reduced charge, sentenced to 365 days in jail (suspended), fined \$5,000 (suspended), placed on unsupervised probation for one year, and the sentence was deferred for one year. In October 2003, a court ordered the finding of guilt to be withdrawn and the case dismissed with prejudice. ⁽⁹⁾

Applicant does not challenge most of the Administrative Judge's findings of fact concerning Applicant's victimization by the investment scam and Applicant's actions to generate funds to pursue the supposed investment. However, Applicant does contend that: (a) the Judge erred by finding that Applicant's misconduct occurred over a nine-month period instead of a four-week period; (b) the Judge erred by concluding Applicant committed a serious offense; (c) the Judge should have concluded Applicant's conduct was mitigated under Criminal Conduct Mitigating Conditions 2, 3, 4, and 6; (d) the Judge failed to take into account state community property laws and erroneously concluded Applicant "sunder[ed] fiduciary relationships with his wife"; and (e) the Judge did not evaluate the facts and circumstances of Applicant's conduct under the general factors of Directive, Adjudicative Guidelines, Item E2.2.1 and the whole person concept.

(a) Contrary to Applicant's assertion, the Administrative Judge did not find that Applicant's misconduct occurred over a nine-month period. The Judge specifically stated that "Applicant's overall actions occurred during a period of approximately nine months, and his illegal actions-- constituting a pattern--involved several different incidents over a shorter period" (Decision at p. 8).

(b) Applicant places too much reliance on the record evidence concerning the actions of a state prosecutor and a state court in handling Applicant's criminal case. That evidence was part of the record that the Administrative Judge had to consider in evaluating Applicant's security clearance case. However, that evidence did not compel the Judge to conclude that Applicant's misconduct was not serious for purposes of evaluating his security eligibility. The actions of a state prosecutor and a state court concerning how to handle a criminal matter within their jurisdiction and authority do not bind a DOHA Judge in the exercise of his or her authority to adjudicate an applicant's security eligibility under applicable federal law. Furthermore, the reasons why a state prosecutor and a state court decide to handle a criminal matter within their jurisdiction and authority in a particular manner are logically, legally, and practically based on various considerations having little or no relevance to a security clearance adjudication. Considering the record evidence as a whole, the Judge had a rational basis for characterizing Applicant's misconduct as a serious offense.

(c) The Board does not find persuasive Applicant's claims that the Administrative Judge should have applied Criminal Conduct Mitigating Condition 2, ⁽¹⁰⁾ Criminal Conduct Mitigating Condition 3, ⁽¹¹⁾ Criminal Conduct Mitigating Condition 4, ⁽¹²⁾ and Criminal Conduct Mitigating Condition 6. ⁽¹³⁾ Given the record evidence in this case, the Judge

properly concluded Applicant engaged in multiple acts of misconduct that involved "several different incidents and victims" (Decision at p. 9), not just an isolated incident of misconduct. Therefore, Applicant's contention concerning Criminal Conduct Mitigating Condition 2 lacks merit. As to Criminal Conduct Mitigating Conditions 3, 4, and 6, Applicant argues for an alternate interpretation of the record evidence, but fails to show that the Judge's analysis of Applicant's conduct was arbitrary or capricious. The Judge's adverse conclusions about Applicant's criminal conduct reflect a plausible, legally permissible interpretation of the record evidence as a whole. Given the record evidence in this case, the Judge was not compelled--logically or legally--to conclude that Applicant had presented sufficient evidence to warrant the application of Criminal Conduct Mitigating Conditions 3, 4 or 6. [\(14\)](#)

(d) The Administrative Judge referred to Applicant's "sundering of his fiduciary relationships with his wife and the civic organization [from which he embezzled \$3,800]" (Decision at p. 9). Applicant does not claim he did not violate his fiduciary duty to the civic organization, but he does take strong exception to the Judge's statement that he violated his fiduciary relationship with his wife. Given the record evidence that Applicant signed his wife's name on some checks written against her account without her knowledge or permission, the Judge had a reasonable basis for concluding that Applicant "crossed the line" (Decision at p. 7) and demonstrated "questionable judgment, untrustworthiness, [and] unreliability" (Decision at p. 9). The Board need not decide whether, under state law concerning community property, Applicant had a right to the money in his wife's account. Even if the Board were to assume--solely for purposes of deciding this appeal-- that Applicant's argument has sufficient merit to warrant a conclusion that the Judge erred by finding Applicant breached a fiduciary duty to his wife, such an error would be harmless in light of the Judge's sustainable findings and conclusions about Applicant's overall misconduct. [\(15\)](#)

(e) The Board is not persuaded by Applicant's contention that the Administrative Judge's decision fails to reflect a consideration of the facts and circumstances of Applicant's conduct under the general factors sets forth in Directive, Adjudicative Guidelines, Item E2.2.1. Applicant's contention is predicated on a strong disagreement with the Judge's weighing of the record evidence and the adverse conclusions the Judge reached, but fails to show how the Judge weighed the record evidence in an arbitrary or capricious manner, fails to identify how the Judge's analysis is arbitrary or capricious, and does not demonstrate that the Judge's analysis is inconsistent with the whole person concept embodied by Directive, Adjudicative Guidelines, Item E2.2.1.

Conclusion

The Board affirms the Administrative Judge's decision because--with one possible exception that would constitute harmless error--Applicant has failed to identify error below.

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: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. *See, e.g.*, ISCR Case No. 99-0710 (March 19, 2001) at p. 5.
2. *See, e.g.*, *Black's Law Dictionary, 6th edition* (West Publishing, 1990) at p. 162 ("Bias").
3. *See, e.g.*, ISCR Case No. 99-0462 (May 25, 2000) at p. 3. As a practical matter, no security clearance decision could ever be upheld on appeal in the face of a claim of bias if the mere fact that an Administrative Judge ruled against the appealing party were to be deemed sufficient to demonstrate bias. Although a party is entitled to receive an adjudication by a fair and impartial Judge, a party is not entitled to expect that a Judge will rule only in the party's favor. Standing alone, an adverse finding, ruling or decision does not prove that a Judge exhibits partiality for or against one of the parties, shows a predisposition to decide an issue or case without regard to the merits, or otherwise demonstrates a lack of impartiality.
4. *See, e.g.*, ISCR Case No. 98-0515 (March 23, 1999) at p. 5. The law recognizes many forms of factual and legal error that are unrelated to any colorable claim of bias. A trier of fact-- whether a judge or a juror--can be fair and impartial and still make a mistake.
5. *See, e.g.*, ISCR Case No. 01-04713 (March 27, 2003) at p. 3.
6. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2.
7. *See, e.g.*, ISCR Case No. 99-0809 (August 19, 1999) at p. 2.
8. *See, e.g.*, ISCR Case No. 02-22657 (October 8, 2004) at p. 4.
9. Because the Administrative Judge entered formal findings in favor of Applicant with respect to Guideline F (Financial Considerations), and because those formal findings are not at issue on appeal, the Board need not review or discuss the Judge's findings of fact concerning the SOR paragraphs under Guideline F.
10. "The crime was an isolated incident" (Directive, Adjudicative Guidelines, Item E2.A10.1.3.2).
11. "The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life" (Directive, Adjudicative Guidelines, Item E2.A10.1.3.3).
12. "The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur" (Directive, Adjudicative Guidelines, Item E2.A10.1.3.4).
13. "There is clear evidence of successful rehabilitation" (Directive, Adjudicative Guidelines, Item E2.A10.1.3.6).
14. *See, e.g.*, ISCR Case No. 02-22163 (March 12, 2004) at p. 6 ("The application of Adjudicative Guidelines for or against clearance is not reducible to a simple formula and requires the Judge to exercise sound judgment, within the parameters of the Directive, after consideration of the record evidence as a whole.").
15. *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine).