

DATE: December 20, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-05340

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

Administrative Judge Roger Wesley issued a decision dated June 17, 2002, in which he concluded that is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Applicant appealed.

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 issues: 1. Whether the Administrative Judge erroneously concluded that Applicant has a history of failing to file income tax returns; 2. Is the Government's case against Applicant mitigated by his stated belief that he is not liable for income taxes?; 3. Whether the Administrative Judge erroneously concluded that Applicant demonstrates an inability to address his debts; and 4. Did the Administrative Judge make harmful errors of fact in the case below?

Procedural History

The Defense Office of hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant dated October 24, 2001. The SOR was based on Guideline F (Financial Considerations) and Guideline J (Criminal Conduct). Applicant requested a hearing which was held on April 4, 2002. The Administrative Judge issued an unfavorable decision dated June 17, 2002. The case is before the Board on Applicant's appeal from that unfavorable 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 erroneously concluded that Applicant has a history of failing to file income tax returns. Applicant takes exception to the Administrative Judge's conclusion that Applicant has a history of failing to file income tax returns. He maintains that his failure to file was really a single event -- his reaching the conclusion in 1994 that he was not required to pay taxes, from which flowed his failure to file, which lasted through 1998.

Applicant has failed to demonstrate the Judge erred. It was not arbitrary or capricious for the Administrative Judge to conclude the filing of income tax returns is a recurring obligation which the Applicant chose to ignore for a period of several years. It was reasonable for the Judge to consider each annual failure to file as a distinct event and to then view Applicant's overall course of conduct as a pattern or a "history." Applicant's characterization of his tax return filing delinquencies as a single event is not supported by the record evidence.

2. Is the Government's case against Applicant mitigated by his stated belief that he is not liable for income taxes? Applicant argues on appeal that he does not believe his failure to file income tax returns constitutes criminal activity. He also argues that his stated belief that he is not liable for income taxes mitigated his failure to pay federal and state taxes over several years and mitigated his failure to file timely returns for those years. Applicant's stated beliefs are predicated on a series of arguments which are merely variations of "tax protester" arguments that the federal courts have repeatedly rejected. *See* ISCR Case No. 94-1153 (March 26, 1997) at p. 4. ⁽¹⁾

DOHA proceedings are not a proper forum for challenging the validity of federal tax matters. *See* ISCR Case No. 00-0596 (October 4, 2001) at pp. 2-3. Furthermore, Applicant's reliance on *Cheek v. United States*, 498 U.S. 192 (1991) is misplaced. At most, the decision in *Cheek* holds that a person accused of willful failure to file income tax returns is entitled, in a criminal trial, to have a jury consider the person's honest beliefs about the tax laws in making its finding as to whether the person's failure to file was willful or not. Since DOHA proceedings are security clearance adjudications, not criminal trials, it is questionable how the *Cheek* decision could be strictly applicable to these proceedings. And, even if the Board were to assume for the sake of deciding this appeal that the *Cheek* decision were applicable in these proceedings, it would not help Applicant. At most, application of *Cheek* in DOHA proceedings would entitle an applicant to have the trier of fact (*i.e.*, the Administrative Judge) decide: (a) whether the applicant has good-faith, honest beliefs about the tax laws, and (b) if the applicant's beliefs are good-faith, honest ones, whether those beliefs negate a finding of willfulness or not. However, application of *Cheek* in DOHA proceedings would *not* entitle an applicant to assert, as a defense to an allegation of willful failure to file income tax returns, that he or she believes the tax laws are unconstitutional. *See* 498 U.S. at 204-206 (holding that claims that the tax laws are unconstitutional "are of a different order" from innocent mistakes that might negate a finding of willfulness).

Failure to file tax returns suggests that an applicant has a problem with complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information. *See* ISCR Case No. 97-0744 (November 6, 1998) at p. 3. Accordingly, Applicant has failed to establish that the Administrative Judge erred by not recognizing Applicant's belief that his failure to file returns and pay taxes was mitigating.

3. Whether the Administrative Judge erroneously concluded that Applicant demonstrated an inability to address his debts. Applicant takes exception to the Administrative Judge's conclusion that he has failed to address his various tax debts. A review of the Judge's decision reveals that he stated that Applicant had not been able to "seriously address" his debt history. (Decision at p. 8). Applicant claims that he has done all he can do in terms of resolving his debts. He represents that he filed an offer in compromise with the IRS in an attempt to work out the terms of payment of tax

arrearages, and that he has responded to all IRS inquiries in a timely manner but because the IRS has a large inventory of cases they are unable to process his case toward a quick resolution. He claims no lack of effort on his part and states that current circumstances are beyond his control.

Applicant's complaint about the Judge's adverse conclusion lacks merit. Notwithstanding the fact that Applicant offered evidence that he is currently stymied by the IRS in his efforts to resolve his tax arrearages, the record evidence clearly supports the Judge's conclusion that Applicant has to date accomplished little in clearing up his tax delinquencies. Applicant's efforts toward resolution were matters that the Judge was bound to consider, and a review of the decision indicates the Judge clearly evaluated those efforts. The Judge was not required, however, to consider such efforts as mitigation that was dispositive of the case. Any recent efforts on Applicant's part to make good on his tax debts must be weighed against his initial, voluntary decision not to file returns and pay taxes, and his long history of failing to take reasonable steps to address his tax obligations. Applicant has not demonstrated that the Judge weighed the evidence in a manner that was arbitrary, capricious or contrary to law, or that the Judge's adverse conclusion is unreasonable in light of the record evidence as a whole.

4. Did the Administrative Judge make harmful errors of fact in the case below? Applicant argues that the Administrative Judge made several errors of fact. These include: (a) a misstatement of Applicant's age; (b) the Judge's characterization of a 1996 state tax assessment as a "tax lien"; (c) the dollar amounts that the Judge stated Applicant owed for state and federal taxes as well as the dollar amounts of tax that Applicant admitted he owed; (d) the dollar amount the Judge stated for Applicant's 1999 income; (e) the finding that Applicant's failure to file income tax returns was the result of a "misunderstanding"; and (f) the finding that Applicant "claimed" to have filed his tax returns when he did, in fact, file them.

Some of the challenged findings are indeed error, specifically Applicant's age and the characterization of the 1996 tax assessment as a lien. There are also minor errors in some of the dollar amounts stated by the Judge. The other findings complained of by Applicant on appeal are reasonable interpretations of the record evidence. The Judge found that Applicant had in fact filed his income tax returns for the years 1993-1998 instead of merely stating that Applicant claimed they had been filed. The factual errors made by the Judge are minor when viewed in the context of his decision as a whole.

None of the errors undermine the core of the Judge's analysis: Applicant failed to file federal and state tax returns for most of the 1990's because he unreasonably relied on "misinformed research." The totality of the factual errors is not sufficient to demonstrate harmful error as the Judge's principal findings and conclusions are supported by adequate record evidence to be sustainable. The Board will not reverse or remand a decision because of harmless errors. *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine).

Conclusion

Applicant has failed to demonstrate error below that warrants remand or reversal. 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. Applicant's beliefs are not predicated not predicated on his income during the relevant period which ranged, according to his testimony, from \$45,000 to \$80,000 - more than enough to create a responsibility to file federal income tax returns.