

DATE: July 24, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-06776

## **APPEAL BOARD DECISION**

### **APPEARANCES**

#### **FOR GOVERNMENT**

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

#### **FOR APPLICANT**

*Pro Se*

Applicant has appealed the March 31, 2003 remand decision of Administrative Judge Richard A. Cefola, in which the Judge concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

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 actions of the Administrative Judge and Department Counsel denied Applicant his rights under federal law; and (2) whether the Administrative Judge's adverse remand decision is arbitrary, capricious, or contrary to law. For the reasons that follow, the Board affirms the Administrative Judge's decision.

### **Procedural History**

The Defense Office of Hearings and Appeals issued to Applicant a Statement of Reasons (SOR) dated February 26, 2002. The SOR was based on Guideline J (Criminal Conduct) and Guideline F (Financial Considerations).

Applicant submitted an answer to the SOR, in which he requested an administrative determination be made in his case. A File of Relevant Material (FORM) was prepared. A copy of the FORM was given to Applicant, who submitted a response to the FORM. The Administrative Judge issued a decision, dated November 13, 2002 ("decision"), in which he entered formal findings for Applicant with respect to Guideline J, but against Applicant with respect to Guideline F.

Applicant appealed the November 13, 2002 decision. On March 13, 2003 the Board issued a Decision and Remand Order ("remand order") and sent the case back to the Administrative Judge with instructions concerning two documents that were referenced in Applicant's response to the FORM but were sent to the Board by an employee of Department Counsel rather than appearing in the case file.

The Administrative Judge issued a Decision on Remand ("remand decision"), dated March 31, 2003. In the remand decision, the Judge: (a) concluded the two documents referenced in Applicant's response to the FORM were originally part of that response and should be considered as part of the record evidence in the case; (b) made findings of fact and

reached conclusions with respect to Guideline J and Guideline F; and (c) 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 remand 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 also* 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 the same record. 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 actions of the Administrative Judge and Department Counsel denied Applicant his rights under federal law. With respect to the two documents that were the subject of the Board's remand order, Applicant asserts that "[t]he actions of both Departments counsel and Judge Cefola are nothing short of malfeasance, misfeasance, nonfeasance, and a clear violation of TITLE 18, U.S.C., SECTION 241 CONSPIRACY AGAINST RIGHTS [and] TITLE 18, U.S.C., SECTION 242 DEPRIVATION OF RIGHTS UNDER COLOR OF LAW" (Applicant's quotations of statutory provisions omitted). The Board construes Applicant's assertion as raising the issue of whether the actions of the Judge and Department Counsel denied Applicant his rights under federal law.

Applicant's claims about alleged violations of Title 18 of the U.S. Code are beyond the jurisdiction and authority of the Board to consider.

The Board does not have supervisory jurisdiction or authority over the actions of Department Counsel and Hearing Office Administrative Judges. However, the Board does have jurisdiction to consider claims that an applicant was denied his or her procedural rights under Executive Order 10865 or the Directive, when such claims are raised during an appeal from a Judge's security clearance decision. *See* Directive, Additional Procedural Guidance, Item E3.1.32.2.

The Board remanded this case in order to ensure that Applicant's right to submit evidence for consideration in his case was not violated. The actions of the Administrative Judge on remand ensured that the entirety of Applicant's response to the FORM was considered by the Judge. Accordingly, Applicant's right to have his response to the FORM considered in the adjudication of his case has been satisfied under Executive Order 10865 and the Directive.

2. Whether the Administrative Judge's adverse remand decision is arbitrary, capricious, or contrary to law. The Administrative Judge entered favorable formal findings for Applicant with respect to Guideline J (Criminal Conduct). However, the Judge found that Applicant has unpaid state taxes in excess of \$16,500 which he has not addressed since 1984. The Judge rejected Applicant's explanation for his outstanding state tax balance, and concluded Applicant's failure to satisfy the state tax debt shows poor judgment on Applicant's part and warranted adverse formal findings under Guideline F. The Judge concluded Applicant had not demonstrated mitigation under Guideline F and further concluded it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

The Administrative Judge's favorable formal findings with respect to Guideline J are not at issue on appeal. With respect to the Judge's adverse findings and conclusions under Guideline F, Applicant argues: (a) the Judge failed to give sufficient weight to the evidence submitted by Applicant for consideration in his case; (b) the state has taken no action against Applicant with respect to any claim concerning state taxes; and (c) the state lien filed against Applicant is legally unenforceable and barred by the statute of limitations.

An Administrative Judge must weigh the record evidence, decide what weight it is reasonably entitled to, and make findings of fact that reflect a reasonable, plausible interpretation of the record evidence as a whole. Absent a showing of action that is arbitrary, capricious, or contrary to law, the Board will not disturb a Judge's weighing of the record evidence. In this case, the Judge accepted Applicant's proof concerning payment of state taxes for two tax years. The Judge's finding that Applicant still had unsatisfied state tax liabilities in excess of \$16,500 reflects a reasonable, plausible interpretation of the record evidence as a whole. Applicant's strong disagreement with that finding is not sufficient to demonstrate it is unsustainable under Directive, Additional Procedural Guidance, Item E3.1.32.1.

Whether state authorities take civil or criminal legal action against Applicant to collect back state taxes is essentially irrelevant to the adjudication of his security eligibility. Applicant's responsibility for paying state taxes does not turn on whether state authorities take legal action against him to collect such taxes. Therefore, the absence of evidence that state authorities have taken steps against Applicant with respect to unpaid state taxes does not have the significance Applicant places on it.

Applicant's reliance on a state statute of limitations is misplaced. Absent an act of Congress or Presidential directive to the contrary, security clearance adjudications are not subject to any statute of limitations. *See, e.g.*, ISCR Case No. 00-0030 (September 20, 2001) at p. 3. Applicant does not cite, and the Board is unaware of, any act of Congress or Presidential directive that imposes any time limitations on security clearance adjudications. Furthermore, absent an express act of Congress to the contrary, the federal government is not bound by provisions of state law when carrying out its duties and responsibilities. *See, e.g.*, ISCR Case No. 00-0423 (June 8, 2001) at p. 3. Applicant does not cite, and the Board is unaware of, any act of Congress that requires the federal government to be bound by state statutes of limitation when adjudicating security clearance cases. Accordingly, Applicant cannot rely on a state statute of limitations to preclude adjudication of his security eligibility.

Under Guideline F (Financial Considerations), an Administrative Judge is not precluded from considering the security significance of an applicant's delinquent debts merely because those debts are barred by a statute of limitations. *See, e.g.*, ISCR Case No. 01-09691 (March 27, 2003) at p. 3 ("[E]ven if a delinquent debt is legally unenforceable under state law, the federal government is entitled to consider the facts and circumstances surrounding an applicant's conduct in incurring and failing to satisfy the debt in a timely manner."). Even if an applicant's delinquent debts are uncollectible because of a statute of limitations, the Judge can consider the facts and circumstances under which the debts were incurred and decide whether the applicant took reasonable steps to address or otherwise resolve those debts before the statute of limitations expired. Accordingly, even if Applicant could not be forced by the state to pay the state taxes because of a statute of limitations, that did not preclude the Judge from considering the security implications of Applicant's failure to pay or otherwise resolve the state taxes before the statute of limitations expired.

For all the foregoing reasons, Applicant has failed to demonstrate factual or legal error with respect to the Administrative Judge's findings and conclusions about his unsatisfied state taxes. Those sustainable findings and conclusions provide a rational basis for the Judge's adverse conclusions under Guideline F, as well as for his adverse security clearance decision.

### **Conclusion**

Applicant has failed to demonstrate error below. Therefore, the Administrative Judge's adverse security clearance decision is affirmed.

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