Date: June 30, 1997

In Re:

SSN: ----------

Applicant for Security Clearance

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ISCR Case No. 96-0710

REMAND DECISION OF ADMINISTRATIVE JUDGE

ROBERT R. GALES

APPEARANCES

FOR THE GOVERNMENT FOR THE APPLICANT

Matthew E. Malone, Esquire

Department Counsel

James G. Smalley, Esquire

STATEMENT OF CASE

On September 27, 1996, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *"Safeguarding Classified Information Within Industry,"* dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *"Defense Industrial Personnel Security Clearance Review Program"* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to ---------- (Applicant), which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked.

A copy of the SOR is attached to this Decision and included herein by reference.

In a sworn written statement, dated October 11, 1996, Applicant responded to the allegations set forth in the SOR, and requested a hearing. The case was initially assigned to Administrative Judge Kathryn Moen Braeman on November 12, 1996, but due to caseload considerations, was subsequently reassigned to, and received by, this Administrative Judge on November 15, 1996. A notice of hearing was issued on November 15, 1996, and amended on November 19, 1996, and the hearing was held before me on November 26, 1996. During the course of the hearing, six Government exhibits and four Applicant exhibits, and the testimony of six Applicant witnesses (including the Applicant), were received. The transcript was received on December 11, 1996.

A Decision was issued on January 14, 1997, in which it was found that it was clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Department Counsel filed a notice of appeal and submitted an appeal brief. Applicant submitted a reply brief. The Appeal Board considered the issue, identified as follows: "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," and, on June 20, 1997, issued its Decision and Order for Remand, and directed that the case be remanded for further consideration, correction of identified errors, and issuance of a new Decision consistent with the requirements of the Additional Procedural Guidance set forth in the Directive.

The Board ruled, in part, as follows:

. . . the Board concludes the record evidence as a whole does not reasonably support the Judge's finding that Applicant has successfully rehabilitated himself. . . . 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 [referring to Guideline 5: . . . "clear evidence of successful rehabilitation"] in Applicant's favor.

In support of its position, the Board commented:

. . . the fact that Applicant will remain on probation until September 1998 cannot simply be disregarded. . . . 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 Board also commented:

. . . 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.

And, the Board stated:

. . . the Administrative Judge erred by relying, in part, on Applicant's potential to contribute to the national security.

And, finally, the Board stated:

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.

FINDINGS OF FACT

The Findings of Fact set forth in my initial Decision, dated January 14, 1997, are hereby incorporated herein as though they were expressly re-written below.

POLICIES

The Policies set forth in my initial Decision, dated January 14, 1997, are hereby incorporated herein as though they were expressly re-written below.

CONCLUSIONS

Upon consideration of the comments set forth in the Appeal Board Decision and Order for Remand, reconsideration of all the facts in evidence, a reassessment of the witness testimony, demeanor, and credibility, and after application of all appropriate legal precepts and factors, including those described briefly above, I conclude the following with respect to the allegation set forth in the SOR:

At the outset, I must restate that I had ample opportunity to evaluate the demeanor of Applicant, observe his manner and deportment, appraise the way in which he responded to questions, assess his candor or evasiveness, read his statements, listen to his testimony, and watch the interplay between himself and those around him. It is my impression that his explanation regarding his conviction of bank fraud, as well as the underlying conduct that got him into the predicament, have the solid ring of truth.

On three separate occasions, commencing during 1988-89, and continuing until early 1991, Applicant was voluntarily involved in criminal behavior which was characterized by the court as bank fraud. While he was not coerced into performing the illegal actions alleged, because of the probable loss of substantial investment money if he had been unsuccessful in his efforts to obtain mortgage funding, there was the presence of a degree of *pressure* to do so. This *pressure* does not, however, excuse Applicant from complying with the norms of society. If it did, all homeowners would be justified in lying on their home mortgage applications. In this instance, I do not raise the issue to excuse the *pressure*, but rather to point out that those *pressures* are no longer considerations in Applicant's life, now that he is no longer involved in the investment scheme, and has vowed never to repeat such conduct. Thus, Mitigating Guideline 3 has some application in this instance.

Applicant's criminal conduct ceased in early 1991, and in the ensuing five years, has not recurred. As bad as the criminal conduct may have been during that period, it has been over five years since the last such incident, and while the Guidelines no longer require a set period of good conduct (i.e., five years), I do not believe that it is necessary to hold an applicant to a longer period of good conduct. Moreover, there is no evidence to infer that Applicant's criminal conduct has continued to a period more recent than early 1991. Thus, I conclude that Applicant's criminal behavior has not been recent, and Mitigating Guideline 1 has significant application in this instance.

The matter of isolation is more troublesome because the scheme consisted of a series of three independent transactions over a period of approximately two and one-half years. As such, one can consider each incident separately or as one scheme with three parts. I recognize that Applicant has, during his lifetime, led what appears to be largely a law-abiding existence, and that these negative incidents are but a small portion of his overall 42 years of life. Nevertheless, in viewing the overall conduct of this scheme, I conclude that, since each transaction was an independent action involving different mortgage lenders for different property, this behavior cannot be considered an isolated incident. Accordingly, Mitigating Guideline 2 does not apply.

The Board has ruled that the record evidence as a whole does not reasonably support my earlier finding that Applicant has successfully rehabilitated himself, and while it agreed that there is evidence of *some* rehabilitation in this case, there is insufficient "clear" evidence of successful rehabilitation to allow me to apply the rehabilitation Mitigating Guideline, referring to Guideline 5 - "clear evidence of successful rehabilitation," in Applicant's favor. While I may disagree, I am bound by the law of the case.[(1)] Accordingly, his plea of guilty; partial acknowledgment of his criminal actions; the rendering of, as the district judge characterized, *substantial assistance* in the investigation and prosecution of other persons; serving his imprisonment; making restitution; abiding by the standard conditions of probation supervision; and his resumption of his place in society, in general, and with his employer, and in his profession, in specific, may not be given the weight that I had initially given to them for the Board has ruled that the *reasonable mind* would not have done so.

I find that there is evidence of rehabilitation, whether the degree is *some*, as stated by the Appeal Board, or any other estimation. Also, in light of the length of time between the criminal conduct and the absence of recurrence of same, I

believe there is little likelihood of recurrence. I do not take this position lightly, but based on the law, as set forth in *Department of Navy v. Egan,* 484 U.S. 518 (1988), my evaluation of the evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under Enclosure 2 of the Directive, I conclude that Applicant has, through evidence of extenuation and explanation, successfully mitigated and overcome the Government's case. Accordingly, allegation 1.a. of the SOR is concluded in favor of Applicant.

For the reasons stated, I conclude Applicant is suitable for access to classified information.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive, are:

Paragraph 1. Criterion J: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

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Robert R. Gales

Chief Administrative Judge

1. I would, however, note that the Adjudicative Process Guideline of the Directive does not require *clear* evidence of rehabilitation, merely "the presence or absence of rehabilitation and other pertinent behavioral changes;" and Section F.3. of the Directive merely requires "the presence or absence of rehabilitation."