

KEYWORD: Guideline E; Guideline F

DIGEST: Applicant violated a trust by misappropriating funds from an employee golf association. Adverse decision affirmed

CASENO: 11-00110.a1

DATE: 01/26/2012

DATE: January 26, 2012

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In Re: )  
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 ----- ) ISCR Case No. 11-00110  
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 Applicant for Security Clearance )  
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**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

Gary L. Rigney, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On April 8, 2011, 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 F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Department Counsel requested a hearing. On November 4, 2011, after the hearing, Administrative Judge James F. Duffy denied Applicant’s request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issue on appeal: whether the Judge’s adverse security clearance decision is arbitrary, capricious, and contrary to law. For the following reasons, the Board affirms the Judge’s unfavorable decision.

The Judge made the following findings of fact: Applicant is 54 years old and served in the military from 1976 to 1996. He is not currently married, and has been divorced three times. The Judge summarized Applicant’s testimony as follows: In 1997 he began working for a private company. In 2005 he was asked to serve as the treasurer of that company’s employees golf association, wherein he would have complete control of the monies flowing in and out of the association account. The company partially funded the golf association. The bank where the association established the account had a \$10,000 cap, wherein deposited amounts in excess of that figure were subject to charges and fees. In 2006, Applicant began transferring golf association funds into his personal checking account, purportedly to avoid the fees and charges. During that year, Applicant transferred \$11,975 from the golf association’s account into his own account. He did not keep the association money separate from his own, and began making withdrawals involving golf association monies that he had transferred from the association account. Also in 2007, Applicant was involved in a divorce. He had a joint checking account that he maintained with his ex-wife. His ex-wife made withdrawals from the joint checking account that involved golf association assets. At one point, Applicant returned from a business trip to learn that checks written on the association’s account were beginning to bounce.

As a result of the bounced checks, the board of directors of the golf association looked into the matter. It was determined that approximately \$12,000 was missing from the account. Applicant was given a month to repay the missing funds. He repaid \$8,800 within that time period. The board of directors asked him to resign as treasurer, which he did in September or October of 2007.

Applicant’s company was informed of the missing funds, and conducted its own investigation. The investigation revealed that there was only one bank fee that applied to the \$10,000 cap. During 2006 and 2007, Applicant transferred \$11,975 from the golf association’s account into his own account. The investigation revealed that none of the golf club’s officers knew that Applicant was transferring money from the golf association account to his own personal account. This finding is at odds with Applicant’s testimony that, in about 2006, he informed the president of the golf association that he was placing some of the association’s funds in his personal account to avoid the \$10,000 cap fee, and that the president gave him permission to do so. In early 2008, Applicant was terminated from his company for theft. At the time of his termination, the company’s records reflected that Applicant still owed \$3,175 to the golf association account. Applicant claims that all the money that belonged to the golf association has been repaid, but provided no documents to prove he made those payments.

The Judge reached the following conclusions: As treasurer of his company's employees golf association, Applicant was entrusted with golf association funds. He violated that trust by depositing golf association funds in his personal accounts and using those funds for personal purposes. The company's investigation does not support Applicant's contention that he transferred golf association funds into his account merely to avoid the \$10,000 cap fees. Applicant knowingly and intentionally misappropriated golf association funds for his personal purposes even though he may have intended to repay that money eventually. By engaging in that conduct, he breached his fiduciary duty. His misappropriation was not an isolated event, but occurred over a number of months. Although he was going through a divorce and experiencing financial difficulties when he misappropriated the funds, such circumstances do not mitigate his conduct. This was a serious breach of trust that casts doubt on his reliability, trustworthiness, and good judgment. The variance between Applicant's testimony and the investigation findings show that he has failed to accept full responsibility for his misconduct, which raises questions about his reform and rehabilitation. Although his misconduct occurred over four years ago, sufficient time has not passed to conclude his misconduct is unlikely to recur in the future. Applicant is meeting his current financial obligations. Here, the financial concern does not arise from delinquent debts, but arises from a breach of financial trust. For the reasons set forth in the discussion under Guideline E, Applicant has also failed to mitigate the security concerns under Guideline F. In spite of his honorable military record and current outstanding job performance, Applicant's misappropriation of funds entrusted to him raises significant security concerns that leave questions and doubts about his eligibility and suitability for a security clearance.

Applicant argues that the Judge failed to recognize the appropriate mitigating factors or to conduct a proper whole person analysis and the findings and conclusions regarding the Applicant's current judgment and trustworthiness cannot be sustained on the basis of the record evidence as a whole. More specifically, he asserts that his conduct was an isolated instance resulting from financial problems occasioned by marital difficulties, the Judge's conclusion that Applicant has not accepted full responsibility for his actions is erroneous, and the misconduct is outweighed by over twenty years of responsible conduct without incident. Applicant has failed to establish error on the part of the Judge.

Applicant included an exhibit with his appeal brief. In addition to his prayer that the Judge's decision be reversed, Applicant requests alternative relief in the form of a remand to permit the introduction of the exhibit for consideration by the Judge. The case history reveals that Applicant, although *pro se*, was given significant additional time after the hearing to submit additional evidence pertaining to the precise issue that is covered by the exhibit proffered on appeal. Although *pro se* applicants cannot be expected to act like lawyers, they are expected to take timely, reasonable steps to protect their rights under the Directive. *See, e.g.*, ISCR Case No. 07-15235 at 2 (App. Bd. Oct. 3, 2008). Applicant's failure to take the necessary steps to supplement the record within the time frame agreed upon by him, Department Counsel, and the Judge, does not constitute a denial of procedural due process and does not justify remand for the purpose of expanding the record.

Applicant's other appeal contentions do little more than argue for a particular interpretation of the record evidence. 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*. See, e.g., ISCR Case No. 06-10320 at 2 (App. Bd. Nov. 7, 2007). A party'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. See, e.g., ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

In this case, the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying conduct and considered the possible application of relevant conditions and factors. He adequately discussed why the disqualifying conduct established under Guidelines E and F was not mitigated. The Judge discussed in some detail his conclusions that Applicant's conduct was not isolated, and that Applicant had not accepted full responsibility for his misconduct. The Judge's analysis is reasonably supported by the record.

The Board does not review a case *de novo*. The favorable evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. See, e.g., ISCR Case No. 06-11172 at 3 (App. Bd. Sep. 4, 2007). After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for his decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). "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). Therefore, the Judge's ultimate unfavorable security clearance decision is sustainable.

### **Order**

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

Signed: Michael Y. Ra'anan  
Michael Y. Ra'anan  
Administrative Judge  
Chairperson, Appeal Board

Signed: Jeffrey D. Billett  
Jeffrey D. Billett  
Administrative Judge  
Member, Appeal Board

Signed: James E. Moody

James E. Moody  
Administrative Judge  
Member, Appeal Board