

DATE: January 22, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0176

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Matthew E. Malone, Esq., Department Counsel

FOR APPLICANT

Christine S. Nielson, Esq.

Administrative Judge John R. Erck issued a decision, dated September 5, 1997, 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 issue of whether the Administrative Judge's decision is arbitrary, capricious, or contrary to law.

Procedural History

The Defense Office of Hearings and Appeals issued a Statement of Reasons (SOR) dated February 26, 1997 to Applicant. The SOR was based on Criterion J (Criminal Conduct).

A hearing was held on July 2, 1997. The Administrative Judge subsequently issued a written decision 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 that adverse decision.

Appeal Issue⁽¹⁾

Applicant does not challenge the Administrative Judge's findings about his failure to file federal income tax returns for tax years 1991, 1992, 1994 and 1995, his failure to file state income tax returns for tax years 1991, 1992, 1993, 1994 and 1995 (for one state), and his failure to file a state income tax return for tax years 1991 (for another state). Rather, Applicant contends the Judge's adverse decision should be reversed because: (a) Applicant has not made any attempt to evade inquiries by the Internal Revenue Service (IRS) and has never concealed his position with respect to his ongoing dispute with the IRS; (b) Applicant has never intended to harm the government during his dispute with the IRS; (c) Applicant had a reasonable belief that he was not required to file income tax returns because he expected to receive refunds and owe no taxes for the tax years for which he did not file returns; (d) Applicant had a reasonable belief that

his Certified Public Accountant could negotiate with the IRS concerning the penalties assessed against him; (e) the Judge erred by finding that Applicant did not identify any basis for why the IRS should forgive a portion of his tax obligation; (f) Applicant's failure to file income tax returns does not establish he lacks loyalty or poses a security risk; (g) Applicant has mitigated his conduct by filing his federal income tax returns for those tax years that formed the basis of the Judge's adverse decision; and (h) the record shows Applicant will not commit the same violation.

Applicant's appeal brief attaches some documents that were not part of the record below, and makes some factual assertions based on matters that go beyond the record evidence. The Board cannot consider new evidence on appeal. Directive, Additional Procedural Guidance, Item 29. Accordingly, the Board will disregard those documents and factual assertions that constitute new evidence, and declines to address appeal arguments based on such new evidence.

The fact that Applicant has been candid with the government about his failure to file income tax returns does not render the Administrative Judge's adverse decision erroneous. Applicant's candor did not preclude the Judge from evaluating the security significance of Applicant's pattern of failing to file income tax returns. *See, e.g.*, ISCR Case No. 96-0608 (August 28, 1997) at p. 5.

Applicant's subjective beliefs about his tax situation and his failure to file conduct are relevant and material to assessing his motivation (Directive, Section F.3.d.), but those subjective beliefs --- however sincere --- are not dispositive. For purposes of evaluating an applicant's security eligibility, the applicant's conduct must be evaluated against the standard of a reasonable person, not merely the applicant's subjective beliefs. A security clearance should not be granted unless the adjudicator can make an affirmative finding that it is clearly consistent with the national interest to grant or continue a security clearance for the applicant. Executive Order 10865, Section 2; Directive, Sections C.2 and D.2. Accordingly, the United States must be able to repose a high degree of trust and confidence in persons granted access to classified information. *See also Snapp v. United States*, 444 U.S. 507, 511 n.6 (1980)(noting high degree of trust that must be reposed in federal employee entrusted with classified information); *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960)(noting security requirements include consideration of a person's honesty, judgment, and sense of his obligations), *aff'd*, 367 U.S. 886 (1961). An applicant who does not act reasonably in fulfilling his or her responsibilities or obligations is not a good candidate for a security clearance.

Given the Administrative Judge's unchallenged findings, the Judge had a rational basis to conclude Applicant had failed to demonstrate his conduct was reasonable, and that Applicant had failed to extenuate or mitigate his repeated failure to file federal and state income tax returns over a period of years. The legal obligation to file income tax returns is independent and distinct from whether the taxpayer is entitled to receive a refund or not. *See, e.g.*, ISCR Case No. 94-0964 (July 3, 1996) at p. 4. The Judge's conclusions reflect a plausible and reasonable interpretation of the record evidence, and therefore, are sustainable on appeal.

Applicant's reference to his loyalty is misplaced. Industrial security clearance decisions are not loyalty determinations. Executive Order 10865, Section 7. Nothing in the decision below indicates or suggests the Administrative Judge based his security clearance decision on any determination concerning Applicant's loyalty.

Applicant's nexus argument is not persuasive. The federal government need not wait until an applicant fails to properly handle or safeguard classified information before it can deny or revoke an applicant's access to such information. *Adams v. Laird*, 420 F.2d 230, 238-39 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970). All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or does not demonstrate the high degree of judgment, reliability, and trustworthiness required of persons granted access to classified information. *See* federal cases cited above. The Administrative Judge's findings and conclusions about Applicant's repeated failure to file state and federal income tax returns provide a rational basis for the Judge to question Applicant's judgment and reliability and conclude it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Conclusion

Applicant has failed to meet his burden on appeal of demonstrating error below. Accordingly, the Board affirms the Administrative Judge's September 5, 1997 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 formal findings for Applicant with respect to SOR ¶1.a., SOR ¶1.g., and SOR ¶1.h. are not at issue on appeal.