

DATE: September 25, 2001

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 00-0754

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

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

**FOR APPLICANT**

*Pro Se*

Administrative Judge Elizabeth M. Matchinski issued a decision, dated May 24, 2001, in which she 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 the Administrative Judge failed to consider certain evidence presented by Applicant; and (2) whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law.

**Procedural History**

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated December 22, 2000 to Applicant. The SOR was based on Guideline J (Criminal Conduct), Guideline E (Personal Conduct), and Guideline F (Financial Considerations).

Applicant submitted an answer to the SOR, in which he indicated he wanted a decision made without a hearing. A File of Relevant Material (FORM) was prepared. A copy of the FORM was provided to Applicant. No response to the FORM was received from Applicant. The case was then assigned to the Administrative Judge for consideration. The Judge issued a written decision, dated May 24, 2001, in which she 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 the Administrative Judge failed to consider certain evidence presented by Applicant. On appeal, Applicant: (a) cites to page seven of the decision below; (b) asserts he has filed his income tax returns for the years 1995, 1996, and 1997; and (c) argues "[i]t seems that my evidence was not looked at" by the Judge. Applicant's argument fails to demonstrate the Judge erred.

Under Guideline J, the SOR alleged that Applicant failed to file his state income tax returns for tax years 1995 (SOR paragraph 1.a), 1996 (SOR paragraph 1.b), and 1997 (SOR paragraph 1.c). The Administrative Judge found that Applicant filed his state income tax returns for 1995 and 1996 late, but concluded Applicant's late filing of those state tax returns was mitigated sufficiently to warrant entry of favorable formal findings with respect to SOR paragraph 1.a and SOR paragraph 1.b. However, the Judge found that, as of January 2001, Applicant had not filed his state income tax return for 1997 and entered a formal finding against Applicant with respect to SOR paragraph 1.c.

To the extent that the Administrative Judge entered formal findings in favor of Applicant with respect to SOR paragraph 1.a and SOR paragraph 1.b, Applicant's appeal arguments are moot. What remains is whether Applicant's argument demonstrates the Judge erred with respect to her findings and conclusions about Applicant's state income tax return for 1997.

Applicant submitted an answer to the SOR, dated January 10, 2001. In the answer, Applicant admitted the allegation set forth in SOR paragraph 1.c. with an explanation that he had sent paperwork concerning the state income tax return for 1997 to a tax consultant with a power of attorney authorizing the consultant to resolve all tax issues and arrange for payment of any money Applicant owed to the state. In support of that explanation, Applicant attached a copy of the power of attorney and copies of state and federal tax returns for 1995 and 1996. Applicant did not submit any additional information or documentation in response to the FORM.

Applicant had the burden of presenting evidence "to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." Directive, Additional Procedural Guidance, Item E3.1.15. Given the record evidence in this case, Applicant had the burden of proving that he had filed his state tax return for 1997. Considering the record evidence as a whole, the Judge had a rational basis for concluding Applicant's explanation about his 1997 state tax return was insufficient to meet his burden of proof with respect to SOR paragraph 1.c.

The Administrative Judge also made findings of fact concerning the matters covered by SOR paragraphs 2.a, 3.a, 3.b, and 3c. Applicant's does not challenge any of those findings on appeal. As noted earlier, there is no presumption of error below and the appealing party has the burden of raising claims of error with specificity. Accordingly, the Board need not address or review the Judge's unchallenged findings.

2. Whether the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. Applicant asks the Board to reverse the Administrative Judge's adverse decision. In support of that request, Applicant argues: (a) he has filed his state tax returns for 1995, 1996, and 1997; (b) he has had a security clearance since 1976 and has worked on various sensitive projects without a security violation; (c) he has never been arrested for anything; (d) he does not drink

or smoke; (e) he has never had his wages garnished and he has never filed for bankruptcy; and (f) he is very dedicated to his work and was named Engineer of the Month at his employer. The Board construes Applicant's arguments as raising the issue of whether the Judge's adverse decision is arbitrary, capricious, or contrary to law.

Applicant's arguments concerning his state income tax returns for 1995, 1996, and 1997 have been addressed in connection with his first appeal issue. The Board need not repeat its discussion and resolution of those arguments.

Applicant's security record did not preclude the Administrative Judge from considering the security significance of Applicant's conduct and circumstances under Guidelines E, F, and J and deciding whether it is clearly consistent with the national interest to grant or continue a security clearance for him. 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.

Applicant's recitation of various forms of conduct that he has not engaged in does not demonstrate the Administrative Judge's adverse decision is arbitrary, capricious, or contrary to law. Regardless of what forms of conduct Applicant has not engaged in, the Judge had the obligation to evaluate the security significance of the conduct Applicant did engage in. *See, e.g.*, ISCR Case No. 00-0382 (June 19, 2001) at p. 4.

Applicant's job performance did not preclude the Administrative Judge from making an adverse security clearance decision. An applicant with good or even exemplary job performance may engage in off-duty conduct that has negative security implications which provide a rational basis for an adverse security clearance decision. *See, e.g.*, ISCR Case No. 99-0462 (May 25, 2000) at p. 5.

The Administrative Judge's sustainable findings and conclusions about Applicant's conduct under SOR paragraph 1.c, and the Judge's unchallenged findings and conclusions about Applicant's conduct under SOR paragraphs 2.a, 3.a, 3.b, and 3.c provide a rational basis for her adverse security clearance decision. *See, e.g.*, ISCR Case No. 98-0448 (April 19, 1999) at pp. 2-3 (discussing security significance of failing to timely file income tax returns); ISCR Case No. 00-0245 (February 16, 2001) at p. 2 (discussing security significance of falsification); and ISCR Case No. 00-0622 (August 28, 2001) at p. 5 (discussing security significance of financial difficulties).

### **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