

DATE: June 15, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-15336

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated March 18, 2004, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline J (Criminal Conduct), Guideline E (Personal Conduct), Guideline M (Misuse of Information Technology Systems) and Guideline F (Financial Considerations). Administrative Judge LeRoy F. Foreman issued an unfavorable security clearance decision, dated January 27, 2005.

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 failed to consider the record evidence as a whole; (2) whether certain findings by the Administrative Judge are not supported by the record evidence; and (3) whether the Administrative Judge erred by not concluding Applicant's past conduct was mitigated. 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 [\(1\)](#)

1. Whether the Administrative Judge failed to consider the record evidence as a whole. Applicant contends the Administrative Judge: (a) failed to consider the totality of the record evidence; (b) "blatantly neglects the totality of the record evidence"; (c) failed to consider the facts of the case; (d) was "myopic to the record evidence"; and (e) ignored Applicant's explanations for his conduct. The Board construes these statements as raising the issue of whether the Judge failed to consider the record evidence as a whole.

There is a rebuttable presumption that an Administrative Judge considered all the record evidence unless the Judge specifically states otherwise. *See, e.g.*, ISCR Case No. 99-9020 (June 4, 2001) at p. 2. Applicant's strong disagreements with the Judge's findings and conclusions are not sufficient to rebut or overcome that presumption. Merely because the Judge did not give certain record evidence the weight that Applicant would have liked the Judge to give it, it does not follow that the Judge simply ignored the evidence or failed to consider it. Moreover, Applicant's explanations for his conduct were not conclusive or binding on the Judge. As the trier of fact, the Judge had to consider Applicant's explanations in light of his assessment of the credibility of Applicant's hearing testimony and the record evidence as a whole. Just because the Judge did not accept Applicant's explanations at face value, it does not follow that the Judge simply ignored them.

2. Whether certain findings by the Administrative Judge are not supported by the record evidence. The Administrative Judge found that Applicant: (a) illegally transferred \$40,000 from the account of a deceased mutual fund owner to his own bank account; and (b) falsified a security clearance application in July 2001 by failing to disclose that he had been terminated from the investment company where he had committed the illegal transfer. On appeal, Applicant asserts the Judge erred by finding: (i) Applicant's credit card debt was a possible motive for the \$40,000 theft; (ii) he is profoundly embarrassed by the theft of the \$40,000; (iii) he tends to minimize and rationalize unfavorable information; and (iv) he

falsified the security clearance application.

The record evidence amply supports the Administrative Judge's finding that Applicant intentionally committed the illegal transfer of \$40,000 from the account of a deceased mutual fund owner. As noted earlier in this decision, the Judge was not compelled to accept Applicant's explanation for his actions. Considering the record as a whole, and giving due deference to the Judge's credibility determination, ⁽²⁾ it was not arbitrary or capricious for the Judge to decide to not accept Applicant's explanations for why he made the illegal fund transfer, and to express doubts about Applicant's motivation for returning the money at a later date. ⁽³⁾

Applicant's second claim of error lacks merit. There is record evidence that would support a finding that Applicant expressed embarrassment over the \$40,000 theft. *See* Government Exhibit 2 at p. 6. Moreover, when making a finding about Applicant's attitude about the \$40,000 theft, the Administrative Judge relied on his assessment of Applicant's hearing testimony about the theft (Decision at p. 6). Given Applicant's testimony characterizing the \$40,000 theft (Hearing Transcript at p. 29), the Judge could conclude Applicant expressed embarrassment over the theft. Applicant's arguments concerning the distinction between "embarrassment" and "remorse" do not demonstrate any error by the Judge, and do not warrant further discussion.

Given the record evidence in this case, and giving due deference to the Administrative Judge's ability to assess Applicant's demeanor when he testified, the Board concludes Applicant has failed to demonstrate the Judge erred by finding Applicant tends to minimize and rationalize unfavorable information. That finding reflects a reasonable interpretation of the record evidence as a whole.

Considering the record evidence as a whole, the Administrative Judge's finding that Applicant falsified a security clearance application in July 2001 is sustainable. Applicant's appeal argument to the contrary is wholly unpersuasive.

3. Whether the Administrative Judge erred by not concluding Applicant's past conduct was mitigated. Applicant also contends the Administrative Judge erred by not concluding that his conduct was extenuated or mitigated under: (a) Personal Conduct Mitigating Conditions 2 and 3; (b) Financial Considerations Mitigating Conditions 1, 2, and 6; (c) Criminal Conduct Mitigating Conditions 1, 2, 5, and 6; (d) Misuse of Information Technology Systems Mitigating Conditions 1, 4, and 5; and (e) application of the whole person concept to the record evidence as a whole. For the reasons that follow, Applicant's claims do not demonstrate the Judge erred.

(a) Personal Conduct Mitigating Conditions. Given the record evidence in this case, Applicant's disclosures to an investigator in May 2003 do not qualify for application of Personal Conduct Mitigating Condition 2. ⁽⁴⁾ *See* ISCR Case No. 99-0557 (July 10, 2000) at p. 4 and ISCR Case No. 97-0289 (January 22, 1998) at p. 3 (explaining why Personal Conduct Mitigating Condition 3, not Personal Conduct Mitigating Condition 2, applies to cases involving a claim that a falsification was later corrected). Moreover, given the record evidence in this case, it was not arbitrary or capricious for the Judge to conclude that the facts and circumstances of Applicant's disclosures to an investigator in May 2003 did not warrant application of Personal Conduct Mitigating Condition 3. ⁽⁵⁾

(b) Financial Considerations Mitigating Conditions. The Administrative Judge concluded that Applicant's illegal transfer of \$40,000 from the account of a deceased mutual fund owner to his own bank account fell under Financial Considerations Disqualifying Condition 2 ⁽⁶⁾ and warranted an adverse formal finding under Guideline F. The Judge's conclusion concerning the applicability of that disqualifying condition was not arbitrary or capricious.

The Administrative Judge referred to the possible applicability of Financial Considerations Mitigating Condition 1 ⁽⁷⁾ and Financial Considerations Mitigating Condition 2 ⁽⁸⁾ (Decision at p. 5). Although the Judge did not explicitly state that he concluded that neither of those mitigating conditions was applicable to Applicant's case, the Judge did explain why he concluded Applicant's illegal transfer was not mitigated by the passage of time and why he concluded it was not an isolated incident (Decision at p. 6). Applicant has not shown the Judge's reasoning to be arbitrary, capricious, or contrary to law.

(c) Criminal Conduct Mitigating Conditions. The Administrative Judge referred to the possible applicability of Criminal

Conduct Mitigating Condition 1, [\(9\)](#) Criminal Conduct Mitigating Condition 2, [\(10\)](#) and Criminal Conduct Mitigating Condition 6 [\(11\)](#) (Decision at p. 5). The Judge explained why he concluded Applicant's theft was not an isolated incident, why he concluded it was not mitigated by the passage of time, and why he concluded Applicant had not demonstrated clear evidence of rehabilitation (Decision at p. 6). Although Applicant strongly disagrees with the Judge's analysis, Applicant has not demonstrated that the Judge's explanations are arbitrary or capricious in light of the record evidence in this case. [\(12\)](#)

The Administrative Judge did not cite or discuss Criminal Conduct Mitigating Condition 5. [\(13\)](#) Given the record evidence in this case, the Judge was not required to cite or discuss that mitigating condition. Although a Judge must apply pertinent provisions of the Directive, [\(14\)](#) a Judge cannot be expected to apply an Adjudicative Guidelines mitigating condition when there is no record evidence supporting its application. Applicant was not acquitted of the criminal charge. Accordingly, it is frivolous for Applicant to assert the Judge should have applied this mitigating condition.

(d) Misuse of Information Technology Systems Mitigating Conditions. The Administrative Judge referred to the possible applicability of Misuse of Information Technology Systems Mitigating Condition 1 [\(15\)](#) and Misuse of Information Technology Systems Mitigating Condition 4 [\(16\)](#) (Decision at p. 5). The Judge concluded Applicant's theft (which involved misuse of a company computer) was serious and not an isolated incident (Decision at p. 6). Given the record evidence in this case, the Judge's conclusions are not arbitrary or capricious. Based on those conclusions, the Judge was not required to apply Misuse of Information Technology Systems Mitigating Conditions 1 and 4. Applicant's contention to the contrary is not persuasive.

(e) Whole person concept. Applicant also contends the Administrative Judge should have concluded his past misconduct was extenuated or mitigated under application of the whole person concept.

A review of the decision below persuades the Board that the Administrative Judge evaluated the facts and circumstances of Applicant's conduct in terms of the general factors set forth in Directive, Section 6.3 and Adjudicative Guidelines, Item E2.2.1. Applicant strongly disagrees with the Judge's analysis, but fails to show that the Judge acted in a manner that is arbitrary or capricious, or contrary to the pertinent language of the Directive when evaluating Applicant's conduct.

Finally, Applicant refers to the absence of any evidence that he has ever violated security. The federal government does not have to wait until an Applicant commits a security violation before it can deny or revoke access to classified information. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). The Administrative Judge's findings and conclusions about Applicant's \$40,000 theft and falsification of a security clearance application provide a rational basis -- consistent with the whole person concept -- for the Judge's adverse conclusions about Applicant's security eligibility.

Conclusion

The Board affirms the Administrative Judge's security clearance decision because Applicant has failed to demonstrate error below.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. The Administrative Judge entered formal findings in favor of Applicant with respect to SOR paragraphs 2.b and 2.c. Those favorable formal findings are not at issue on appeal.
2. *See* Directive, Additional Procedural Guidance, Item E3.1.32.1.
3. The Board rejects Applicant's argument that he did not legally commit a theft because there is no record evidence that he tried to use the illegally transferred money to pay any of his debts. The theft occurred when he illegally transferred the \$40,000 to his personal bank account. Applicant's actions or inactions after the illegal transfer occurred did not render the illegal transfer any less a theft.
4. "The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily" (Directive, Adjudicative Guidelines, Item E2.A5.1.3.2).
5. "The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts" (Directive, Adjudicative Guidelines, Item E2.A5.1.3.3).
6. "Deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust" (Directive, Adjudicative Guidelines, Item E2.A6.1.2.2).
7. "The behavior was not recent" (Directive, Adjudicative Guidelines, Item E2.A6.1.3.1).
8. "It was an isolated incident" (Directive, Adjudicative Guidelines, Item E2.A6.1.3.2).
9. "The criminal behavior was not recent" (Directive, Adjudicative Guidelines, Item E2.A10.1.3.1).
10. "The crime was an isolated incident" (Directive, Adjudicative Guidelines, Item E2.A10.1.3.2).
11. "There is clear evidence of successful rehabilitation" (Directive, Adjudicative Guidelines, Item E2.A10.1.3.6).
12. Applicant's reliance on a decision by another Hearing Office Administrative Judge in a different case is misplaced. Although a decision by a Hearing Office Judge may be cited as persuasive authority, it is not legally binding precedent that has to be followed by the Judge's colleagues in the Hearing Office or by the Board. *See, e.g.*, ISCR Case No. 01-22606 (June 30, 2003) at pp. 3-5 (discussing precedential value of decisions by Hearing Office Judges).
13. "Acquittal" (Directive, Adjudicative Guidelines, Item E2.A10.1.3.5).
14. *See* Directive, Section 6.3 and Additional Procedural Guidance, Item E3.1.25.
15. "The misuse was not recent or significant" (Directive, Adjudicative Guidelines, Item E2.A13.1.3.1).
16. "The misuse was an isolated event" (Directive, Adjudicative Guidelines, Item E2.A13.1.3.4).