

DATE: April 18, 1997

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 95-0622

**APPEAL BOARD DECISION AND REVERSAL ORDER**

Appearances

FOR GOVERNMENT

Carla Conover, Esq.

Department Counsel

FOR APPLICANT

Thomas M. Buchanan, Esq.

Administrative Judge Paul J. Mason issued a decision, dated November 18, 1996, in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Department Counsel appealed. For the reasons set forth below, the Board reverses the Administrative Judge's decision.

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

Department Counsel's appeal presents the following issues: (1) whether the Administrative Judge misapplied the Adjudication Policy felony provision; and (2) whether the Administrative Judge's favorable conclusions are arbitrary, capricious, or contrary to law.

**Procedural History**

The Defense Office of Hearings and Appeals issued to a Statement of Reasons (SOR), dated December 15, 1995, to Applicant. The SOR was based on Criterion H (criminal conduct), Criterion G (disregard of public law or regulations), and Criterion I (poor judgment, unreliability, or untrustworthiness).

A hearing was held on April 23, 1996. The Administrative Judge subsequently issued a written decision in which he concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Department Counsel's appeal from that favorable decision.

**Appeal Issues**

1. Whether the Administrative Judge misapplied the Adjudication Policy felony provision. The Administrative Judge found that: (a) Applicant, when he was a high-level federal official, improperly disclosed sensitive information concerning DoD procurements to a private consultant on various occasions during 1986-1988; (b) in 1991, Applicant

pleaded guilty to one count of criminal conspiracy to commit fraud, bribery, and conversion in violation of 18 U.S.C. §371 and one count of bribery of a government official in violation of 18 U.S.C. §201(b)(2), and was sentenced to serve 33 months (subsequently reduced to 20 months), fined approximately \$10,000, and placed on supervised release for two years upon his release from prison. The Administrative Judge noted the Adjudication Policy felony provision applied to Applicant's misconduct, but concluded Applicant had demonstrated trustworthiness and respect for the law over the period of time. In support of this conclusion, the Judge cited: (a) the fact that Applicant's offenses ended in June 1988; (b) Applicant's cooperation with federal prosecutors before and after sentencing; (c) Applicant's assistance to the federal government in a civil litigation that resulted in saving money for the government; and (d) Applicant's credibility.

Department Counsel contends the Administrative Judge misapplied the Adjudication Policy felony provision because: (a) the felony provision exception relied on by the Judge was not applicable on its face; (b) the Judge gave no explanation for his deviation from the felony provision; and (c) the Judge's improper application of the felony provision and the Section F.3 factors renders his favorable decision arbitrary and capricious.<sup>(1)</sup> For the reasons that follow, the Board finds Department Counsel's position has merit.<sup>(2)</sup>

An Administrative Judge must apply pertinent Adjudication Policy factors for and against clearance. Directive, Section F.3. Where there is evidence that supports application of a particular Adjudication Policy factor, the Judge must apply it or provide an adequate explanation why a deviation from that factor is warranted under the particular facts of the case. *See, e.g.*, ISCR Case No. 95-0560 (August 16, 1996) at p. 3; ISCR Case No. 94-0964 (January 29, 1996) at pp. 5-6. Failure to do so is arbitrary, capricious, and contrary to law.

There is no question that Applicant's conduct falls squarely within the scope of the Adjudication Policy felony provision. Moreover, the Administrative Judge correctly found that Applicant's misconduct was "an exceptionally grave offense" under the felony provision, and was not "isolated episode." Yet, despite the simple fact that none of the exceptions to the felony provision applied to Applicant's situation, the Judge relied on the third of three mandatory provisions from the first exception ("the individual has demonstrated maturity, trustworthiness, and respect for the law over an extended period since the offense occurred") to find in Applicant's favor. A Judge does not have unfettered discretion in applying Adjudication Policy factors. Accordingly, a Judge cannot deviate from the plain language of the Adjudication Policy without an explanation. *See, e.g.*, ISCR Case No. 95-0578 (October 2, 1996) at p. 6. Here, the Judge's reliance on only one condition where three are jointly required by the plain language of the felony provision exception was arbitrary, capricious, and contrary to law.<sup>(3)</sup>

Department Counsel also argues that application of the felony provision, standing alone, mandates an unfavorable decision. Department Counsel cites no authority for that argument, which is flatly contrary to prior Board rulings concerning the felony provision. *See, e.g.*, DOHA Case No. 95-0904 (November 15, 1996) at p. 2 ("The Board has held that an Administrative Judge can evaluate an applicant's felonious conduct under Section F.3. even if the applicant does not fall under any of the exceptions to the Felony Policy."). If Department Counsel chose to ignore those prior Board rulings, such a choice would not be consistent with the obligation to engage in zealous advocacy within the bounds of the law. If Department Counsel was unaware of those prior Board rulings, then simple legal research would have shown that prior Board decisions ran contrary to Department Counsel's position.

2. Whether the Administrative Judge's favorable conclusions are arbitrary, capricious, or contrary to law. Department Counsel contends the Administrative Judge's favorable decision is not supported by the record evidence. In support of this contention, Department Counsel argues: (a) the record evidence does not support the Judge's finding that Applicant has demonstrated trustworthiness and respect for the law over an extended time since the offense occurred; (b) the Judge erred by finding that Applicant's cooperation with law enforcement authorities demonstrates trustworthiness and respect for the law; (c) the Judge erred by giving great weight to the character evidence presented by Applicant; (d) the Judge erred by giving great weight to the character evidence from Applicant's present employer; (e) the Judge was arbitrary and capricious in finding Applicant's testimony was credible, and using that favorable credibility determination as a substitute for record evidence; (f) the Judge's favorable conclusions are not supported by the record evidence; (g) the Judge's favorable decision is not sustainable under Section F.3. of the Directive;<sup>(4)</sup> and (h) if the Board were to sustain the Judge's favorable decision, it would result in Applicant holding a security clearance while being ineligible to vote or hold public office as a convicted felon.

Department Counsel's arguments concerning the weight that the Administrative Judge gave to the character evidence fail to demonstrate error below. As the trier of fact, the Judge has discretion in weighing the evidence, both favorable and unfavorable. Absent a showing that the Judge acted in a manner that is arbitrary, capricious, or contrary to law, the Judge's weighing of the evidence will not be disturbed on appeal. The Board does not have to agree with the Judge's weighing of the character evidence to conclude Department Counsel's arguments fail to demonstrate the Judge acted in a manner that was arbitrary, capricious, or contrary to law with respect to the character evidence.

The Board need not agree with the Administrative Judge's findings and conclusions about Applicant's trustworthiness and the end date of Applicant's criminal conduct to conclude Department Counsel has failed to demonstrate that all of the Judge's findings and conclusions are error, as a matter of law.<sup>(5)</sup>

Department Counsel persuasively argues that Applicant's testimony concerning the circumstances under which a Swiss bank account was opened in his name is not credible. Applicant's testimony on that matter was flatly inconsistent with Government Exhibit 3, a statement of facts that Applicant agreed to in federal court in connection with his guilty plea. *See also* Government Exhibit 5 at pp. 8-9. Unlike an evidentiary admission, such a judicial admission is conclusive and binding on Applicant. *See* DISCR Case No. 90-0401 (January 24, 1994) at p. 5 n.4. Applicant's effort to distance himself from that judicial admission at the hearing tends to undercut his credibility, as a matter of law.<sup>(6)</sup>

There is only partial merit to Department Counsel's argument concerning Applicant's cooperation with law enforcement officials. There is no rule of law that precludes an Administrative Judge from taking into account evidence that an applicant has cooperated with law enforcement officials.<sup>(7)</sup> However, as with any other evidence, the Judge must consider such evidence in light of the record evidence as a whole, including any evidence that detracts from it. *See* Directive, Additional Procedural Guidance, Item 32.a. *See also* ISCR Case No. 94-1109 (January 31, 1996) at p. 4. Applicant's cooperation with law enforcement officials was a necessary part of his plea agreement and it did not begin until 1991, almost three years after Applicant knew he was a possible target in a criminal investigation. Accordingly, the weight the Judge gave to Applicant's cooperation was excessive and not reasonable in light of the record evidence that clearly undercut it.

Department Counsel persuasively argues the record evidence and application of the Directive's Section F.3. factors does not support the Administrative Judge's favorable conclusions. As discussed above, Department Counsel makes several arguments that persuasively demonstrate error by the Judge. Viewed collectively, those errors undermine the Judge's favorable conclusions about Applicant. In addition, Department Counsel notes that Applicant's criminal conduct involved a serious breach of his fiduciary obligations to the United States and contends that affirmance of the Judge's favorable security clearance decision would tend to undermine public confidence in the industrial security system. This contention is a serious one that warrants discussion.

Federal courts have held that there must be a nexus or rational connection between a person's conduct or situation and a decision to deny or revoke access to classified information. *See, e.g., Gayer v. Schlesinger*, 490 F.2d 740, 750 (D.C. Cir. 1973); *McKeand v. Laird*, 490 F.2d 1262, 1263-64 (9th Cir. 1974). Turning to court decisions in the area of federal employment cases (as persuasive authority), we note that the concept of nexus is **not** limited to showing that a federal employee has failed to perform, or is not capable of performing, his or her duties in a satisfactory manner. A nexus that justifies removal can also be shown by evidence that removal advances some other legitimate government interest that promotes the efficiency of the civil service. *See Doe v. Hampton*, 566 F.2d 265, 272 (D.C. Cir. 1977). Accordingly, a federal employee may be removed where:

the employee's conduct adversely affects the relationship between supervisors and employees in general, *Dominguez v. Department of Air Force*, 803 F.2d 680, 683 (Fed. Cir. 1986);

retention of the employee would impair discipline, morale, or productivity in an agency, *Ryan v. U.S. Department of Justice*, 950 F.2d 458, 460-61 (7th Cir. 1991), *cert. denied*, 504 U.S. 958 (1992); *Bonet v. U.S. Postal Service*, 712 F.2d 213, 215 (5th Cir. 1983); *Sherman v. Alexander*, 684 F.2d 464, 469 (7th Cir. 1982), *cert. denied*, 459 U.S. 1116 (1983);

the employee's conduct interferes with the agency's ability to conduct internal investigations of alleged misconduct, *Kissinger v. U.S. Postal Service*, 801 F.2d 551, 554 (1st Cir. 1986);

the employee's conduct, if tolerated, would impair the integrity of the federal government, *Stanek v. Department of Transportation*, 805 F.2d 1572, 1577 (Fed. Cir. 1986); or

the employee's conduct is of a kind that undermines public confidence in the agency, thereby impairing its ability to carry out its mission, *Allred v. Department of Health & Human Services*, 786 F.2d 1128, 1131 (Fed. Cir. 1986); *Borsari v. F.A.A.*, 699 F.2d 106, 110-11 (2d Cir. 1983), *cert. denied*, 464 U.S. 833 (1983); *Wild v. U.S. Department of Housing and Urban Development*, 692 F.2d 1129, 1132-33 (7th Cir. 1982); *Murray v. U.S. Department of Justice*, 821 F.Supp. 94, 109 (E.D.N.Y. 1993), *aff'd mem.*, 14 F.3d 591 (2d Cir. 1993).

Given the compelling interest of the United States to protect and safeguard classified information, *Department of Navy v. Egan*, 488 U.S. 518, 527 (1988), the nexus concept in industrial security clearance cases should be construed and applied in a manner that effectuates and advances the national security interests of the United States. *Cf.* DISCR Case No. 88-2577 (February 22, 1991) at p. 11 (Industrial Security Manual should be read and construed to effectuate its essential purpose of protecting and safeguarding classified information).

The United States must be able to repose a high degree of trust and confidence in persons granted access to classified information. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). Conduct that demonstrates a person has betrayed the trust reposed in that person by the federal government weighs very heavily against reposing in that person the trust and confidence required of persons granted access to classified information. When Applicant was a high-level federal official, he engaged in a pattern of criminal conduct (over a period of three years) that constituted a betrayal of his public office and his fiduciary duties. That pattern of criminal and dishonest conduct was extremely serious and weighs very heavily against reposing in Applicant the trust and confidence required of persons granted access to classified information. Given the extremely serious nature of Applicant's pattern of misconduct, the favorable evidence of Applicant's good conduct since August 1991 is insufficient to support the Judge's favorable security clearance decision under Section F.3. of the Directive. The integrity of the industrial security program, and the need to maintain public confidence in it, require a much stronger showing of reform and rehabilitation over a significant period of time before it can be safely said that it is clearly consistent with the national interest to grant Applicant a security clearance.

Given the Board's resolution of Department Counsel's other appeal arguments, there is no need to address Department Counsel's final argument.

### **Conclusion**

Department Counsel has met its burden of demonstrating error that warrants reversal. Accordingly, pursuant to Item 33.c. of the Additional Procedural Guidance, the Board reverses the Administrative Judge's November 18, 1996 decision.

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: Michael D. Hipple

Michael D. Hipple

Administrative Judge

Member, Appeal Board

1. Department Counsel's last argument will be considered in connection with the second appeal issue.
2. Applicant's reply brief cites to various DOHA decisions, including decisions by DOHA Administrative Judges. Such decisions may be cited as persuasive authority, but they are not binding on the Board. *See, e.g.*, ISCR Case No. 95-0600 (May 16, 1996) at p. 5 n.9. We note that Applicant's brief incorrectly refers to some Administrative Judge decisions as Board decisions. Considering Applicant's brief in its entirety, we conclude those erroneous references are the result of simple carelessness rather than an effort to mislead the Board.
3. We note the Administrative Judge cited, without any discussion, Criminal Conduct Mitigating Factor 5 ("Conduct occurring only in the distant past (such as more than 5 years ago) in the absence of subsequent criminal conduct."). The Judge's citation of that Mitigating Factor was misplaced because the felony policy expressly supersedes the application of the other Criminal Conduct Disqualifying and Mitigating Factors. *See* Directive, Enclosure 2 at page 2-12 ("The above criteria supersede all criteria previously used to adjudicate criminal conduct involving commission of felonies under the Laws of the United States."). *See also* DISCR Case No. 94-0033 (January 11, 1995) at p. 5 (once it is determined that conduct constituted federal felony, "that conduct is to be evaluated under the Directive felony policy rather than the enumerated Criminal Conduct Disqualifying and Mitigating Factors.").
4. *See* footnote 1, above.
5. Applicant's reply brief correctly notes Applicant had the right, under the Fifth Amendment of the Constitution, to not incriminate himself. Accordingly, the Board finds no merit in Department Counsel's argument that Applicant's criminal conduct continued until he pleaded guilty in August 1991.
6. Moreover, it would be inequitable to allow Applicant to repudiate, in these proceedings, judicial admissions that he made before a federal district court in connection with his guilty plea. *Cf.* ISCR Case No. 94-1213 (June 7, 1996) at p. 4 n.6 ("Having gained the benefit of a plea bargain in court, it is inequitable for Applicant to seek to retain the benefits of that plea bargain (*i.e.*, probation) and then turn around and seek to repudiate his guilty plea and its legal effect in another federal forum.").
7. We are not persuaded by Department Counsel's argument concerning the Administrative Judge's reliance on Applicant's Exhibit A. It was not arbitrary, capricious, or contrary to law for the Judge to consider the favorable statements made by the former prosecutor concerning Applicant's cooperation in connection with his criminal case.