Date: January 14, 1997

In Re:

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

Applicant for Security Clearance

ISCR Case No. 96-0710

DECISION OF ADMINISTRATIVE JUDGE

ROBERT R. GALES

APPEARANCES

FOR THE GOVERNMENT FOR THE APPLICANT

Matthew E. Malone, Esquire

Attorney-Advisor

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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.

RULINGS ON PROCEDURE

On December 11, 1996, the court reporter contracted to furnish professional transcription services for DOHA advised me that, due to technical difficulties, an estimated four pages of testimony, commencing at page 65 of the transcript, may have been lost. After reviewing my own notes for the missing segment, I concluded that the missing testimony came at the very end of the cross-examination of Applicant, conducted by Department Counsel, as well as the very brief redirect examination of him, conducted by his attorney. My notes reflect that the missing information referred to Applicant's probation ceasing in September 1999; his inability to open new lines of credit; and that he is no longer involved with his former business partners.

On December 20, 1996, I informed both parties of the situation and offered them the opportunity to submit proposed draft findings of fact derived only from the missing segments of the transcript. No other portions of the transcript were to be considered for that purpose. Accordingly, each party was requested to furnish me with their proposal, as well as objections to each other's proposal, no later than December 30, 1996. Department Counsel timely offered proposed findings of fact, but Applicant's attorney chose not to do so, nor to object to those offered by Department Counsel.

FINDINGS OF FACT

Applicant has admitted the factual allegation pertaining to criminal conduct under Criterion J (subparagraph 1.a.), while denying the conclusory allegation. That admission is hereby incorporated herein as a finding of fact.

After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 42 year old male employed by a defense contractor, and he is seeking to obtain a SECRET clearance. He was originally granted a SECRET clearance in 1978, and held it until at least 1985.

Applicant was a would-be entrepreneur who, on or before April 1991, engaged in illegal activities to facilitate his desired accumulation of wealth. Those activities resulted in his arrest, and eventual plea of guilty,[(1)] for bank fraud, in violation of Title 18, United States Code, Section 1344, a felony. On December 9, 1994, Applicant was committed to the custody of the United States Bureau of Prisons to be imprisoned for the term of eighteen months;[(2)] upon release from imprisonment, he was to be on supervised release (probation) for a term of three years; he was directed to not incur new credit card charges or open additional lines of credit without the approval of his probation officer; and he was ordered to pay restitution in the amount of $150,000.[(3)]

On July 28, 1995, because Applicant had rendered substantial assistance in the investigation and prosecution of other persons who had committed offenses against the United States, on the Government's motion, Applicant's period of imprisonment was reduced to a term of nine months, with all other terms of his original order remaining unchanged. He has been on supervised release since September 1995, and will remain in that status until September 1999.

The events which resulted in Applicant's involvement with legal authorities commenced in about 1988-89, when he entered into some real estate ventures with local business people which dealt with purchasing, land development, renovation, and property resale. He had previously purchased and owned approximately ten investment properties over the years, and he felt he was ready to move up to higher-priced investment properties. His associates made him an offer that was "too good to pass up." Having little experience in financing the particular type of deal, Applicant took his first large land investment to a mortgage banker, and through that person's contacts, the two became partners in the venture. His initial real estate venture was an investment of $17,000 as a down payment, and about $10,000 in payments, with a purchase price of $745,000 on a property valued at $1,200,000. No financing papers were signed, and the potential profit, with no market increase, was estimated at $400,000. The actual profit was $130,000 in less than 12 months. The remaining three transactions are what eventually resulted in his conviction.

As he became more involved in the process, and sought acceptance by the business group, Applicant's financial responsibilities became greater. His partner chose not to actively participate in the next ventures, ostensibly because he was unable to afford another investment at the time. Instead, his partner(s) assisted Applicant in securing three other loans for other properties through the mortgage operation, and, in order to obtain the loans, it became necessary for

Applicant to make false entries on the various loan forms. His partners -- the mortgage bankers -- *guided* him to "repackage" or inflate[(4)] his actual income, on prepared forms, and although he had misgivings, he agreed to comply with their guidance. Applicant continued his scheme, knowing that what he was doing was wrong, and without being forced by anyone to do so. The scheme continued until early 1991.[(5)]

In time, Applicant was unable to make mortgage payments because of insufficient income, and personal bankruptcy became an attractive alternative. While the motivation to do so is unclear,[(6)] in November 1991, Applicant filed for bankruptcy under Chapter 13. It was later converted to a filing under Chapter 7, and discharge occurred in October 1992. Included in the filing were the three mortgage lenders for the three investment properties in issue. Applicant eventually re-established credit, and currently has qualified for a residence loan, an car loan, and a national credit card.

Applicant is no longer involved with his former partners. He continues to make a restitution payment of $500 each month.

Applicant has been employed by his present employer since April 1993, with the exception of the time served while imprisoned. The employer's chief operating officer, a company director (a former rear admiral and graduate of the U.S. Naval Academy), as well as former colleagues, all strongly support Applicant's efforts, and characterize his work performance in positive terms. He is a very valuable and creative employee; and is dedicated, with professionalism above the norm.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Factors) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Factors).

An Administrative Judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision -- an expansion of the factors set forth in Section F.3. of the Directive, are intended to assist the Administrative Judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an Administrative Judge should consider are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

[Criminal Conduct - Criterion J]: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Conditions that could raise a security concern and may be disqualifying include:

(1) any criminal conduct, regardless of whether the person was formally charged;

(2) a single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns include:

(1) the criminal behavior was not recent;

(3) the person was pressured or coerced into committing the act and those pressures are no longer present in that person's life;

(4) the person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur;

(5) there is clear evidence of successful rehabilitation.

Since the protection of the national security is the paramount determinant, the final decision in each case must be arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the interests of national security,"[(7)] or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded that both standards are one and the same. In reaching this Decision, I have endeavored to draw only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have attempted to avoid drawing inferences that are grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the Government to establish a case which demonstrates, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the Government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the Government's case, and to ultimately demonstrate that it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk that an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to the potential for, rather than actual risk of, compromise of classified information.

One additional comment is worthy of note. Applicant's loyalty and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides that industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than loyalty and patriotism. Nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied decision as to Applicant's loyalty or patriotism.

CONCLUSIONS

Upon consideration of all the facts in evidence, an assessment 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:

With respect to Criterion J, the Government has established its case. At the outset, I am obliged to state 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.

During one limited period from 1988-89, and on three separate occasions, 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.

Applicant's actions in furtherance of the illegal scheme ceased in early 1991, and in the ensuing five years, have not recurred. Thus, as bad as the criminal conduct might have been, it has been over five years since the last such incident. Department Counsel has argued that Applicant's failure to correct the fraud he had previously engaged in, as well as his later efforts to escape responsibility by declaring bankruptcy, should be viewed against Applicant because they indicate that he is still looking out for himself.[(8)] That argument avoids the issue of recency rather than serving persuasively as evidence of it. In any event, I conclude that Applicant's criminal behavior has not been recent.

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, that mitigating factor does not apply.

Applicant had clear opportunities to clean up his act after he had been arrested, and he apparently chose to do so by: entering a plea of guilty and acknowledging his criminal actions; rendering, 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; resuming his place in society, in general, and with his employer, and in his profession, in specific; and making continuing contributions to the national security.

Department Counsel has argued, unpersuasively, that because Applicant is still on supervised probation, and because he cannot incur new indebtedness without permission, he, *ipso facto*, cannot be trusted and cannot be considered as rehabilitated. I disagree.

As has been said by the noted trial attorney J.W. (Jake) Ehrlich:[(9)]

Certain crimes are committed impulsively by men of previous good character who are not likely to threaten society again. In the commission he suffers more punishment than can be given by the law; the stigma of the crime is punishment enough.

I believe Applicant is one of those people. 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. Applicant was represented by an attorney during the proceeding. *See*, Government Exhibit 3, at 1.

2. It should be noted that the guideline range determined by the court was imprisonment for 18 to 24 months. *Id.*, at 7.

3. Applicant was initially ordered to make restitution in the amount of $369,863.38, but because of the unlikelihood that his future earning capacity would enable him to make such payments, the amount was reduced to a more realistic figure. *Ibid.* After his release from imprisonment, Applicant researched the history of the three properties in issue and found what he believes to have been fraudulent information submitted by the mortgage lenders to substantiate their claims for losses, which claims were used to establish Applicant's punishment and financial liability. For example, one mortgage lender furnished $1,400,000 and recovered $1,600,000; another furnished $668,000, and recovered $690,000; and the third furnished $288,000, and recovered $315,000. As a result, he believes he has a civil action against the mortgage lenders for damages to him arising from their false information. *See*, Government Exhibit 2, at 3.

4. Applicant claimed that the amounts were true, but that the "location" of certain information on the forms was incorrect.

5. Applicant acknowledged that the scheme continued until April 1991, but the court found that it concluded in February 1990. *See*, Government Exhibit 3, at 1.

6. Applicant claims that he had made a decision that what he had done was wrong, and in an effort to accept the outcome of what he had done, and to start over, it was necessary to file for bankruptcy. The reasoning is confusing. *See*, Government Exhibit 2, at 2.

7. *See*, Executive Order 12968, *"Access to Classified Information;"* as implemented by Department of Defense Regulation 5200.2-R, *"Personnel Security Program,"* dated January 1987, as amended by Change 3, dated November 8, 1995. However, the Directive uses both "clearly consistent with the national interest" (*see*, Sec. B.3; Sec. C.2.; and Sec. D.2.; Enclosure 3, Sec. 1.; and Sec. 25), and "clearly consistent with the interests of national security" (*see*, Enclosure 2 (Change 3), Adjudicative Guidelines, at 2-2).

8. *See*, Transcript (Tr.), at 104-05.

9. *See*, J. Ehrlich, *A Reasonable Doubt* 128 (1965).