

DATE: June 20, 1997

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 96-0710

APPEAL BOARD DECISION AND ORDER FOR REMAND

Appearances

FOR GOVERNMENT

Matthew E. Malone, Esq.

Department Counsel

FOR APPLICANT

James G. Smalley, Esq.

Administrative Judge Robert R. Gales issued a decision, dated January 14, 1997, 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, as amended.

Department Counsel's appeal presents the issue of whether the Administrative Judge's finding that Applicant has successfully rehabilitated himself after a federal conviction for bank fraud is arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated September 27, 1996. The SOR was based on Criterion J (Criminal Conduct). A hearing was held on November 26, 1996. The Administrative Judge subsequently issued a 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 now before the Board on Department Counsel's appeal from that favorable decision.

Discussion

In December 1994, Applicant was convicted for bank fraud under 18 U.S.C. §1344. Applicant's criminal conviction was based on illegal activities associated with real estate ventures that occurred between 1988 and April 1991. Notwithstanding the conviction, the Administrative Judge found that Applicant successfully mitigated and overcome the Government's case against him under Criterion J. He based his finding on the following factors: (a) although Applicant was not coerced to engage in illegal activities, there was "a degree of pressure to do so" and such pressure was no longer present in Applicant's life; (b) Applicant's criminal conduct ended in April 1991 and has not recurred; (c) Applicant

demonstrated reform and rehabilitation by taking various steps to "clean up his act after he was arrested". In discussing the rehabilitation issue, the Judge found that Applicant's current probationary status is not a *per se* bar to a favorable security clearance decision.

Department Counsel contends it was arbitrary, capricious, and contrary to law for the Administrative Judge to find that Applicant had successfully rehabilitated himself. In support of this

contention, Department Counsel argues: (a) Applicant's current probationary status serves as a bar to finding Applicant has been rehabilitated; (b) Applicant's payment of restitution was court-ordered and not voluntary in nature; (c) Applicant still has not completed making restitution and is seeking to reduce the amount of restitution he must make; (d) Applicant did not cooperate with law enforcement authorities until after he received a sentence of imprisonment; (e) Applicant's satisfactory employment record is insufficient to overcome the negative implications of his bank fraud; (f) it is irrelevant whether Applicant is making contributions to the national security; and (g) the record evidence does not support the Judge's finding that Applicant has been motivated to "clean up his act."

The Board reviews an Administrative Judge's findings to determine whether they "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." Directive, Additional Procedural Guidance, Item 32.a. For the reasons that follow, the Board concludes the record evidence as a whole does not reasonably support the Judge's finding that Applicant has successfully rehabilitated himself. Indeed, there is significant record evidence that seriously detracts from the Judge's finding that Applicant has demonstrated sufficient rehabilitation.

Nothing in the Directive indicates that an applicant's current probationary status is a *per se* bar to a favorable security clearance decision. Accordingly, the Board rejects Department Counsel's contention that Applicant's current probationary status required the Administrative Judge to make an adverse security clearance decision. However, the fact that Applicant will remain on probation until September 1998 cannot simply be disregarded. *See* DISCR Case No. 90-1115 (October 6, 1992) at p. 3 ("In evaluating Applicant's behavior since the 1988 criminal charges, the Judge, as trier of fact, may properly note Applicant can be expected to exhibit good behavior while on probation."). The fact the federal court that found Applicant guilty and sentenced him has not seen fit to release him from probation is evidence that would, to a reasonable mind, significantly undercut Applicant's claim of successful reform and rehabilitation.

The fact that Applicant has made restitution payments as part of his court-imposed sentence does not preclude the Administrative Judge from considering that conduct under Section F.3. of the Directive. However, the fact that Applicant is making restitution under compulsion of a court order reduces the mitigating weight of that conduct because a reasonable mind could not conclude that it is really voluntary in nature. ⁽¹⁾

The timing of Applicant's cooperation with law enforcement authorities is a relevant consideration. However, the Administrative Judge is not precluded, as a matter of law, from considering evidence of such cooperation by Applicant merely because it did not arise or begin sooner than it did.

Applicant's employment history is favorable evidence that the Administrative Judge reasonably could consider. *See* Directive, Section F.3. Nothing in the decision indicates or suggests that the Administrative Judge's favorable decision turned on his findings concerning Applicant's employment history. However, the Administrative Judge erred by relying, in part, on Applicant's potential to contribute to the national security. "While proof of job performance is relevant and may constitute favorable evidence, the standard of what is clearly consistent with the national interest focuses on the risk associated with granting access to classified information an[d] not on the individual's contribution to the defense effort." DISCR Case No. 90-1803 (March 31, 1992) at p. 3. *See also* DISCR Case No. 90-0365 (July 23, 1991) at p. 4 ("Applicant's technical abilities and his contributions to the defense effort do not reduce or negate the negative security significance of his knowing falsifications to the government.").

In finding Applicant has demonstrated reform and rehabilitation, the Administrative Judge commented favorably on Applicant's decision to "clean up his act" by, *inter alia*, "acknowledging his criminal actions." Given the record evidence in this case, it is not tenable for the Judge to find that Applicant "acknowledg[ed] his criminal actions." To the contrary, Applicant has sought to deny his culpability in connection with the activities for which he was convicted. On a

continuation sheet to a National Agency Questionnaire (Government Exhibit 1), Applicant stated the following in connection with his description of his conviction for bank fraud:

"As a result of this situation, I plead guilty. Unaware of the law and previous court rulings, I plead to items and became sentenced to charges which I now know I should not have been charged."

"What I agree to now is the acquisition of these loans had improper forms and the banks making the loans were not informed of the true purchase prices. These banks were not injured in any way, shape, or form as they described."

And, in the answer to the SOR, Applicant stated the following:

"I deny the charges no longer to be accurate and in some parts to be false and greatly exaggerated."

These statements by Applicant cannot reasonably be interpreted as acknowledgments of guilt or acceptance of responsibility for the crime to which Applicant pleaded guilty in December 1994. *See* Government Exhibit 3. Moreover, the record evidence showing Applicant's desire to shift blame for his actions to other persons who procured his cooperation in the bank fraud scheme (which Applicant expected to profit from) is not indicative of a person accepting responsibility for his own wrongdoing.

Considering the record as a whole, while there is evidence of some rehabilitation in this case, for the reasons cited above, there is insufficient "clear" evidence of successful rehabilitation to allow the Judge to apply the rehabilitation Mitigating Guideline in Applicant's favor.⁽²⁾

Conclusion

The Judge's favorable security clearance decision is based, in part, on Mitigating Guidelines (under Criterion J) apart from the rehabilitation issue. On appeal the Government did not address the Judge's application of those Mitigating Guidelines. On the rehabilitation issue, Department Counsel has met its burden on appeal of demonstrating error that warrants remand. Accordingly, pursuant to Item 33.b. of the Additional Procedural Guidance, the Board remands the case to the Administrative Judge. After correction of the errors identified in this decision, the Judge must issue a new decision consistent with the requirements of Items 35 and 25 of the Additional Procedural Guidance.

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

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

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Applicant for Security Clearance

ISCR Case No. 96-0710

**Separate Opinion of Administrative Judge Emilio Jaksetic,
concurring in part and dissenting in part**

I fully concur with the majority's statement of the case and identification of the issues on appeal. I also fully concur with the majority's discussion and resolution of the appeal arguments concerning: (a) Applicant's probationary status; (b) Applicant's restitution payments; (c) the timing of Applicant's cooperation with law enforcement authorities; and (d) Applicant's employment history and his potential to contribute to the national security.

With minor exceptions not worth stating, I agree with the majority's discussion of the appeal arguments concerning Applicant's rehabilitation. I agree with the conclusion that the record evidence does not support the Administrative Judge's application of Criminal Conduct Mitigating Guideline 5 ("[T]here is *clear* evidence of successful rehabilitation")(emphasis added). The Judge's application of that Mitigating Guideline is not sustainable in light of the record evidence that Applicant still resists admitting his responsibility for the criminal conduct for which he was convicted. *See Directive, Additional Procedural Guidance, Items 32.a. and 32.c.*

For the reasons that follow, I disagree with my colleagues' decision to remand the case to the Administrative Judge.

There is no presumption in favor of granting a security clearance. *See Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). Indeed, an applicant "has the ultimate burden of persuasion as to obtaining favorable security clearance decision." *Directive, Additional Procedural Guidance, Item 15.* Furthermore, any doubts about an applicant's security eligibility should be resolved in favor of the national security. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

Applicant's inability or unwillingness to accept responsibility for his serious criminal conduct is very significant. Without any sustainable finding of clear reform and rehabilitation, I fail to see how a Judge can reasonably find, under Section F.3., that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Even if other Mitigating Guidelines are applicable, Applicant's inability or unwillingness to accept responsibility for his serious criminal conduct weighs heavily against a favorable decision because it raises doubts about whether he has really rehabilitated himself (Section F.3.e.) and whether he might repeat similar conduct in the future (Section F.3.f.). Those doubts should be resolved in favor of the national security. Accordingly, I would reverse the Administrative Judge's January 14, 1997 decision pursuant to Item 33.c. of the Directive's Additional Procedural Guidance.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

1. We do not find merit in Department Counsel's contention that Applicant's stated belief that he should get a reduction in the amount of restitution he must pay is evidence that he has not reformed or rehabilitated himself. However, these proceedings are not a proper forum for Applicant to challenge the amount of restitution he properly owes.
2. Mitigating Guideline (5) under the Criminal Conduct Criterion (Criterion J) speaks to "...clear evidence of successful rehabilitation."