

DATE: October 1, 1999

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 99-0040

## APPEAL BOARD DECISION AND REVERSAL ORDER

### APPEARANCES

#### FOR GOVERNMENT

Peregrine Russell-Hunter, Department Counsel

#### FOR APPLICANT

*Pro Se*

Administrative Judge John G. Metz Jr. issued a decision, dated June 28, 1999, in which he concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed. For the reasons set forth below, the Board reverses the Administrative Judge's decision.

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

Applicant's appeal presents the following issue: Whether the Administrative Judge properly applied the pertinent provisions of the Directive in his decision and if not was the outcome arbitrary, capricious and contrary to law.

#### **Procedural History**

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) to Applicant dated January 28, 1999. The SOR was based on Criterion J (Criminal Conduct) and Criterion E (Personal Conduct). Applicant requested resolution without a hearing.

The Administrative Judge issued a decision based on a File of Relevant Material on June 28, 1999, in which he concluded that it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case is before the Board on Applicant's appeal from that unfavorable decision.

#### **Appeal Issues**

Whether the Administrative Judge properly applied the pertinent provisions of the Directive in his decision and if not was the outcome arbitrary, capricious and contrary to law. Applicant argues that the Administrative Judge failed to apply properly several provisions of the Directive to Applicant's case and as a result the outcome was arbitrary, capricious and contrary to law. Applicant's argument is persuasive.

The Administrative Judge made the following findings of fact: About one year before the close of the record, Applicant, then 21 years old, stole a role of film worth less than ten dollars from a retail store. As a result of the theft Applicant lost his job with a subsidiary firm of the victim. Applicant was prosecuted, pleaded guilty and was sentenced to a six-months

deferred sentence and a \$248 fine.

Applicant notes that the Administrative Judge applied two disqualifying conditions under Criterion E, one of which is "A pattern of dishonesty or rule violations." Applicant argues that one instance fails to show a pattern. The Board agrees.

Applicant argues that Criterion J should have been mitigated by, among others, mitigating condition 2 ("the crime was an isolated incident"). The Administrative Judge did cite that condition but did not apply it in full mitigation of the one act. Given the de minimus nature of the act the Board agrees with Applicant. In this case, applicant's single act of a de minimus nature occurring a year prior to the close of the record is fully mitigated by mitigating condition 2. The Judge cites Applicant's failure to explain the offense or to offer other evidence in extenuation or mitigation as a partial basis for his adverse decision. Notwithstanding the absence of such input from the Applicant, the existing evidence must be evaluated qualitatively in making an overall common sense determination based upon all available facts.

Applicant argues that the factors under Section F.3. of the Directive were not adequately applied to Applicant's case. Given the nature and seriousness of Applicant's disqualifying conduct (a one-time, non-violent incident of shoplifting merchandise worth under \$10), the Board concurs with Applicant. Additionally, the Board cannot sustain the Administrative Judge's conclusion that Applicant's loss of his job was disqualifying. Rather, Applicant lost his job as a result of the single instance of disqualifying conduct. The mere loss of his job in this case carries no independent security significance.

Applicant raises other issues on appeal. These issues either rely on new evidence which the Board may not consider on appeal (Directive, Additional Procedural Guidance Item 29) or are not outcome determinative.

The Board concludes that it was arbitrary, capricious and contrary to law for the Administrative Judge to conclude that Applicant was not eligible for a security clearance given the sparse record of disqualifying conduct in this case.

### **Conclusion**

Applicant has met his burden of demonstrating error that warrants reversal. Accordingly, pursuant to Item 33.c. of the Directive's Additional Procedural Guidance, the Board reverses the Administrative Judge's June 28, 1999 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

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

**Separate opinion of Chairman Emilio Jaksetic, concurring:**

I concur with my colleagues' conclusion that the Administrative Judge's adverse decision should be reversed. I write separately to explain my reasons for voting to reverse in this unusual case.

I fully concur with my colleagues in connection with their (a) statement of the procedural history of the case and the appeal issues raised by Applicant; (b) discussion about Personal Conduct Disqualifying Condition 5 ("[A] pattern of dishonesty or rule violations"); (c) conclusion that Applicant's loss of a job has no independent security significance under the particular facts of this case; and (d) statement about the new evidence raised by Applicant on appeal.

Because persons entrusted with access to classified information are in a fiduciary relationship with the federal government, evidence that an applicant previously has breached a fiduciary duty would raise serious questions as to the applicant's security suitability. In this case, the Administrative Judge's decision indicated that "[Applicant's] theft from the parent company of his employer at the time raises at least the hint of breach of fiduciary duty." If there were record evidence to support that statement by the Administrative Judge, then I would have voted to affirm the Judge's decision. However, there is no record evidence to support the Judge's statement.

An 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." Directive, Additional Procedural Guidance, Item 15. In this case, the Administrative Judge correctly noted that Applicant did not respond to the File of Relevant Material (FORM). On the face of it, Applicant's failure to respond to the FORM could be interpreted as a failure to meet his burden under Item 15. However, the Board has cautioned against the piecemeal application of provisions of the Directive, noting that they cannot be simply viewed in isolation, but rather must be construed and applied in light of other relevant provisions of the Directive. *See, e.g.*, ISCR Case No. 98-0395 (June 24, 1999) at p. 4; ISCR Case No. 97-0289 (January 22, 1998) at p. 3.

Read as a whole, the Administrative Judge's decision gives undue weight to Item 15, despite the Judge's express recognition that Applicant's misconduct was isolated and minor in nature. The Administrative Judge acted in an arbitrary and capricious manner when he elevated the procedural significance of Applicant's failure to respond to the FORM over the Administrative Judge's responsibility to make a common sense decision under Section F.3. The failure of Applicant to present evidence in response to the FORM did not make the record evidence against him more serious or security significant. Finally, a pattern of otherwise minor incidents may, under the whole person concept, raise serious doubts about an applicant's security eligibility. However, a single instance of minor misconduct is clearly distinguishable.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board