

DATE: October 10, 1997

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 96-0710

APPEAL BOARD DECISION

Appearances

FOR GOVERNMENT

Mathew E. Malone, Esq.

Department Counsel

FOR APPLICANT

James G. Smalley, Esq.

The government has appealed the June 30, 1997 Remand Decision of Administrative Judge Robert R. Gales that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. For the reasons set forth below, the Board affirms the Remand Decision of the Administrative Judge.

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

Applicant's appeal presents the issues of whether the Administrative Judge failed to comply with the Board's directions on remand, specifically whether (1) the finding that Applicant has met his burden of proof on mitigation is supported by the record evidence and (2) whether the Administrative Judge erred in his application of Mitigating Guideline 3 of the Criminal Conduct Criterion (Criterion J).

Procedural History

A procedural history of this case may be found in the Board's June 20, 1997 Decision and Order for Remand. Following issuance of the Administrative Judge's Remand Decision, Department Counsel lodged a timely appeal and filed an appeal brief. Applicant filed a reply brief and the matter is now ready for final decision by the Board.

Discussion

The Administrative Judge's original decision in this case resulted in a favorable determination for the Applicant. The Judge's decision was based in large part upon his conclusion that Applicant had successfully rehabilitated himself. On appeal the Board ruled that the record evidence in the case did not reasonably support that conclusion and that the Judge's reliance on Criminal Conduct Mitigating Guideline 5⁽¹⁾ to find that the Applicant had overcome the government's case was erroneous. In his remand decision the Judge coupled a finding of some evidence of rehabilitation with other Criminal Conduct Mitigating Guidelines⁽²⁾ and considerations under paragraph F.3 of the Directive to support his favorable finding.

Department Counsel asserts that the Administrative Judge failed to comply with the Board's instructions on remand and

that he issued substantially the same decision on remand that he had issued previously. This contention is without merit. Inasmuch as the Remand Decision is not based on a finding of successful rehabilitation and application of Mitigating Guideline 5 in favor of the Applicant, it differs from the original decision. The Judge indicated on remand that his favorable decision was based in part on a finding of some evidence of rehabilitation and that as a result of the Board's ruling he was compelled to give reduced weight to such evidence. The Board cannot conclude that the Judge's finding of some favorable evidence of rehabilitation was erroneous as a matter of law.

Department Counsel's reliance on an earlier Board decision (DISCR Case No. 90-0634) in support of a claim of error is misplaced. The cited decision involved a Judge's open disagreement with and defiance of a Board ruling. The Remand Decision does not contain such disagreement and defiance. The Judge's pronouncements of his personal views in the Remand Decision do not constitute error as the Judge acknowledges the law of the case and he has essentially followed the instructions of the Board on remand.

Department Counsel argues that the Judge's findings that the Applicant met his burden of proof of mitigation is arbitrary, capricious and contrary to law. As indicated above the Judge's decision is based in part on Mitigating Guidelines and paragraph F.3 factors that are separate from the issue of rehabilitation. Applicant in his reply brief notes that Department Counsel fails to address all of the mitigation components relied on by the Judge. Applicant's point is well taken in this case. There is no presumption of error below. The appealing party bears the burden of demonstrating error. The Board need not agree with the Judge's analysis or conclusions to rule that Department Counsel has fallen short of demonstrating the Judge's action in applying the mitigating factors and the F.3 factors was arbitrary, capricious or contrary to law.

Department Counsel asserts that the Administrative Judge erred in his application of Mitigating Guideline 3. It argues that the facts in this case reflect knowing acts of the Applicant who was intent on making money through high-risk real estate ventures in which he willingly involved himself. Thus, there was an absence of external pressures of the kind anticipated by the language of the mitigating factor. Department Counsel is correct in pointing out that the actions of Applicant appeared to be largely a matter of personal choice. However, the Department Counsel's point is insufficient to justify remand or reversal in light of the remaining parts of the Judge's analysis.

Conclusion

Department Counsel has not met its burden on appeal of demonstrating harmful error. Accordingly, the Board affirms the Administrative Judge's Remand Decision.

See separate opinion

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

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Concurring opinion of Chairman Emilio Jaksetic

I still adhere to the views expressed in the dissenting portion of my separate opinion to the Board's June 20, 1997 Remand Order, and I expect to rely on them in future appeals with similar issues. However, for purposes of deciding this appeal those views are irrelevant. In reviewing the Administrative Judge's June 30, 1997 Remand Decision, I am constrained by the law of the case as expressed by the Board's June 20, 1997 Remand Order.

Although I believe the Administrative Judge's Remand Decision was wrongly decided, it substantially complies with the law of the case as set forth in the Board's June 20, 1997 Remand Order. Furthermore, given the law of the case, Department Counsel has failed to meet its burden on appeal of demonstrating error that warrants remand or reversal. Accordingly, I concur with the result reached by my colleagues.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

1. Mitigating Guideline 5 reads "[T]here is clear evidence of successful rehabilitation."
2. Specifically, Mitigating Guideline 1 ("[T]he criminal behavior was not recent.") and Mitigating Guideline 3 ("[T]he person was pressured or coerced into committing the act and those pressures are no longer present in that person's life.").