

DATE: September 29, 1998

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0676

**APPEAL BOARD DECISION AND REMAND ORDER**

**APPEARANCES**

**FOR GOVERNMENT**

Carol A. Marchant, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

Administrative Judge Kathryn M. Braeman issued a decision, dated April 6, 1998, in which she concluded it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Department Counsel appealed. The Board remands the case to the Administrative Judge for further processing consistent with the rulings and instructions set forth in this Decision and Order for Remand.

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

Department Counsel's appeal presents the following issues: (1) whether the Administrative Judge erred by finding that Applicant did not try to steal money from an employer in 1996; and (2) whether the Administrative Judge's favorable security clearance decision 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 October 14, 1997. The SOR was based on Criterion J (Criminal Conduct). Department Counsel later moved to amend the SOR to include the allegations that Applicant's conduct under Criterion J also fell under Criterion E (Personal Conduct). Applicant did not object to the motion to amend the SOR.

A hearing was held on March 11, 1998. The Administrative Judge subsequently issued a written decision, dated April 6, 1998, in which she 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 erred by finding that Applicant did not try to steal money from an employer in 1996. The Administrative Judge found Applicant did not try to steal \$30.00 in 1996 from his then-employer.

Department Counsel contends the Judge's find is not supported by the record evidence as a whole. This contention is not persuasive.

There is conflicting evidence on the issue of whether Applicant tried to steal \$30.00 from his then-employer in 1996. There is record evidence, which if found credible, would support a finding that Applicant did try to steal the money. There is record evidence, which if found credible, would support a finding that Applicant did not try to steal the money. The Administrative Judge weighed the record evidence and found Applicant did not try to steal that money. The Board does not have to agree with the Judge's finding to conclude it reflects a plausible, permissible interpretation of the conflicting record evidence. Department Counsel's ability to argue for an alternate interpretation of the record evidence is insufficient to demonstrate the Judge's finding is erroneous. *See, e.g.*, ISCR Case No. 97-0625 (August 17, 1998) at p. 3.

2. Whether the Administrative Judge's favorable security clearance decision is arbitrary, capricious, or contrary to law. The Administrative Judge found that in 1994 Applicant "kept \$600 of [his then-employer's] money at home because he resented the fact that he had been promoted, but not been given the raise he anticipated." The Judge found Applicant's conduct was "reprehensible," but concluded Applicant had mitigated his misconduct because: (a) Applicant's criminal conduct was "isolated"; (b) Applicant repaid the money in 1994; (c) Applicant did not conceal his misconduct from the government; (d) Applicant testified consistently at the hearing about his misconduct; (e) Applicant has matured and taken positive steps to significantly reduce or eliminate his vulnerability to coercion or exploitation; (f) Applicant has demonstrated "a responsible work ethic for two years for his current employer"; (g) Applicant's coworkers and supervisors "commend him"; (h) Applicant acknowledges his past misconduct, which occurred when he was younger; and (i) Applicant is now married, has a child, and is "willing to take more responsibility on his job and in his life."

Department Counsel contends the Administrative Judge's favorable decision is arbitrary and capricious. In support of this contention, Department Counsel argues: (a) the Judge erred by characterizing Applicant's conduct as "isolated" and applying Criminal Conduct Mitigating Guideline 2, but not applying Personal Conduct Disqualifying Guideline 5; (b) the Judge erred by finding Applicant's 1994 theft to be "egregious" and then concluding that theft demonstrated merely "questionable judgment"; (c) the Judge failed to give proper weight to the security significance of Applicant's abuse of his obligations toward his then-employer; (d) the Judge gave undue weight to the evidence of Applicant's marriage and parenting; (e) the Judge gave undue weight to the character references submitted on Applicant's behalf; (f) there is no "clear evidence of rehabilitation" within the meaning of Criminal Conduct Mitigating Guideline 5; (g) the Judge gave undue weight to her favorable assessment of Applicant's credibility; (h) there is no basis in the record to support the Judge's application of Personal Conduct Mitigating Guideline 5; and (i) the Judge gave undue weight to the fact that Applicant disclosed his past problems to the government. For the reasons that follow, the Board concludes Department Counsel has demonstrated the Judge committed harmful error.

The record evidence does not support the Administrative Judge's characterization of Applicant's 1994 misconduct as being "isolated." Applicant misappropriated money from his then-employer in small amounts over a 3-4 week period, for a total of \$600. Such a course of misconduct -- involving multiple, separate acts of misappropriation over a period of several weeks -- cannot fairly be characterized as "an isolated incident" within the meaning of Criminal Conduct Mitigating Guideline 2. The record evidence does not support the Judge's reliance on that mitigating guideline. Nor does the record evidence allow for a conclusion, under Section F.3. of the Directive, that Applicant's 1994 misconduct was isolated or aberrational in nature. Furthermore, given the evidence that Applicant engaged in a series of misappropriations over a period of 3-4 weeks, not merely a single act of misappropriation, the Judge acted in an arbitrary and capricious manner by not applying Personal Conduct Disqualifying Guideline 5. [\(1\)](#)

The Administrative Judge was somewhat inconsistent in her conclusions about the seriousness of Applicant's 1994 misconduct. The Judge referred to that misconduct as "egregious" (Decision at p. 6), as showing "questionable judgment" (Decision at p. 7), and as "reprehensible" (Decision at p. 8). Given the record evidence of Applicant's pattern of deliberate misappropriation of his employer's money over a period of 3-4 weeks in 1994, it was not reasonable for the Judge to characterize Applicant's misconduct as demonstrating merely "questionable judgment." Applicant's conduct in 1994 involved a pattern of deliberate dishonesty and criminal conduct when he knew or should have known that his misconduct was serious, improper and without justification. Furthermore, it demonstrated his willingness to breach his obligations to his then-employer because of anger and resentment over his belief that he had been wrongfully denied a

raise. Such a deliberate breach of the trust reposed in Applicant by his then-employer raises serious questions about Applicant's judgment, reliability and trustworthiness, not merely indicate "questionable judgment."

The Administrative Judge did not err in taking into account evidence of Applicant's conduct after the 1994 misconduct, including evidence about his marriage and parenting. Consideration of such evidence is permissible under Section F.3. of the Directive and the requirement that a security clearance decision must be based on the "whole person" concept. Reading the Judge's decision in its entirety, the Board cannot conclude the Judge gave undue or decisive weight to the evidence about Applicant's marriage and parenting. Absent a showing of arbitrary and capricious action by the Judge, the Board will not disturb a Judge's weighing of the evidence. *See, e.g.*, ISCR Case No. 97-0289 (January 22, 1998) at p. 6.

The Administrative Judge gave undue weight to the character references submitted on Applicant's behalf. Although those character references were admitted without objection by Department Counsel, the Judge was obligated to weigh that evidence and make a reasoned decision about what weight could be given to that evidence. *See, e.g.*, ISCR Case No. 97-0727 (August 3, 1998) at p. 4 n.1. At the hearing, when questioned, Applicant admitted that the character references did not know about his 1994 misconduct (Hearing Transcript at pp.55-57). Those admissions detract from the weight that reasonably can be given to the favorable statements made by the character references about Applicant's values, reliability, and trustworthiness.

The record evidence as a whole does not support the Administrative Judge's application of Criminal Conduct Mitigating Guideline 5.<sup>(2)</sup> Although Applicant claimed he took the employer's money in 1994 without intending to steal it and claimed he did not spend it, he never returned the money to the employer. Although Applicant said he repaid the \$600 he misappropriated (Government Exhibit 2), he testified that he did not return the money he took home, but rather his then-employer kept his last pay check (Hearing Transcript at pp. 48-49). Clearly, Applicant's hearing testimony is not consistent with his earlier claim that he repaid the misappropriated money. Indeed, the record evidence does not support the Judge's finding that Applicant repaid the employer for the \$600 he misappropriated.<sup>(3)</sup> Furthermore, if Applicant really did not intend to steal the money, and if he really kept it at home separate from his personal funds, then why did he keep the \$600 and not return it to its rightful owner? And since Applicant did not return the money to its rightful owner, it strains credulity for Applicant to claim he did not spend it. Acceptance of Applicant's explanation would require acceptance of the inference that Applicant still has the misappropriated \$600 in his possession. Absent a sustainable finding that Applicant made restitution of the money he misappropriated in 1994, the Judge did not have a rational basis to find Applicant demonstrated "clear evidence of rehabilitation."

The Administrative Judge gave undue weight to the evidence that Applicant disclosed his past problems to the government. Honesty and candor with the government do not immunize admitted misconduct from being considered for its security significance. *See, e.g.*, ISCR Case No. 97-0176 (January 22, 1998) at p. 2. Applicant's 1994 misconduct is not extenuated or mitigated by the fact that he admitted it to the government. However, Applicant's disclosure of his past problems to the government provides *some* support for the Judge's reliance on Personal Conduct Mitigating Guideline 5.<sup>(4)</sup> Therefore, the Board does not find persuasive Department Counsel's contention that there is no basis for the Judge to apply Personal Conduct Mitigating Guideline 5.

Taken in their totality, the errors identified in this decision undercut the Administrative Judge's favorable conclusions about Applicant and her overall favorable security clearance decision. Given the totality of the Judge's errors, the Board cannot conclude they are harmless.

## Conclusion

Department Counsel has met its burden on appeal of demonstrating error that warrants remand. 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.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

See separate opinion

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

### **Separate Opinion Of Administrative Judge Michael Y. Ra'anan**

Although I concur in the majority's analysis of individual points, I differ in that I would sustain the Administrative Judge's ultimate conclusion that Applicant qualifies for a security clearance. Applicant's misconduct has been superceded by subsequent events. Therefore, while I dissent from the result of the majority opinion, I am not troubled by the reasoning in individual analyses.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan

Administrative Judge

Member, Appeal Board

1. "[A] pattern of dishonesty or rule violations."
2. "[T]here is clear evidence of successful rehabilitation."
3. By way of analogy: when a car is involuntarily repossessed by a creditor because the debtor defaulted on the car payments, it cannot fairly be said that the debtor "repaid" the creditor because of the repossession.
4. "[T]he individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or pressure."