

DATE: July 16, 1999

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 98-0424

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Carol A. Marchant, Esq., Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Paul J. Mason issued a decision, dated January 20, 1999, 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 misapplied Criminal Conduct Mitigating Conditions; 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 a Statement of Reasons (SOR) dated June 25, 1998 to Applicant. The SOR was based on Criterion J (Criminal Conduct).

A hearing was held on October 21, 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 the Administrative Judge's favorable decision.

Appeal Issues

1. Whether the Administrative Judge misapplied Criminal Conduct Mitigating Conditions. Department Counsel contends the Administrative Judge erred by applying Criminal Conduct Mitigating Conditions 1, 2 and 5. For the reasons that follow, the Board concludes Department Counsel's contention has merit.

Criminal Conduct Mitigating Condition 1. [\(1\)](#)

Department Counsel argues the Administrative Judge erred by applying this mitigating condition because in July 1997 Applicant engaged in criminal conduct for which he pleaded "no contest" to 24 criminal charges in April 1998 and there is no basis in the record evidence for the Judge to characterize Applicant's criminal conduct as not recent. Department Counsel's contention has mixed merit.

It was within the bounds of the Administrative Judge's discretion to conclude the July 1997 criminal conduct was not recent within the meaning of Criminal Conduct Mitigating Condition 1. However, given Applicant's history of criminal conduct over two decades, the Judge gave undue weight to Mitigating Condition 1. The presence of a mitigating condition must be weighed in light of the evidence as a whole, not in isolation.

Criminal Conduct Mitigating Condition 2. [\(2\)](#)

Department Counsel argues the Administrative Judge erred by applying this mitigating condition because Applicant engaged in various criminal acts in 1970, 1977, 1990 and 1997. This argument has merit. Because Applicant engaged in multiple acts of criminal conduct over a period of years, the Administrative Judge did not have a rational basis for applying Criminal Conduct Mitigating Condition 2.

Criminal Conduct Mitigating Condition 5. [\(3\)](#)

Department Counsel contends the record evidence does not support the Administrative Judge's application of this mitigating condition. Department Counsel specifically argues: (a) the Judge's acceptance of Applicant's statement that Applicant realizes his conduct was wrong is not a substitute for record evidence of reform and rehabilitation; (b) Applicant's statement that he knows his acts were wrong does not provide a rational basis for the Judge to conclude Applicant has reformed because the record shows Applicant engaged in criminal conduct in the past despite knowing it was illegal; (c) the Judge gave undue weight to the two character witnesses who testified on behalf of Applicant; (d) the Judge erred by relying on Applicant Exhibits A and B because they are irrelevant to Applicant's security eligibility; and (e) the overall record evidence does not provide a basis for the Judge's finding of mitigation.

Department Counsel's first two arguments are interrelated. An applicant's acknowledgment of the wrongfulness of his or her past conduct, if found to be credible, has some probative value with respect to a Judge's consideration of whether an applicant has demonstrated reform and rehabilitation. However, an acknowledgment of wrongdoing is merely a first step and does not constitute evidence of conduct that demonstrates reform and rehabilitation. *Cf.* 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 demonstrate a track record of reform and rehabilitation."). Furthermore, Applicant's acknowledgment of the wrongfulness of his past criminal conduct cannot be viewed in isolation, but must be considered in light of the record evidence as a whole, including evidence that fairly detracts from it. *See* Directive, Additional Procedural Guidance, Item 32.a. As Department Counsel aptly notes, the mitigating value of Applicant's acknowledgment of the wrongfulness of his past actions is undercut by the record evidence that Applicant deliberately engaged in illegal conduct as recently as 1997 despite knowing his actions violated the law.

The Administrative Judge has discretion in weighing the record evidence. Absent a showing that the Judge acted in a manner that is arbitrary, capricious, or contrary to law, the Board will not disturb the Judge's weighing of the record evidence. *See, e.g.*, ISCR Case No. 98-0394 (June 10, 1999) at p. 6. Considering the record as a whole, the Board concludes Department Counsel has failed to meet its burden of demonstrating the Judge gave undue weight to the character testimony of the two witnesses who appeared on Applicant's behalf.

Department Counsel's challenge to the relevance of Applicant Exhibits A and B (which show the value of the product made by Applicant's company) is well-taken. The value of the products made by Applicant's company is irrelevant to a determination whether Applicant is suitable for a security clearance. Merely because Applicant's company makes a valuable product does not demonstrate that Applicant, in his personal conduct, has demonstrated the high degree of judgment, reliability, and trustworthiness that must be expected of persons granted a security clearance. *Cf.* ISCR Case No. 98-0370 (January 28, 1999) at p. 3 ("It is irrelevant whether Applicant could be a valuable asset to her employer if she were allowed to have access to classified information. There is no logical connection between Applicant's suitability for access to classified information and her value to her employer. [citation omitted] It is possible for an applicant to be

an asset to his or her employer, yet at the same time fail to demonstrate the high degree of judgment, reliability, and trustworthiness that must be expected of persons granted a security clearance." The Judge erred by relying on Applicant Exhibits A and B in reaching his favorable conclusions about Applicant's security eligibility.

The record evidence as a whole provides the Administrative Judge with a basis to conclude Applicant has demonstrated *some* evidence of reform and rehabilitation. However, the question is not whether there is *some* evidence of rehabilitation, but rather whether there is evidence of rehabilitation sufficient to warrant the Judge's favorable conclusions under Criterion J in light of the record evidence as a whole. *See, e.g.*, ISCR Case No. 97-0821 (October 15, 1998) at p. 3. Considering the record as a whole, the evidence is insufficient to support a conclusion that Applicant has demonstrated "clear evidence of successful rehabilitation." Accordingly, the Judge erred by applying Criminal Conduct Mitigating Condition 5.

2. Whether the Administrative Judge's favorable security clearance decision is arbitrary, capricious, or contrary to law. Department Counsel also contends the Administrative Judge's favorable decision is arbitrary, capricious, and contrary to law. In support of this contention, Department Counsel argues: (a) the Judge misapplied pertinent Criminal Conduct Mitigating Conditions; (b) the Judge gave undue weight to the fact that Applicant, on some occasions, pleaded guilty to less serious charges than those originally brought against him; (c) the Judge gave undue weight to the fact that Applicant was not responsible for the 1997 fireworks explosion, while ignoring the security significance of the numerous safety violations by Applicant discovered during the investigation of the 1997 fireworks explosion; (d) the Judge erred by finding Applicant's 1977 firearms violation was extenuated by his motivation on that occasion; and (e) Applicant's history of criminal conduct demonstrates a pattern of selective compliance with the law that raises considerable doubt about his willingness to abide with rules and regulations pertaining to the handling of classified information.

As discussed earlier in this decision, the Administrative Judge erred in his application of Criminal Conduct Mitigating Conditions.

It was not arbitrary and capricious for the Administrative Judge to consider whether the charges to which Applicant pleaded guilty were less serious than the charges initially brought against him. The fact that an applicant was arrested or charged with a criminal offense is not proof that the applicant actually engaged in criminal conduct. *See, e.g.*, ISCR Case No. 96-0461 (December 31, 1997) at p. 3. Furthermore, a conviction, whether based on a trial or a plea agreement, is evidence only of the criminal conduct specifically covered by the conviction, not proof of any other criminal conduct. *See, e.g.*, ISCR Case No. 96-0525 (June 17, 1997) at pp. 4-5. In addition, the nature and seriousness of an applicant's conduct are a matter the Judge must consider. *See* Directive, Section F.3.a.; Adjudicative Guidelines at page 2-1. In view of the foregoing, Department Counsel's appeal argument on this point lacks merit.

Department Counsel persuasively argues that the Administrative Judge gave undue weight to his finding that Applicant was not responsible for the 1997 fireworks explosion. The Judge relied on that finding to a great extent in his analysis of the 1997 incident and, as a result, failed to give fair consideration to the significance of Applicant's numerous safety violations that were discovered during the investigation of the 1997 incident. The fact that those safety violations did not cause the 1997 fireworks explosion does not negate their security significance in light of the evidence of Applicant's history of knowing and deliberate selective compliance with the law. *See, e.g.*, ISCR Case No. 98-0350 (March 31, 1999) at p. 3 ("Under the whole person concept, the Administrative Judge was required to consider the totality of Applicant's conduct to decide whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant."); ISCR Case No. 89-1377 (November 2, 1990) at p. 4 ("Even if . . . any one facet of Applicant's conduct might not, by itself, be sufficient to support an adverse security clearance decision, the Administrative Judge may still consider whether the totality of Applicant's conduct has negative security implications.").

Department Counsel persuasively argues that Applicant's concern about the possible loss of his firearms did not provide the Administrative Judge with a rational basis to find extenuation or mitigation of Applicant's decision to transport those firearms in 1977 in a manner that Applicant knew was in violation of the law. It was reasonable for the Judge to consider Applicant's motivation on that occasion. *See* Directive, Section F.3.d.; Adjudicative Guidelines at page 2-2. However, Applicant demonstrated a lack of judgment, reliability, and trustworthiness when he made a conscious decision to violate the law when transporting his firearms without trying to find a way to transport them in a lawful manner. The Judge's finding that Applicant's motivation extenuated or mitigated his criminal conduct on that occasion

was an abuse of his discretion under Section F.3. of the Directive.

Of course, Applicant's lawful involvement with explosives and firearms raises no security concerns. However, Department Counsel is correct in arguing that Applicant's various violations of the law in connection with his possession and handling of explosives and firearms raise serious questions as to Applicant's ability or willingness to abide with the law when he believes compliance with the law is inconvenient for him. The federal government 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). Applicant's history of selective compliance with the law raises serious questions as to his security eligibility. Absent a sustainable basis for the Judge to conclude Applicant's history of criminal conduct was extenuated or mitigated, Applicant's history of criminal conduct would preclude a finding that it is clearly consistent with the national interest to grant or continue a security clearance for him. *See* Directive, Additional Procedural Guidance, Item 15 ("The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.").

For the reasons stated in this decision, the Administrative Judge did not have a sustainable basis to conclude Applicant's history of criminal conduct was extenuated or mitigated sufficiently to warrant a favorable security clearance decision. Accordingly, the Judge's favorable security clearance decision cannot be sustained.

Conclusion

Department Counsel has met its burden of demonstrating harmful error that warrants reversal. Accordingly, pursuant to Item 33.c. of the Directive's Additional Procedural Guidance, the Board reverses the Administrative Judge's January 20, 1999 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. "[T]he criminal behavior was not recent."
2. "[T]he crime was an isolated incident."
3. "[T]here is clear evidence of successful rehabilitation."