

DATE: August 3, 1998

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 97-0727

## APPEAL BOARD DECISION AND REVERSAL ORDER

### APPEARANCES

#### FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

#### FOR APPLICANT

Thomas M. Abbott, Esq.

Administrative Judge Richard A. Cefola issued a decision, dated March 16, 1998, 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 following issues: (1) whether the Administrative Judge's factual findings are supported by substantial record evidence; and (2) whether the Administrative Judge's decision is arbitrary, capricious, and contrary to law.

#### **Procedural History**

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated October 24, 1997 to Applicant. The SOR was based on Criterion J (Criminal Conduct).

A hearing was held on February 26, 1998. 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's factual findings are supported by substantial record evidence. The Administrative Judge made the following findings: In September 1987, Applicant (then a 32-year-old lawyer) purchased a company engaged in defense contracting. Prior to the purchase, the then-owner of the company:(a) received a mistaken double payment from one of the military services in the amount of \$980,000 and converted that payment to the company's use; and (b) improperly converted more than \$1 million of the employee's profit-sharing plan's funds. Applicant discovered these wrongful conversions after he purchased the company. Fearing that disclosure of these facts would jeopardize his company's existence, Applicant: (a) misstated the status of the profit-sharing plan to the Department of Labor in 1987;

and (b) filed False Corporate Income Tax Returns in Spring 1988 showing the \$980,000 as income. Shortly after acquiring the company, Applicant set up a dummy company for the purpose of funneling illegal campaign contributions to federal office holders in the hope of gaining access to certain members of Congress. In November 1990, Applicant was arrested and later pleaded guilty to (a) Conspiracy to Make False Statements and Aiding Abetting and Illegal Campaign Contributions to a Political Committee; (b) Conspiracy to Defraud the United States; and (c) Making and Subscribing False Corporate Income Tax Returns. Applicant was incarcerated for fifteen and a half months of an eighteen-month sentence and released to a halfway house in April 1993. A corrected Corporate Tax Return was subsequently filed and the \$980,000 ultimately repaid to the military service. Acting through the company, Applicant is currently paying back \$15,000 a month (with interest) to the profit-sharing plan and owes \$150,000 to complete the restitution.

The Administrative Judge found Applicant presented "impressive mitigating evidence," citing: (a) Applicant's acceptance of full responsibility for his actions; (b) Applicant's testimony that he will never repeat his criminal conduct; and (c) the favorable character statements submitted on behalf of Applicant (Decision at p. 3). The Judge also relied on: (d) the passage of time since Applicant committed his criminal acts in 1987 and 1988; (e) the fact that Applicant "paid his 'debt to society' through his incarceration which ended in April of 1993"; and (f) his finding that "[d]uring the past five years, Applicant has reestablished his firm's good name as a valued [defense] contractor" (Decision at pp. 4-5).

Department Counsel does not challenge the Administrative Judge's findings about Applicant's criminal conduct. However, Department Counsel challenges the Administrative Judge's findings that Applicant has mitigated his criminal conduct, rehabilitated himself, and proven the criminal conduct will not recur. In support of this contention, Department Counsel argues: (a) the Judge's finding that Applicant's testimony was credible is not a substitute for record evidence of reform and rehabilitation; (b) the Judge erred by relying on his finding that Applicant paid his "debt to society" through incarceration that ended five years ago; (c) the Judge erred by finding that during the past five years Applicant has reestablished his company's good name as a valued defense contractor; and (d) the record evidence as a whole does not support the Judge's finding of reform and rehabilitation. For the reasons that follow, the Board concludes Department Counsel's arguments demonstrate the Judge erred.

On appeal, the Board is responsible for determining whether "[t]he Administrative Judge's findings of fact 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. In making such a review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge." Directive, Additional Procedural Guidance, Item 32.a. The Board must consider not only whether there is evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings. *See, e.g.*, ISCR Case No. 97-0435 (July 14, 1998) at p. 3. Whether there is sufficient evidence to support a Judge's findings is a question of law, not one of fact. *See, e.g.*, ISCR Case No. 97-0803 (June 19, 1998) at p. 3. *See also Lauvik v. INS*, 910 F.2d 658, 660 (9th Cir. 1990) ("There is some point at which the evidence, though it exists, becomes so slight and so thoroughly outweighed by contrary evidence, that it would be an abuse of discretion to base a decision upon it.").

The Administrative Judge's favorable assessment of Applicant's credibility is not a substitute for record evidence of reform and rehabilitation. *See, e.g.*, ISCR Case No. 97-0356 (April 21, 1998) at p. 3 ( Judge's credibility determination, whether favorable or negative, is not a substitute for record evidence). However credible or sincere an applicant is, claims of reform must be measured and weighed against the presence or absence of evidence of demonstrated reform and changed behavior. *See* Directive, Section F.3.e.; Enclosure 2 to Directive (Adjudicative Guidelines) at pages 2-1 to 2-2. *Cf.* ISCR Case No. 96-0544 (May 12, 1997) at p. 5 (promise to take remedial action in future, however credible, not evidence of actual rehabilitation); ISCR Case No. 94-1109 (January 31, 1996) at p. 4 ("While sincere expressions of remorse are the first steps on the road to rehabilitation, they are not evidence that demonstrates a track record of reform and rehabilitation."). Common sense and human experience show that there can be a significant difference between stated intentions -- however sincere --- and subsequent behavior. Only with the passage of time will there be a track record that shows whether a person, though actions and conduct, is willing and able to adhere to a stated intention to refrain from acting in a way that the person has acted in the past. Accordingly, the Judge erred by giving great weight (Decision at p. 3) to his conclusion that Applicant "testified credibly that such criminal conduct will never be repeated."

The Administrative Judge erred by relying on his finding that Applicant paid his "debt to society" to find Applicant's

criminal conduct was mitigated. That finding is essentially irrelevant to the issue of whether it is clearly consistent with the national interest to grant Applicant a security clearance. The underlying seriousness of Applicant's criminal conduct is not reduced or lessened by the mere fact that Applicant completed serving his sentence. Furthermore, the final disposition of Applicant's criminal case through the judicial system is not dispositive of his security eligibility. *See, e.g.,* DISCR Case No. 90-0133 (January 30, 1991) at p. 5. *Cf. Shane Meat Co. v. U.S. Department of Defense*, 800 F.2d 334, 338 (3rd Cir. 1986)(debarment need not be proportional to the severity of a prior criminal sentence; debarment may be properly imposed even though it is more severe than criminal sentence). In addition, the mere fact that a person has completed a period of incarceration does not, standing alone, prove the person has reformed or rehabilitated. Nor does it demonstrate the person has the high degree of judgment, reliability, or trustworthiness that must be possessed by persons granted access to classified information.

The Administrative Judge also erred by finding that during the past five years Applicant has reestablished his company's good name as a valued defense contractor. The record evidence shows Applicant was debarred from defense contracting for several years and did not return to his company until February 1997. Accordingly, it was arbitrary and capricious for the Judge to find Applicant reestablished his company's good name during the past five years. Given the record evidence in this case, it was arbitrary and capricious for the Judge to give Applicant any credit for whatever good reputation his firm regained in the years prior to his return in February 1997.

Although there is some evidence supporting the Administrative Judge's findings of mitigation, the totality of the record evidence detracts from the favorable evidence relied on by the Judge, undercutting the Judge's reliance on that evidence. Given the totality of the record evidence, the Judge gave undue weight to the favorable character statements submitted on behalf of Applicant.<sup>(1)</sup> In the face of Applicant's serious criminal conduct --- which involved deception and deceit directed against the federal government and corruption of the political process -- the favorable character statements had to be viewed with a grain of salt and discounted somewhat. *See, e.g.,* ISCR Case No. 96-0083 (January 10, 1997) at p. 4 (favorable reputation for honesty and reliability must be discounted in face of proven acts of falsifications). Furthermore, the character evidence exhibited some limitations bearing on its intrinsic weight. Three of the character statements and two letters were made by persons who have known Applicant for only about a year to 14 months prior to the hearing. Of the two letters the Judge cited as being of particular note, one is expressly favorable to Applicant and the other somewhat restrained in its wording. Four of the character statements were made by people who knew Applicant for many years, going back to the time period of his criminal conduct. Despite Applicant's deep involvement in serious criminal conduct at that time, the people making those statements indicate they had never witnessed any behavior by Applicant that would lead them to question his judgment and stated they felt Applicant was honest and forthright in all his professional relationships. One of those four persons specifically limited his favorable opinion about Applicant to his experience with Applicant in the nine months prior to the person's statement. Although the seven character statements noted awareness that Applicant's criminal conviction was the focus of the security clearance proceeding, none of them expressed any opinion about Applicant's criminal conduct, gave any explanation of how the declarant viewed Applicant's involvement in that criminal conduct, or gave any indication as to what weight (if any) they gave to that criminal conduct in reaching their opinion about Applicant.

The Administrative Judge considered the passage of time since Applicant's criminal conduct occurred. *See* Directive, Section F.3.b. and Criminal Conduct Mitigating Condition 1. However, apart from a *pro forma* recitation of the Section F.3. factors, the Judge's discussion of Applicant's conduct seems to essentially ignore: the seriousness of Applicant's multiple acts of criminal conduct (Section F.3.a.); Applicant's age and maturity at the time of the criminal conduct (Section F.3.c.);<sup>(2)</sup> and Applicant's motivation and the evidence of his active, willful voluntary participation in serious criminal conduct (Section F.3.d.) for which he (a lawyer) acknowledged that he "was the mastermind of the scheme."<sup>(3)</sup> The Judge's failure to address such aspects of the case indicates a failure to consider evidence that fairly detracts from the Judge's favorable findings and conclusions.

2. Whether the Administrative Judge's decision is arbitrary, capricious, and contrary to law. Department Counsel makes several arguments in support of its contention that the Administrative Judge's decision is arbitrary and capricious: (a) the seriousness of Applicant's criminal conduct required stronger evidence of rehabilitation to justify a favorable security clearance decision; (b) a favorable decision in this case could undermine public confidence in the security clearance system; (c) the Judge's analysis of Applicant's conduct under the Section F.3. factors is not sustainable; and (d) the

Judge's finding of mitigation is not supported by the record evidence.

An Administrative Judge's decision can be arbitrary and capricious if: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. ISCR Case No. 97-0435 (July 14, 1998) at p. 3.

There is no dispute that Applicant engaged in criminal conduct as alleged in the SOR. Once that criminal conduct was admitted or proven, the burden shifted to Applicant to present evidence to explain, extenuate or mitigate the criminal conduct. Directive, Additional Procedural Guidance, Item 15. Given the "clearly consistent with the national interest" standard (Directive, Sections C.2 and D.2), Applicant had a heavy burden of persuasion to demonstrate he was entitled to obtain a favorable security clearance decision. Directive, Additional Procedural Guidance, Item 15. *See also Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990)(noting there is no right to a security clearance and there is a "strong presumption against granting a security clearance"), *cert. denied*, 499 U.S. 905 (1991). Given the seriousness of Applicant's willful felonious criminal conduct (committed when he was a licensed lawyer), he was required to present strong evidence of rehabilitation in order to satisfy his burden of persuasion. *See, e.g.*, ISCR Case No. 97-0435 (July 14, 1998) at p. 5. *See also* Criminal Conduct Mitigating Guideline 5 ("[T]here is *clear* evidence of successful rehabilitation.")(italics added). Accordingly, the mere presence of *some* evidence indicative of reform and rehabilitation is not sufficient to justify a favorable security clearance decision in this case.

As discussed earlier, some elements of the Administrative Judge's findings of reform and mitigation are not supported by the record evidence as a whole. The failure of those findings to be sustainable undercuts and undermines the viability of the Judge's ultimate finding of reform and rehabilitation sufficient to warrant a favorable security clearance decision.

In addition, Department Counsel persuasively argues the Administrative Judge's decision fails to take into account the principle that the "clearly consistent with the national interest" standard and the nexus concept must be construed and applied in a manner that effectuates the national security interests of the United States and must include consideration of the need to protect the integrity of the industrial security program and maintain public confidence in it. *See, e.g.*, ISCR Case No. 97-0435 (July 14, 1998) at p. 4 n.2 and p. 6; ISCR Case No. 95-0622 (April 18, 1997) at pp. 5-6. Applicant engaged in serious criminal conduct which involved deception and deceit directed against the federal government and corruption of the political process. Such misconduct, deliberately undertaken by a lawyer, demonstrates a clear lack of the high degree of judgment, reliability, and trustworthiness that must be expected of persons granted access to classified information. Absent a very strong showing of extenuation, reform and rehabilitation, or both, the integrity of the industrial security program and the need to maintain public confidence in it weigh heavily against granting a security clearance to an applicant who has engaged in such serious misconduct. The clear weight of the record evidence in this case does not support the Judge's finding that Applicant has met his heavy burden of persuasion that it is clearly consistent with the national interest to grant him a security clearance.

Earlier in this decision, the Board discussed the Administrative Judge's analysis of Applicant's conduct under the Section F.3 factors. It need not repeat that discussion here.

### **Conclusion**

Department Counsel has met its burden of demonstrating error that warrants reversal. Pursuant to Item 33.c. of the Directive's Additional Procedural Guidance, the Board reverses the Administrative Judge's March 16, 1998 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: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

1. The fact that the character statements and two letters submitted on behalf of Applicant were admitted without objection did not relieve the Administrative Judge of the obligation to weigh them in light of their intrinsic value and the record evidence as a whole. *See, e.g.*, ISCR Case No. 97-0202 (January 20, 1998) at pp. 4-5. It is not simply a matter of considering whether other people express favorable opinions about Applicant, but rather: (a) whether the favorable opinions about Applicant are reasonable and well-founded; and (b) what weight reasonably can be placed on such favorable opinions in light of the record evidence as a whole.

2. Applicant argues his criminal conduct occurred when he was young (Reply Brief at p. 22), implying he should be given the benefit of Section F.3.c. Since Applicant was a 32-year-old lawyer when he acquired the company in 1987, he was clearly a man of mature age and fully capable of understanding the illegality and seriousness of the criminal acts he committed.

3. On appeal, Applicant's counsel has sought to minimize Applicant's criminal culpability. Counsel asserts Applicant was "pressured" to commit his crimes (Reply Brief at pp. 15, 23), argues "[t]he acts for which [Applicant] was convicted demonstrate not malfeasance, but rather, only the unfortunate decisions made by a young business novice" (Reply Brief at p. 18), contends "Applicant's actions were not taken for personal profit" (Reply Brief at pp. 23-24), suggests Applicant was an unwitting victim who inherited the problems caused by the financial improprieties committed by the previous owner of the company (Reply Brief at p. 24), and describes Applicant's involvement with illegal campaign contributions as merely a "misguided attempt to increase the company's visibility" (Reply Brief at pp. 24-25). Counsel's arguments do not reflect a fair or plausible reading of the record evidence. Furthermore, counsel's arguments appear to be an attempt to distance Applicant from the criminal culpability he acknowledged in his plea agreement (Government Exhibit 2). The right to engage in zealous advocacy does not permit Applicant's counsel to seek to distance his client from the clear meaning and significance of the judicial admissions his client made in that plea agreement. *See, e.g.*, ISCR Case No. 95-0622 (April 18, 1997) at pp. 4-5 n.6 ("[I]t 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.")(citing earlier Board decision).