DATE: July 11, 1997

In Re:

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

Applicant for Security Clearance

ISCR Case No. 96-0277

APPEAL BOARD DECISION

Appearances

FOR GOVERNMENT

Michael H. Leonard, Esq.

Department Counsel

FOR APPLICANT

Personal Representative

Administrative Judge Kathryn M. Braeman issued a decision, dated December 30, 1996, 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 Applicant was denied the right to counsel; (2) whether Applicant was denied the opportunity to cross-examine persons and present evidence in his own behalf; (3) whether the "clearly consistent with the national interest standard" is incompatible with a fair hearing; and (4) whether revocation of Applicant's security clearance constituted a taking of property without due process, in violation of the Fifth Amendment to the U.S. Constitution.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated June 10, 1996 to Applicant. The SOR was based on Criterion D (Sexual Behavior) and Criterion F (Financial Considerations).

A hearing was held on October 1, 1996. The Administrative Judge subsequently issued a written decision in which she entered formal findings for Applicant with respect to Criterion F, but against him with respect to Criterion D, and 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 that adverse decision.[(1)]

[(2)]

Appeal Issues

1. Whether Applicant was denied the right to counsel. Applicant claims he was denied the right to counsel because he did not have the financial means to afford an attorney for these proceedings. Applicant also contends these proceedings are not really civil in nature because they have "all the indicia of criminal proceedings," including: (a) the government as an adversary; (b) imposition of a penalty if an applicant loses; and (c) a losing applicant is stigmatized. For the reasons that follow, the Board finds these contentions to be unpersuasive.

Applicants have the right to retain counsel to represent them in these proceedings. Executive Order 10865, Section 3(5); Directive, Section D.3.d. and Additional Procedural Guidance, Item 8. Absent a constitutional right to counsel, Applicant was not entitled to have the government to pay for an attorney to represent him. There is no constitutional right to counsel in civil proceedings,[(3)] and DOHA proceedings are civil in nature. Therefore, in these proceedings an applicant is not entitled to have an attorney appointed to represent the applicant or be reimbursed by the government if the applicant retains an attorney.

The sole purpose of a security clearance decision is to determine whether it is clearly consistent with the national interest to grant or continue a security clearance for an applicant. Executive Order 10865, Section 2; Directive, Section D.2. and Additional Procedural Guidance, Item 25. The SOR issued to Applicant does not have the effect of a criminal indictment or information. Neither the Administrative Judge nor the Board has any authority to conduct a criminal trial or impose a criminal sentence on an applicant. An adverse security clearance decision is not a criminal sanction. *See Chesna v. U.S. Department of Defense*, 850 F.Supp. 110, 119 (D. Conn. 1994). No adverse security clearance decision will result in imprisonment, a criminal record, or criminal fines being imposed on an applicant. For all these reasons, there is no merit in Applicant's contention that DOHA proceedings are the functional equivalent of criminal proceedings.

2. Whether Applicant was denied the opportunity to cross-examine persons and present evidence in his own behalf. Applicant contends he was effectively denied the opportunity to cross-examine persons orally or through written interrogatories, as authorized under Section 3(6) of Executive Order 10865 and the Directive. Specifically, Applicant argues that without subpoena power he was unable to obtain the presence of the woman who filed suit against him in order to cross-examine her about the allegations contained the complaint she filed in federal court (Government Exhibit 6). Applicant further argues that he was hampered in his ability to cross-examine witnesses and present evidence in his own behalf because a settlement he reached with his company has, as a condition, a requirement that Applicant not contact any current or former employees of the company.

The absence of subpoena power in DOHA proceedings is a matter beyond the authority of the Administrative Judge and this Board to change. However, the absence of subpoena power in these proceedings does not resolve the cross-examination issue. Department Counsel has the obligation to present witnesses and other evidence to prove controverted facts. *See* Directive, Additional Procedural Guidance, Item 14. If Department Counsel relies on third party statements adverse to an applicant to prove controverted facts, then an applicant has the right to cross-examine the authors of those third party statements. There are at least two exceptions to an applicant's right to cross-examination: (a) an applicant can waive the right to cross-examine, *Adams v. Laird*, 420 F.2d 230, 237-38 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970); or (b) the documents presented by Department Counsel fall within recognized exceptions to the hearsay rule. *See, e.g.*, DISCR Case No. 90-2069 (March 25, 1992) at pp. 7-8 (applicant's right to confront adverse witnesses is not more expansive than the right to confrontation protected by the Sixth Amendment to the U.S. Constitution; therefore applicant's right to confrontation not violated by admission of documents that fall within well-established exceptions to hearsay rule); DISCR Case No. 88-2173 (September 14, 1990) at pp. 4-5 (same).

The government offered several documents (Government Exhibits 2, 3 and 6) in support of the SOR allegations pertaining to sexual harassment. At the hearing, Applicant did not object to the admission of those documents. Government Exhibit 2, a written statement by Applicant, was admissible as a prior statement by Applicant. Government Exhibit 3 consists of business records,[(4)] which are admissible in these proceedings as an exception to the hearsay rule. *See, e.g.*, DISCR Case No. 88-2173 (September 14, 1990) at p. 5. Government Exhibit 6 is a copy of a civil complaint filed in federal court by one of the women who alleged Applicant had sexually harassed her.[(5)] To the extent Government Exhibit 6 was offered by Department Counsel to prove Applicant engaged in acts of sexual harassment, it

was the functional equivalent of a third party statement adverse to Applicant. As such, Government Exhibit 6 would have been properly excludable by the Administrative Judge if Applicant had objected to its admission and Department Counsel failed to produce the plaintiff to testify about the allegations contained in the complaint.

Since Applicant did not object to the admission of Government Exhibit 6 when it was offered at the hearing, he cannot fairly complain now that the Administrative Judge erred by admitting it into evidence. Of course, the absence of any objection by Applicant to Government Exhibit 6 did not relieve the Administrative Judge from her obligation to consider what weight, if any, the Judge reasonably could give to that document. *See* ISCR Case No. 95-0381 (February 15, 1996) at p. 3; DISCR Case No. 89-1014 (August 6, 1992) at p. 4. At the hearing, the Judge expressed scepticism about the evidentiary value of Government Exhibit 6. And, in the decision itself, the Judge specifically noted that Applicant denied the allegations made in Government Exhibit 6. Moreover, a reading of the Judge's decision shows that the Judge did not rely on Government Exhibit 6 to find that Applicant engaged in sexual harassment as alleged by the SOR. Rather, the Judge relied on a combination of Government Exhibits 2 and 3 and Applicant's hearing testimony to make that finding.[(6)] Accordingly, even if the Board were to assume solely for the sake of argument that the Judge erred by admitting Government Exhibit 6, it would conclude such an error was harmless.

Whatever restrictions the settlement placed on Applicant with respect to contacting current or former employees of his former employer, those restrictions were not the result of any action by Department Counsel or the Administrative Judge. Nothing in the record indicates that either Department Counsel or the Administrative Judge engaged in any action that denied Applicant the opportunity to present evidence in his own behalf.

3. Whether the "clearly consistent with the national interest" standard is incompatible with a fair hearing. Applicant contends there is an irreconciliable conflict between the "clearly consistent with the national interest" standard and his right to a fair hearing. Applicant also argues that principle that doubts should be resolved in favor of the national security is inconsistent with the concept of a fair hearing. For the reasons that follow, the Board concludes Applicant's contentions fail to demonstrate error below.

As Applicant acknowledges, the "clearly consistent with the national interest" standard is set by Executive Order 10865 and the Directive. There is nothing inherently incompatible with that standard and the concept of a fair hearing. The "clearly consistent with the national interest" standard relates to the ultimate decision as to whether a security clearance should be granted or continued for an applicant. That standard is separate and distinct from the requirements of a fair hearing under Executive Order 10865 and the Directive: written notice of the reasons why the government wants to deny or revoke access to classified information; an opportunity to respond to those allegations; the right to a hearing; a reasonable time to prepare for the hearing; opportunity to cross-examine persons providing information adverse to the applicant; opportunity to present evidence on his behalf; written notice of the clearance decision; and notice of appeal procedures. *See generally* Executive Order 10865, Section 3; Directive, Section D.3.

The Supreme Court has held that, in security clearance cases, the government is entitled to resolve doubts about a person's security eligibility in favor of the national security. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988). Applicant's disagreement with that principle is not surprising. However, it is a principle that has been sanctioned by the Supreme Court. Furthermore, there is nothing inherently incompatible between Applicant's right to a fair hearing (with the procedural requirements enumerated in the preceding paragraph) and the principle that the government is entitled to resolve doubts in favor of the national security when making security clearance decisions.

4. Whether revocation of Applicant's security clearance constituted a taking of property without due process, in violation of the Fifth Amendment to the U.S. Constitution. Applicant relies on the dissenting opinion in *Department of Navy v. Egan* to support his contention that revocation of his security clearance constituted a taking of property without due process. Applicant also argues that he made a sufficient investment in his 30-year career to have a property right or interest in a security clearance. Applicant's contention lacks merit.

The Supreme Court has acknowledged the inherently discretionary nature of security clearance decisions and concluded "[i]t should be obvious that no one has a 'right' to a security clerarance." *Department of Navy v. Egan, supra*, 484 U.S. at 527-28. Given the inherently discretionary nature of security clearance decisions, no applicant has any reasonable expectation of having a vested interest in or right to a security clearance. In addition, the federal courts have held there

is no property right or interest in a security clearance or a job requiring a security clearance. *Jones v. Navy*, 978 F.2d 1223, 1225 (Fed. Cir. 1992)(no property right to security clearance); *Dorfmont v. Brown*, 913 F.2d 1399, 1403-04 (9th Cir. 1990)(no property right to security clearance or job requiring security clearance), *cert. denied*, 499 U.S. 905 (1991); *Doe v. Cheney*, 885 F.2d 898, 909 (D.C. Cir. 1989)(no property interest in access to Sensitive Compartmented Information); *Chesna v. U.S. Department of Defense*, 850 F.Supp. 110, 118-19 (D. Conn. 1994)(no property right to security clearance or job requiring security clearance); *Williams v. Reilly*, 743 F.Supp. 168, 172 (S.D.N.Y. 1990)(no property right in a security clearance). Given this legal authority, Applicant's contention on this issue lacks merit.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's December 30, 1996 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's findings and conclusions under Criterion F are not at issue on appeal.

2. Applicant's appeal brief contains various statements and makes factual assertions that go beyond the record evidence. The Board cannot consider new evidence on appeal. Directive, Additional Procedural Guidance, Item 29.

3. *See, e.g., Lavado v. Keohane*, 992 F.2d 601, 605-06 (6th Cir. 1993); *United States v. Gosnell*, 961 F.2d 1518, 1521 (10th Cir. 1992).

4. The first page of Government Exhibit 3 is an adverse information report that Applicant's former employer submitted to the Defense Investigative Service. Such an adverse information report is a business record. *See* DISCR Case No. 93-1234 (May 19, 1995) at p. 4 (report made by defense contractor to government under requirements of Industrial Security Manual is admissible as business record).

5. The complaint had **no** evidentiary value as to the allegations of sexual harassment made in it. Just as an SOR does not constitute proof of the allegations contained in it, a complaint filed in federal court does not constitute proof of the allegations contained in that complaint.

6. Applicant's ability to argue for an alternative interpretation of the record evidence does not demonstrate the Administrative Judge erred by finding Applicant engaged in sexual harassment as alleged in the SOR. *Cf. American*

Textile Mfr. Institute v. Donovan, 452 U.S. 490, 523 (1981)(possibility of drawing two inconsistent conclusions from evidence does not mean agency's findings and conclusions are not supported by substantial evidence).