

DATE: December 7, 2001

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 00-0519

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esq., Chief Department Counsel

FOR APPLICANT

Pro Se

Administrative Judge Barry M. Sax issued a decision, dated August 14, 2001, 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 affirms 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.

Applicant's appeal presents the following issues: (1) whether Applicant is being unfairly punished a second time concerning matters that resulted in a one-year suspension of her security clearance in 1991; (2) whether the Administrative Judge made some erroneous findings and reached some erroneous conclusions about Applicant; and (3) whether Applicant can have her security clearance reinstated for six months to a year until she retires.

Procedural History

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated January 31, 2001. The SOR was based on Guideline J (Criminal Conduct) and Guideline F (Financial Considerations). A hearing was held on July 11, 2001. The Administrative Judge issued a written decision, dated August 14, 2001, in which he concluded 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 the Administrative Judge's adverse security clearance decision.

Scope of Review

On appeal, the Board does not review a case *de novo*. Rather, the Board addresses the material issues raised by the parties to determine whether there is factual or legal error. There is no presumption of error below, and the appealing party must raise claims of error with specificity and identify how the Administrative Judge committed factual or legal error. *See* Directive, Additional Procedural Guidance, Item E3.1.32. *See, e.g.*, ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (discussing reasons why party must raise claims of error with specificity).

When an Administrative Judge's factual findings are challenged, the Board must determine 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 making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge." Directive, Additional Procedural Guidance, Item E3.1.32.1. The Board must consider not only whether there is record 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. 99-0205 (October 19, 2000) at p. 2.

When a challenge to an Administrative Judge's rulings or conclusions raises a question of law, the Board's scope of review is plenary. *See* DISCR Case No. 87-2107 (September 29, 1992) at pp. 4-5 (citing federal cases).

Appeal Issues

1. Whether Applicant is being unfairly punished a second time concerning matters that resulted in a one-year suspension of her security clearance in 1991. On appeal, Applicant does not challenge the Administrative Judge's findings that she failed to file her federal income tax returns for tax years 1985, 1986, and 1987 until 1991. However, Applicant contends she is being unfairly punished a second time because in 1991 her security clearance was suspended for a year based on her failure to file those income tax returns and later reinstated. Applicant's contention fails to demonstrate the Administrative Judge erred.

At the hearing, Applicant indicated that around 1991 her security clearance had been suspended for a year based on her failure to file her federal income tax returns and was later reinstated. (Hearing Transcript at pp. 32-34, 63-64) Although Applicant did not present any documentation to support her claim on this point, the Administrative Judge accepted it. (Administrative Judge's Decision at p. 6) For purposes of deciding this appeal, the Board will accept as true Applicant's claim that her failure to file her federal income tax returns for tax years 1985, 1986, and 1987 resulted in an adverse security clearance decision around 1991, that her access to classified information was suspended for a year, and that her security clearance was reinstated after the one-year suspension.

Security clearance adjudications are not criminal proceedings and adverse security clearance decisions are not criminal penalties or sanctions. Accordingly, the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution does not apply to security clearance cases. *See* DISCR Case No. 94-0295 (December 30, 1994) at p. 4 (discussing federal cases). However, Applicant's appeal argument raises the issue of whether the Administrative Judge's adverse security clearance decision violates the doctrine of *res judicata*.

In general, under the doctrine of *res judicata*, a party cannot try to relitigate a matter that has been litigated previously. The doctrine of *res judicata* can be applied to decisions of administrative bodies that have attained finality. *Astoria Federal Savings & Loan Association v. Solimino*, 501 U.S. 104, 107 (1991). However, the doctrine of *res judicata* is not applied as strictly in administrative proceedings as it is in judicial proceedings. DISCR Case No. 86-3543 (April 27, 1989) at p. 3 (citing federal cases). Furthermore, the doctrine of *res judicata* should not be applied in the face of a contrary public policy. *Quinones Candelario v. Postmaster General of United States*, 906 F.2d 798, 801 (1st Cir. 1990), *cert. denied*, 499 U.S. 919 (1991); DISCR Case No. 86-3543 (April 27, 1989) at p. 3 (citing federal cases). *See also* ISCR Case No. 97-0191 (April 28, 1998) at pp. 3.

The federal government has a compelling interest in protecting and safeguarding classified information. *Department of Navy v. Egan*, 484 U.S. 518, 527 (1988). Furthermore, no one has a right to a security clearance. 484 U.S. at 528. A favorable security clearance decision does not give an applicant the right to retain a security clearance regardless of subsequent events or changed circumstances. Accordingly, the doctrine of *res judicata* does not bar an adverse security clearance decision when an applicant has engaged in misconduct subsequent to a favorable security clearance decision. Therefore, if an applicant who received a favorable decision based on a finding of reform and rehabilitation subsequently engages in conduct that has negative security implications, the federal government can decide that the applicant's security eligibility should be reevaluated in light of the applicant's new conduct. And, in light of the "whole person" concept (Directive, Section 6.3; E2.2.1, E2.2.3, and E2.2.4), such a reevaluation should consider the applicant's overall history, including the earlier conduct, not just the most recent instances of the applicant's conduct. *See* ISCR Case No. 97-0191 (April 28, 1998) at pp. 3-4.

In this case, the Administrative Judge found that after 1991: (a) Applicant did not satisfy her federal tax obligations for

several years, and had federal tax liens filed against her; and (b) Applicant failed to satisfy her state tax obligations for several years, and had her wages garnished to satisfy those state tax obligations. The Judge's findings provided a rational basis for the Judge to consider Applicant's past failure to timely file her federal tax returns as part of a "whole person" analysis of Applicant's security eligibility. Reinstatement of an applicant's security clearance does not preclude the government from reconsidering the applicant's past conduct and circumstances as it assesses the applicant's security eligibility in light of new information that has negative security implications. The Judge's decision in this case does not violate the doctrine of *res judicata*.

2. Whether the Administrative Judge made some erroneous findings and reached some erroneous conclusions about Applicant. Applicant challenges: (a) the Administrative Judge's finding that Applicant's payments did not significantly reduce her state and federal tax liabilities; (b) the Judge's conclusion that Applicant's conduct shows a pattern of misconduct and/or financial problems that began in 1985 and continued to the present; and (c) the Judge's conclusion that Applicant's conduct demonstrates poor judgment, untrustworthiness or unreliability. Applicant also asserts (d) that she has held a security clearance for more than 30 years and has shown that she is capable of safeguarding classified information.

(a) Considering the amount of Applicant's payments against the amount of her state and federal tax liabilities, it was not arbitrary or capricious for the Administrative Judge to find that Applicant's payments did not significantly reduce her state and federal tax liabilities. Applicant's personal belief that her payments have been significant does not demonstrate the Judge erred.

(b) Considering the record as a whole, the Administrative Judge had a rational basis for concluding that Applicant's conduct demonstrated a pattern of misconduct or financial problems that began in 1985 and continued to the present. ⁽¹⁾ The specific matters cited by Applicant in her appeal brief reflect favorable evidence. However, the Judge had to consider the record as a whole and decide whether the favorable evidence outweighs the unfavorable evidence or *vice versa*. Given the record evidence of Applicant's long history of continuing problems with her state and federal tax obligations, the favorable evidence cited by Applicant did not preclude the Judge from reaching his adverse conclusions about her overall history of conduct.

(c) Given Applicant's failure to timely file her federal tax returns for tax years 1985, 1986, and 1987, and her long history of failing to resolve her state and federal tax obligations, the Administrative Judge had a rational basis for concluding Applicant's conduct demonstrated poor judgment, untrustworthiness or unreliability for purposes of determining her security eligibility.

(d) Applicant's history of holding a security clearance does not preclude an adverse security clearance decision in her case. The government need not wait until a person mishandles or fails to properly safeguard classified information before it can decide to deny or revoke access to such information. *Adams v. Laird*, 420 F.2d 230, 238-239 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). Indeed, there are many types of conduct and circumstances other than security violations that can provide a rational basis for an adverse security clearance decision. In this case, Applicant's overall history of failing to deal with her state and federal tax obligations provides a rational basis for the Judge's adverse conclusions about her security eligibility.

3. Whether Applicant can have her security clearance reinstated for six months to a year until she retires. Applicant asked the Administrative Judge to be allowed to keep a security clearance for six months to a year until she retires. Because the Administrative Judge's findings and conclusions provided a rational basis for his adverse security clearance decision, it was not arbitrary or capricious for the Judge to not give Applicant the relief she sought. Applicant's personal desire to retain a security clearance until she retires does not provide a rational basis for concluding it is clearly consistent with the national interest to allow her access to classified information.

Conclusion

Applicant has failed to demonstrate error below. Accordingly, the Board affirms the Administrative Judge's adverse security clearance 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 Administrative Judge entered formal findings in favor of Applicant with respect to the state tax matters covered by SOR paragraphs 2.j. and 2.k. Those favorable formal findings are not at issue on appeal.